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UNITED STATES

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OF THE

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# CASES

## ARGUED AND DETERMINED

IN THE

# UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

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### WESTERN INDEMNITY CO. v. CRAFTS et al.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1917.)

No. 2892.

1. COURTS ⟸109—RULES OF DECISION—PRECEDENTS—SYLLABUS OR OPINION.
The law of a case decided by the Supreme Court of Ohio before the court's adoption of the rule requiring a syllabus of the points decided to be approved by the concurring judges (5 Ohio St. v, rule 6), is to be determined from the opinion.

2. DEPOSITARIES ⟸6—STATE FUNDS—STATUTES—RATIFICATION.
While a state is not bound by the terms of its own general statutes, except when a contrary purpose is expressly declared, yet the state may ratify a transaction of its treasurer, who deposited state funds in violation of the statute.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. § 20.]

3. DEPOSITARIES ⟸6—STATE FUNDS—RATIFICATION.
Despite Bates' Ann. St. Ohio, § 6841 (Page & A. Gen. Code, §§ 12873–12875), denouncing the loan or deposit of public moneys as embezzlement, but with a proviso permitting the treasurers of certain municipalities to deposit the moneys of such bodies with either state or federal banks, the state treasurer, on the faith of a bond given by a trust company in his favor and with plaintiff's assignor as surety, deposited state funds with such trust company before the depository act of April 25, 1904 (97 Ohio Laws, p. 535; Bates' Ann. St. §§ 200—2 to 200—9), went into effect. After the depository act became operative, the trust company surrendered the original certificates of deposit, issued new ones, and gave a new bond direct to the state, with the same surety as that of the old bond. Defendants had, on plaintiff's assignor executing the original bond, entered into a contract to indemnify such assignor for any loss occurring under such bond, or renewals thereof, or any new obligation in its place. Some years thereafter the state, the deposit not having been paid by the trust company, sued and recovered on the second bond. *Held*, that as the depository act had gone into effect in the meantime, and a second bond had been executed in lieu of the first, such action was not a ratification of the original unauthorized deposit.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. § 20.]

4. CONTRACTS ⟸131—INDEMNITY CONTRACTS—ILLEGALITY OF CONSIDERATION.
The purpose of the whole transaction being to induce the state treasurer to make a deposit in defiance of the law, the indemnity contract is unenforceable because of the illegality of the consideration; the whole transaction being permeated by such illegality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 594–607.]

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5. CONTRACTS ⊂=137(3)—CONSIDERATION—ILLEGALITY.
Every part of the consideration goes equally to the whole promise, and, if any part of it is contrary to public policy, the whole promise falls.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 705.]

6. CONTRACTS ⊂=138(2)—INDEMNITY CONTRACTS—ILLEGALITY.
Where defendants were not liable on a contract to indemnify plaintiff, who had executed a surety bond to induce the state treasurer to make a deposit of public moneys in defiance of law, plaintiff could not, by notifying defendants of the pendency of a suit on a bond substituted for the original one and demanding that they defend the action, create any rights against them.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 686, 687, 689.]

7. INDEMNITY ⊂=14—INDEMNITY TO SURETY—CONCLUSIVENESS AGAINST INDEMNITOR OF JUDGMENT AGAINST INDEMNITEE.
Where defendants' contract to indemnify plaintiff from liability on a bond executed to enable a trust company to secure a deposit of state funds in defiance of law was not in issue and could not be brought in issue in an action on a bond substituted for the original one, the judgment in such action is not conclusive on defendants.
[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 41.]

In Error to the District Court of the United States, for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Action by the Western Indemnity Company against William H. Crafts and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

T. L. Johnson, of Cleveland, Ohio, for plaintiff in error.
D. C. Westenhaver, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and HOLLISTER, District Judge.

WARRINGTON, Circuit Judge. The writ of error is prosecuted by the Western Indemnity Company to reverse the judgment below sustaining defendants' demurrer and dismissing the petition. The action was based upon a written instrument dated August 15, 1904, whereby the defendants had undertaken to indemnify another company, the Federal Union Surety Company (herein called Federal Company), against loss under a certain bond in the sum of $20,000, bearing date August 11, 1904, given by the Euclid Avenue Trust Company (herein called Euclid Company) of Cleveland, Ohio, as principal, and the Federal Company, as surety, "running to W. S. McKinnon of Ashtabula, Ohio." The instrument first mentioned in terms binds defendants to indemnify the Federal Company under the bond of August 11, 1904, and also under any "renewals thereof, or other and new obligations (given) in its place or in lieu thereof." Later, on December 29, 1904, the Euclid Company, as principal, and the Federal Company, as surety, executed a bond in the sum of $20,000 in favor of the state of Ohio. May 8, 1908, the Euclid Company made an assignment for the benefit of its creditors; and its assignee subsequently paid the state $10,065.12. The state thereafter recovered judgment against the Fed-

eral Company for the balance due under the bond last mentioned; and admittedly the present plaintiff in error (hereafter called the Western Company), having succeeded to the rights and assumed the liabilities of the Federal Company and having paid and satisfied such judgment of the state, relies in its present action against defendants upon their indemnity agreement of August 15, 1904, to recover the amount so paid to the state, together with certain counsel fees, costs, and expenses set out in the petition.

The demurrer, sustained below, sets out two grounds: (1) That the facts stated in the petition do not constitute a cause of action; and (2) that "the alleged contract upon which the petition is based is void as against public policy." The petition shows that when the first bond was given by the Euclid Company and the Federal Company, and the indemnity contract was given by the defendants, as before pointed out, William S. McKinnon was treasurer of the state of Ohio, and that he thereafter continued to hold such office until the date of his death, November 17, 1908; that on or about the time such first bond was executed, August 11, 1904, McKinnon "deposited, of the public moneys of the state of Ohio," with the Euclid Company, the sum of $20,000, to be held by that company "as a deposit to the credit of the state of Ohio, and to be repaid to the said state of Ohio upon demand made * * * by the said William S. McKinnon, treasurer, * * * upon said deposit." Although the petition does not distinctly state the relations existing between the Euclid Company and the present defendants at the time the Euclid Company's first bond was given (August 11, 1904), or at the time the defendants' indemnity contract was executed (August 15, 1904), yet it is fairly to be deduced from admitted facts that on those dates, as also at the date of the last bond, the defendants were officially and pecuniarily related to the Euclid Company. For instance, it is disclosed by the petition: (1) That the Federal Company became surety upon the Euclid Company's first bond at the "request" of the defendants; (2) that the Euclid Company's last bond, with the Federal Company as surety, was executed "as a renewal of and in lieu of" the Euclid Company's first bond and "at the instance of said defendants" (such requests, in view of defendants' promises in the indemnity contract and in the absence as here of allegation to the contrary, give rise to a presumption that they were throughout officially and pecuniarily related to the Euclid Company); and (3) that, when the second bond was given, defendant Crafts was president and the defendant Thomas secretary-treasurer of the Euclid Company; and, further, we understood counsel to concede at the argument of the cause that Crafts and Thomas were president and secretary-treasurer, respectively, and the other two defendants directors of the Euclid Company during the period covered by the dates of the instruments above mentioned. If this be a right interpretation of the facts deducible from the record and the concessions of counsel, the grounds of the demurrer, especially the second ground, will be readily understood when considered in connection with the statutory conditions prevailing in Ohio at the times the instruments alluded to were executed.

When the first bond of the Euclid Company, with the Federal Com-

pany as surety, and the indemnity contract of the defendants were respectively executed in August, 1904, a statute of Ohio denounced acts like the act of McKinnon in depositing the money of the state with the Euclid Company as felonies (section 6841, 3 Bates' Ann. Ohio Stat. [6th Ed.], now sections 12873, 12874, 12875, 6 Ohio Gen. Code). The statute is too long to quote here. It is enough to say that it embraces a number of subjects and so discloses abundant reason for its continuance after the passage of the depository statute which was subsequently enacted. It (section 6841) in terms applies to all officers charged with the safe-keeping and the disbursement of public moneys of the state, or of any county, township, municipal corporation, board of education, cemetery association, "or company in this state," and denounces the loan or deposit of any such money as embezzlement, but with a proviso which in effect permits a treasurer of a township, municipality, board of education, or cemetery association to deposit the money of any such organization with either state or federal banks. True, a statute was passed April 25, 1904, approved May 3, 1904, entitled "An act to provide a depository for state funds" (1 Bates' Ann. Ohio Stat. §§ 200—2 to 200—9; 97 Ohio Laws 535), which authorized the state treasurer to deposit moneys of the state in such banks or trust companies "as shall have been approved * * * by the board of deposit"—comprising the treasurer, auditor, and attorney general—therein provided for; but by the terms of section 2 this act did not become effective until on and after the first Monday in October, 1904, since the board of deposit was not empowered to meet for purposes of designation and approval of banks or trust companies as state depositories until that date, which, of course, was after the dates alike of the Euclid Company's bond, with the Federal Company as surety, in favor of McKinnon, and the indemnity contract of defendants. Thus in August, 1904, all state funds were held subject to the prohibition of the statute (old section 6841), and they continued so to be held except as to such banks as the board of deposit might on or after the first Monday of the following October designate or approve as state depositories; but it will be observed that the Euclid Company's bond in favor of the state of Ohio, with the Federal Company as surety, was executed after the depository statute became effective. The provisions of these two acts, therefore, plainly point to a difference in statutory effect upon the two instruments of August, 1904, on the one hand, and the instrument of December, 1904, on the other. Indeed, one effect of the depository statute, in contrast with the inhibitory act, may be seen in the judgment recovered by the state against the Federal Company upon the bond of December 29, 1904. We are not concerned for the moment with the effect of that judgment, further than to say that the suit was in fact brought on that bond (not on the bond of August 11, 1904), and that, although the state failed in the common pleas court (State of Ohio v. Federal Union Surety Co., 21 Ohio Dec. 571), it succeeded in the Ohio circuit court and in the Supreme Court. The opinion of the circuit court has not been published, though counsel have furnished a copy; and the Supreme Court affirmed the judgment of the circuit court, save as to a certain amount of interest, with-

out opinion (Federal Union Surety Company v. State of Ohio, 91 Ohio St. 392, 110 N. E. 1059); and hence, apart from what will be shown later, it might fairly be presumed that the judgment was founded on facts arising solely under the depository act.

The controlling question is whether, in view of the crime involved in the act of depositing the money of the state with the Euclid Company in August, 1904, recovery is allowable at the suit of the Western Company (as the successor in right of the Federal Company) against the defendants upon their indemnity contract of that month.

[1, 2] Counsel for plaintiff contend, in the first place, that this question is met through certain acts of alleged ratification by the state. It is urged in support of this theory that it was open to the state itself to ratify the acts of McKinnon in making the deposit of August, 1904, and so to validate the deposit and, if need be, the bond of the 11th of that month concerning which the defendants gave their indemnity contract; and that the state did adopt and ratify and so validate every unlawful act of McKinnon through the suit brought upon the bond of December 29, 1904, and the recovery had thereunder. Counsel's main reliance is placed on the decision in State of Ohio v. Executor of Buttles, 3 Ohio St. 309. The pertinence of the case may be considered with reference to the order in which the two features of the contention are stated. In that case, it is true, it was presumed on demurrer to the petition that the state had ratified the bond there in issue; and that bond was in principle similar to the August bond here. The bond there ran in favor of the Ohio Canal Fund Commissioners, and the money involved belonged to the state and was under the control of the commissioners. The money had been deposited by the commissioners with the Columbus Insurance Company, and, upon default of that company, suit was commenced in the name of the state and upon the bond mentioned. The case was decided before the adoption of the rule requiring a syllabus of the points decided by the court in each case to be approved by the concurring judges (5 Ohio St. rule 6, p. v); and therefore we must look to the opinion for the law of the case. The bond taken by the fund commissioners, like the bond taken by McKinnon on August 11, 1904, was given to secure the return of money belonging to the state, and the deposit or loan of such money by the agencies charged with its safe-keeping was denounced as a felony. Of course, as Judge Ranney in substance said, the sovereign enacting such a prohibitory law is competent to waive its violation; and the question at last in that case was reduced to one of adoption and ratification by the state itself of the forbidden act of the state's agents. Upon this subject it was said (3 Ohio St. at page 324):

"But the state, through its legislative department, had power to make such a contract; and just as ample power to ratify one already made without authority. On this demurrer we are bound to suppose it has ratified this contract; and, if it has, the contract has taken effect between parties under no legal impediment to contract, upon a money consideration, and requires nothing to be done in its performance in violation of any law or of public morals."

The principle thus recognized finds further support in the settled rule that a state is not bound by the terms of its own general statutes, ex-

cept when a contrary purpose is expressly declared. Ohio ex rel. v. Board of Public Works, 36 Ohio St. 409; State ex rel. v. Railway Company, 37 Ohio St. 157, 176.

[3] Assuming then that counsel are right in their reliance upon the rule of the Buttles Case that the state had power to ratify the acts of its treasurer in making the deposit and in receiving the bond of August 11, 1904, still the question remains whether the power so to ratify was exercised. As regards the claim that the state ratified those acts through its suit upon the bond of December 29, 1904, it is to be observed that more than two months prior to the execution of that bond the depository act had become effective, that the bond recites on its face that the Euclid Company (bank) had then been designated and approved as a state depository, and that the suit was not commenced until nearly five years later, December 4, 1909. Moreover, an important fact was developed in the suit which vitally affects plaintiff's claim of ratification. The opinion of the Ohio circuit court in the case (Federal Union Surety Company v. State, supra) shows that the old certificates of deposit which had theretofore been issued by the Euclid Company to McKinnon were surrendered and canceled and new certificates taken when the last bond was given; in other words, the transaction was treated by the circuit court as a new and distinct deposit of the state's money; and, since the decision was affirmed by the Supreme Court of Ohio without opinion, it must be concluded that that court also regarded the new certificates as a new deposit. It follows that the effect of those decisions was to consider the transactions occurring under the depository act as a repudiation, rather than a ratification, of the transactions which took place in the previous month of August. If, then, it be assumed upon the present demurrer, in accordance with the rule of the Buttles Case, that the Legislature of the state authorized the suit to be brought, it would be a perversion of the facts to treat the transactions of August, 1904, as having been adopted and ratified through the supposed legislative action authorizing the suit of 1909 to be brought. The natural inference arising from the commencement of the suit is that the deposits therein sought to be recovered, as also the bond given to secure them, had the full and exclusive sanction of the depository statute. The case of the plaintiff, then, is to be stripped of all aid which its counsel insist it derived through alleged acts of the state, and is to be tested solely according to the acts of the immediate parties to the August transactions.

[4, 5] It is further contended that since the statute (old section 6841) does not in terms make it a crime to receive a deposit of money belonging to the state, nor expressly denounce as unlawful a bond given to secure repayment of the money, it must result that the indemnity contract in suit cannot be regarded as unlawful. The learned counsel endeavor to establish this proposition by decisions which, where applicable, are of course authoritative. For example, Harris v. Runnels, 53 U. S. (12 How.) 79, 83, 13 L. Ed. 901; Dunlop v. Mercer, 156 Fed. 545, 555, 86 C. C. A. 435 (C. C. A. 8). And we may in addition call attention to Carland v. Heckler, 233 Fed. 504, 506, 147 C. C. A. 396 (C. C. A. 6), and Reichardt v. Hill, 236 Fed. 817, 825, —— C. C. A. ——

(C. C. A. 6); but we do not regard those decisions as applicable here. Upon the facts admitted by the demurrer to the present petition, it cannot reasonably be doubted that, when the indemnity contract in issue was executed and delivered, all the parties named in the instrument knew it was an essential step in a design to induce the treasurer of the state of Ohio to deposit moneys of the state with the Euclid Company, and obviously the parties were chargeable with notice of the statute which denounced such an act of the treasurer as a felony. In saying that this was the purpose of the indemnity contract, we have in mind that the state treasurer was not a formal party to the contract, but upon the admitted facts it is perfectly evident that the Federal Company would not have indemnified the state treasurer by becoming surety upon the Euclid Company's bond of August 11, 1904, unless the defendants had in turn secured the Federal Company by this indemnity contract. Thus it is sought to enforce a contract which was executed and received with the plain intent and purpose to promote a scheme to divert state moneys from the state treasury to the Euclid Company; and while it is true, as counsel insist, that the statute did not in terms make it a crime to receive and secure deposits of state moneys, still the inhibition of the statute is broad enough to forbid a scheme looking to such a diversion of state moneys. Estate of Ramsay v. Whitbeck, 183 Ill. 550, 568, 56 N. E. 322. The statute clearly implies a rule of public policy which is condemnatory of such a scheme, and the effect of this was to taint the very consideration upon which the indemnity contract was founded.

The defendants by their indemnity contract expressly bound themselves, in consideration of the Federal Company's execution of the bond of August 11, 1904, to pay to that company an annual cash premium "in advance on the 11th day of August, 1904, (and) in each and every year during the time the (Federal) Company shall be and continue liable upon the said instrument. * * *" It is to be presumed that the defendants' official and pecuniary interests in the Euclid Company would receive a distinct benefit through the deposits of the state funds, and the inhibitory provision of the statute applied whether the deposits were made "with or without interest." The consideration therefore which the several parties to the indemnity contract were thus to receive through the consummation of the August transactions necessarily calls for application of the settled rule that a contract will not be enforced where any part of the consideration is opposed to public policy or otherwise tainted with illegality. As Mr. Justice Holmes said, in Hazelton v. Sheckells, 202 U. S. 71, 78, 26 Sup. Ct. 567 [50 L. Ed. 939, 6 Ann. Cas. 217]:

"Every part of the consideration goes equally to the whole promise, and therefore, if any part of it is contrary to public policy, the whole promise falls."

See, also, McMullen v. Hoffman, 174 U. S. 639, 654, 19 Sup. Ct. 839, 43 L. Ed. 1117; Oscanyan v. Arms Co., 103 U. S. 261, 268 et seq., 26 L. Ed. 539; Arnold v. Clifford, Fed. Cas. No. 555, C. C., decided by Mr. Justice Story on circuit; Widoe v. Webb, 20 Ohio St. 431, 435, 5 Am. Rep. 664; McQuade v. Rosecrans, 36 Ohio St.

442, 448; E. E. Taenzer & Co. v. Chicago, R. I. & P. Ry. Co., 191 Fed. 543, 550, 112 C. C. A. 153 (C. C. A. 6); Cleveland, C., C. & St. L. Ry. Co. v. Hirsch, 204 Fed. 849, 854, 123 C. C. A. 145 (C. C. A. 6); Estate of Ramsay v. Whitbeck, supra (183 Ill. 550, 566, 56 N. E. 322); Harrington's Adm'r v. Crawford, 136 Mo. 467, 471, 472, 38 S. W. 80, 35 L. R. A. 477, 58 Am. St. Rep. 653.

It thus becomes unnecessary to consider the claim that a portion of the indemnity contract is applicable to the bond of December 29, 1904, and that this portion alone warrants recovery for the amount of the judgment rendered in the state suit. The complete answer to this is that the present action could not be stated (and it certainly has not been) without disclosing the entire indemnity contract and its evident object and, consequently, the illegality of its consideration. McMullen v. Hoffman, supra, 174 U. S. at page 656 et seq., 19 Sup. Ct. 839, 43 L. Ed. 1117.

[6, 7] Still another ground of reversal is urged. It is alleged that the Federal Company notified defendants of the pendency and nature of the state suit and demanded that they appear and make defense to the cause of action; and that, having failed to do so, they are bound by the judgment. This attempt to vouch the defendants into that suit is based upon the theory that the Federal Company had a right of action over, and that the present plaintiff has succeeded to that right; but this ignores the illegality of the indemnity contract. Further, and as the present Mr. Justice Clarke pointed out below, since the indemnity contract was not in issue and could not have been made an issue in the state suit, the judgment therein cannot operate as an estoppel against the defendants.

The judgment is affirmed.

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## In re CREECH BROS. LUMBER CO.*

## TITLOW v. MacPHAIL.

(Circuit Court of Appeals, Ninth Circuit. February 26, 1917.)

No. 2827.

1. BANKRUPTCY ⊂⊃440—REVIEW—PROCEEDINGS.
Where the proper method to obtain review of an order in bankruptcy is doubtful, a party may appeal in accordance with Bankruptcy Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (Comp. St. 1913, § 9608), and also petition to review in accordance with section 24b.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915.]

2. BANKRUPTCY ⊂⊃440—REVIEW—ALTERNATIVE METHODS.
Where, in a proceeding to review an order in bankruptcy, an appeal is taken as well as a petition to review in matter of law, the appellate tribunal must determine which is the correct procedure, since each is exclusive of the other.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915.]

3. BANKRUPTCY ⊂⊃440—REVIEW—PROCEDURE—APPEALS.
An order allowing as preferred a claim of several thousand dollars, may be reviewed by an appeal under either Bankruptcy Act, § 24a, or sec-

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied May 14, 1917.

tion 25a, cl. 3 (Comp. St. 1913, §§ 9608, 9609), respectively providing for appeals in controversies arising in bankruptcy and for appeals as in equity from judgments allowing or rejecting a debt or claim of $500 or over.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915.]

4. CORPORATIONS ⊜550(2)—INDEBTEDNESS—ASSIGNMENTS.

Pursuant to an agreement entered into between a lumber company which later became bankrupt and all of its ascertained creditors, the company's plant was assigned to claimant for operation. Claimant agreed to operate the plant as assignee, to purchase logs for that purpose, and otherwise finance operation, provided it could be run at a profit, applying all proceeds for the benefit of creditors after repaying his own advances. The agreement further provided that in case the plant could not be run at a profit of $1,000 per month, claimant might cease operations and sell and dispose of the property, and, after reimbursing himself for sums advanced, pay the creditors. *Held*, that the agreement having been ratified by the creditors, it was not invalid, it not appearing that the company was then insolvent, as depriving creditors of the property of the debtor company, which later became bankrupt, in violation of the trust fund theory.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2191, 2192, 2194.]

5. BANKRUPTCY ⊜178(3)—VALIDITY—EFFECT OF.

As a general assignment of all the person's property is not per se fraudulent, such assignment cannot be attacked as tending to hinder and delay creditors, it being for the benefit of creditors, even if bankruptcy occurred within four months after the assignment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 283, 284.]

6. BANKRUPTCY ⊜178(3)—ASSIGNMENTS—VALIDITY.

An assignment by a corporation of its property to a trustee for operation, made more than four months before bankruptcy, cannot be questioned in the bankrupty proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 283, 284.]

7. BANKRUPTCY ⊜467—CLAIMS—RIGHT OF CLAIMANT.

That the trustee is by Bankruptcy Act, § 47, subd. a, cl. 2, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), deemed vested with all the rights, remedies, and powers of any creditor holding a lien by legal or equitable proceedings, does not enlarge the right of a creditor appealing in the name of the trustee from an order allowing another claimant a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929.]

8. ESTOPPEL ⊜78(2)—EQUITABLE ESTOPPEL.

All the ascertained creditors of a lumber corporation which subsequently became bankrupt consented to the assignment of the company's property to a trustee for management. The holder of notes which were subsequently transferred to the bank of which appellant was receiver signed the agreement, and the insolvent bank had actual knowledge thereof before it received the notes. *Held*, that appellant and the other creditors were estopped from attacking the priority given the assignee in the contract of assignment.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 205.]

Appeal from and Petition for Revision of Proceedings of the District Court of the United States for the Southern Division of the Western District of Washington; Jeremiah Neterer, Judge.

In the matter of the bankruptcy of Creech Bros. Lumber Company, a corporation. The claim of H. W. MacPhail to a preference was allowed, and from such order A. R. Titlow, as receiver of the United States National Bank of Centralia, appearing in the name and stead of Robert G. Chambers, as trustee of the bankrupt company, appeals and

petitions to revise the order in matter of law. Petition for revision dismissed, and order affirmed on appeal.

Creech Bros. Lumber Company, a corporation operating a sawmill and engaged in the manufacture of lumber, being in an insolvent condition and for that reason unable to pay its debts, procure credit, or purchase logs necessary in the operation of its sawmill, entered into an agreement with H. W. MacPhail, respondent and appellee, on October 29, 1912, whereby all the property and assets of the lumber company were assigned to MacPhail, who was given an irrevocable power of attorney and was to continue operations for such time as the plant could be operated at a profit of $1,000 per month, sell the property and assets, and apply all proceeds for the benefit of all the creditors; it being provided, however, "that any sums advanced by the second party (MacPhail) or any sums which he may contract as indebtedness in the operation of said plant, or in the purchase of logs or the employment of labor for the operation of said plant shall be a first and prior lien and shall be paid prior to the payment of any sums now due the creditors of said corporation." It was further provided "that from the profits derived from the operation of said plant, he (MacPhail) shall first reimburse himself for any sums advanced by him and shall next pay and discharge any bills or indebtedness which he may contract in the operation of said plant, and the remainder, if any, he shall pay to the creditors pro rata, share and share alike, in proportion to their said claims;" and, further, that in case the plant should fail to clear the sum of $1,000, net, per month, MacPhail might, at his option, "cease to operate said plant, and sell and dispose of all of said real estate and personal property, and accounts and bills receivable for the purpose of first reimbursing himself for any sums advanced by him or any sums contracted by him in the operation of said plant, and second to pay the creditors of the first party in full or pro rata, and the fact that he may cease to operate said plant shall not be construed as terminating his rights under this contract until he has been fully paid for all sums by him advanced and until all sums by him contracted for have been fully paid, satisfied and discharged, and creditors have been paid in full or said assets have been all reduced to cash and the second party reimbursed, and the balance paid, pro rata, to the creditors of the first party."

Stockholders owning a majority of the stock of the Creech Bros. Lumber Company indorsed upon this instrument their consent to and approval of all its terms and conditions, and the action of the president and secretary in executing the same. The instrument was never acknowledged or recorded.

Prior to the execution of this instrument, on October 21, 1912, Creech Bros. Lumber Company secured from its creditors an agreement, consenting to the assignment mentioned in the foregoing contract of October 29, 1912, and reading, in part, as follows:

"Whereas, the stockholders and trustees of said corporation have agreed to make an assignment to H. W. MacPhail for the benefit of all of the creditors of said corporation, and whereas, the said H. W. MacPhail has agreed to operate said plant as assignee and purchase logs for that purpose and otherwise finance the operation of the same, provided the same can be operated at a profit, and also provided the creditors will extend the time of payment of their several accounts and desist from pressing said accounts until they can be paid by the profits derived from the operation of said plant: Now, therefore, we the undersigned creditors, in consideration of said assignment and of the agreement of the said H. W. MacPhail to finance said plant, severally agree that if said assignment is made and if the said H. W. MacPhail shall finance and operate said plant, that we will extend the time of payment of our several claims and desist from pressing said claims in the courts or otherwise, so long as said plant is operated at a monthly net profit of $1,000 or more per month. It being understood that in the operation of said plant that the said H. W. MacPhail shall first pay the cost of operation and all sums contracted by him as such assignee, and all sums advanced by him, and thereafter shall pay to the creditors interest at the rate of eight per cent. per annum on their said accounts, and shall pay the balance to the said creditors pro rata, share and share alike in proportion to their several claims, payments to be made quarterly, commencing on the 1st day of March, 1913, and continuing until all of said indebtedness, including principal and interest is paid in full."

"This consent was executed by most of the creditors, though not all; the books of the lumber company at that time being in such condition that it was impossible to definitely ascertain to whom or in what amounts the company was indebted.

MacPhail took possession of the plant as trustee under the assignment of October 29th about November 1, 1912, and operated the same until July or August, 1913, when it was found the plant could no longer be operated at a profit, due to a "break" in the market. MacPhail immediately notified all creditors and stockholders of the bankrupt by letter, and requested to be relieved of the so-called assignment or agreement, but was not relieved, and retained possession of all of the assets until about July 28, 1914, when a receiver was appointed by the superior court of the state of Washington in a suit against the lumber company by John L. Myers. During the operation of the mill MacPhail paid something over 10 per cent. of the claims of the creditors; paid over $3,000 in insurance; over $2,000 in taxes; and upon the mill being closed down, after having paid for all of the logs amounting to over $93,000 and for labor amounting to over 46,000, together with other items necessarily disbursed, he found that he had expended $13,877.71 of his own funds in excess of the various payments which had been made him from the earnings.

On August 27, 1914, proceedings in involuntary bankruptcy were instituted by certain creditors of the lumber company, and on November 16, 1914, an adjudication of bankruptcy was made, and Robert G. Chambers duly appointed trustee in bankruptcy on December 28, 1914. MacPhail presented his claim, which, with interest thereon, amounted to $15,170.69, to the referee, who, on October 6, 1915, disallowed the same as a preferred claim. Thereupon MacPhail petitioned for an order certifying the record to the United States District Court for the Western District of Washington, Southern Division, for review; and an order was entered by that court on March 25, 1916, allowing the claim as preferred in the sum of $13,877.74.

The plant and other property and assets of the bankrupt estate were sold by the trustee in bankruptcy, and the amount realized therefrom was somewhat less than the amount of appellee's claim. The appellee received no compensation for his services in operating the property.

The United States National Bank of Centralia became insolvent on September 21, 1914, and A. R. Titlow was thereafter duly appointed receiver thereof. At the time of the execution of the agreement of October 29, 1912, the United States National Bank was not a creditor of the bankrupt company, but subsequently became such, and the receiver has proved its claim in the sum of $16,255.75. Charles H. Gilchrist, the vice president and manager, and George Dysart, one of the other officers of this bank, were instrumental in procuring the signature of the bankrupt corporation and of the creditors to the agreements of October 21, 1912. The former was at that time the president of the Willapa Harbor State Bank, and at the time the United States National Bank procured the notes on which its claim is founded and which make it a creditor, it knew, through the dual capacity of its vice president and manager, that MacPhail was in possession of the mill and all of the property of the bankrupt, and of the agreement signed by the creditors, and had full notice and knowledge of all of the facts relating thereto.

A. R. Titlow, as receiver of the United States National Bank of Centralia, appearing in the name and stead of Robert G. Chambers, as trustee in bankruptcy of the estate of Creech Bros. Lumber Company, petitions this court for a review of, and appeals from, the order allowing the preferred claim of MacPhail in the sum of $13,877.74.

R. P. Oldham and R. C. Goodale, both of Seattle, Wash. (Walter L. Nossaman, of Seattle, Wash., of counsel), for appellant and petitioner.

John T. Welsh and Martin C. Welsh, both of South Bend, Wash., for appellee and respondent.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] 1. The case comes here upon appeal from an order of the bankruptcy court under section 24a of the Bankruptcy Act, and also upon a petition to review such order under section 24b of the same act, because of a doubt as to the correct procedure for obtaining a review of the order in controversy. Both methods of procedure may be resorted to in order to avoid a mistake in the remedy. Chavelle v. Washington Trust Co., 226 Fed. 400, 405, 141 C. C. A. 230.

[2] But when the case is here upon both methods of procedure, this court must determine which of the two the court is authorized to entertain, since each is exclusive of the other (Bothwell v. Fitzgerald, 219 Fed. 408, 413, 135 C. C. A. 212; Pindel v. Holgate, 221 Fed. 342, 346, 137 C. C. A. 158, Ann. Cas. 1916C, 983), and the scope of the review is not the same.

[3] The matter in controversy is a claim which the bankruptcy court allowed as a preferred claim. The objection to the claim is that it is not a preferred claim under the statute. The controversy comes, therefore, under clause 3, § 25a, of the bankruptcy act, which provides for an appeal "as in equity" from "a judgment allowing or rejecting a debt or claim of five hundred dollars or over," and is appealable under that section, and also under section 24a as a controversy "arising in bankruptcy proceedings."

[4] 2. It is contended by the appellant that the instrument under which MacPhail took possession and operated the plant of the Creech Bros. Lumber Company was illegal: First, because it violated the trust fund theory of the law of the state of Washington as applied to the assets of an insolvent corporation; and, second, it was a fraudulent conveyance because it hindered and delayed creditors.

It is contended that these objections are supported by the decision of the Supreme Court of Washington in Thompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, where the court said:

> "When it [the corporation] has reached a point where its debts are equal to or greater than its property, and it cannot pay in the ordinary course, and its business is no longer profitable, it ought to be wound up and its assets distributed. Therefore no device can receive the countenance of the courts which provides for an indefinite continuance of its corporate life under the protection of a mortgage, against the protest of those who are entitled to share in its property, be it much or little. The hindrance and delay contemplated by the terms of the instrument ought to render it null and void."

This was said with respect to property which remained in the possession of the mortgagor after the execution of the mortgage, and the mortgagor continued in business in every respect in the same manner as it had done prior to the execution of the mortgage. But, referring to the stipulations contained in the mortgage, the court said that the irresistible conclusion was "that the mortgage was designed to act as a shield between the corporation and its other creditors while it prosecuted its ordinary business for an indefinite length of time." In other words, it was a preference in favor of the mortgagee for an existing debt, running counter to the purpose of the law to distribute the assets of an insolvent corporation ratably among its creditors. Upon this

feature of the case, the court, upon page 605 of 4 Wash., on page 742 of 30 Pac., said:

"A general assignment without preferences does not defeat this purpose, but, if the estate of a corporation comes into the court or into the hands of the assignee burdened with preferences, there is an end of equal distribution, and the object of the law is defeated."

There is not a particle of evidence tending to show that the assignment in this case was designed to act as a shield between the corporation and its creditors, or to burden the transaction with preferences other than such as were necessary to continue the business of the corporation as a going concern until the debts were paid or the assets reduced to cash and distributed among the creditors. Upon the other hand, it does appear that the assignment was designed to benefit all the creditors, and there was never any protest upon the part of any of the creditors against the assignment, nor was there any objection to the operation of the plant by MacPhail under its terms. The assignment was without any preferences whatever as to any of the creditors of the lumber company at the date of the instrument. The assignment was made on October 29, 1912, in pursuance of an agreement signed by the creditors of the lumber company on October 21, 1912, wherein it was recited that the stockholders and trustees of the lumber company had agreed to make an assignment to MacPhail for the benefit of all the creditors of the corporation, and that MacPhail had agreed to operate the plant as assignee and purchase logs for that purpose and otherwise finance the operation of the plant, provided the same could be operated at a profit, and provided also the creditors would extend the time of payment of their several accounts and desist from pressing said accounts until they could be paid from the profits derived from the operation of the plant. In accordance with this agreement, the lumber company, eight days later, made the assignment in controversy, wherein it was recited that MacPhail had signified his willingness to finance the operation of the plant, provided he could be amply and fully protected for all sums advanced or contracted by him, and provided the creditors would extend the time of payment of their several claims and desist from pressing said claims in the courts or otherwise; and it was accordingly so provided in the agreement. That is to say, it was provided that any sums advanced by MacPhail and any sums he might contract as an indebtedness in the operation of the plant, or in the purchase of logs or the employment of labor for the operation of the plant, should be a first and prior lien, and should be paid prior to the payment of any sums then due the creditors of the lumber company. It was further provided that the fact that MacPhail might cease to operate the plant should not be construed as terminating his rights under the contract until he had been fully paid for all sums by him advanced, and until all sums by him contracted for had been fully paid, satisfied, and discharged, and the creditors had been paid in full, or the assets had all been reduced to cash and MacPhail reimbursed and the balance paid pro rata to the creditors of the lumber company.

This assignment followed strictly the terms of the prior agreement signed by all the creditors that could then be ascertained. The United States National Bank of Centralia was not then a creditor of the lumber company and, of course, did not sign the agreement; nor did Titlow, its receiver, who now prosecutes this appeal in the name of the trustee in bankruptcy; nor was the bank or its receiver in any way interested in the affairs of the lumber company at that time. But the Willapa Harbor State Bank was a creditor, and it signed the agreement, authorizing the lumber company to execute the contract making the assignment to MacPhail, and thereafter the Willapa Harbor State Bank, holding the notes of the lumber company, sold and assigned the notes to the United States National Bank of Centralia. It was in this manner that the latter bank has become a creditor of the lumber company. The notes were sold to the United States National Bank subsequent to the execution of the assignment and while MacPhail was operating the lumber company plant under the assignment. It appears, further, that at the time the United States National Bank purchased these notes from the Willapa Harbor State Bank, and thus became a creditor of the lumber company, it took with actual notice of all the facts concerning the agreement with the creditors and the assignment of the property of the lumber company to MacPhail with all the priorities in his favor therein provided for. This notice has been established by evidence that C. H. Gilchrist was the president of the Willapa Harbor State Bank and was the vice president and manager of the United States National Bank, and the testimony shows that Gilchrist was instrumental in obtaining the signature of some of the creditors to the agreement providing for the assignment by the lumber company to MacPhail, and the court has so found as a fact.

This makes a very different case from that stated in Thompson v. Huron Lumber Co., supra. A case more in point is that of Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 571, 35 Pac. 396. In that case the mill company had given a mortgage to the Parke & Lacy Machinery Company to secure the purchase price of certain real estate and machinery. Upon the execution of the mortgage, the mortgagee at once entered into possession of the property covered by it, but did not operate the mill, which remained idle for several months. In proceedings brought by one Vincent to enforce a laborer's lien against the mill company, and in proceedings brought to foreclose the mortgage in favor of the Parke & Lacy Machinery Company, numerous defendants were brought into the case, claiming liens upon the property. A single judgment was entered, the property sold, and the proceeds ordered distributed, first, in payment of certain lien claims, and then to the Parke & Lacy Machinery Company in satisfaction of its mortgage. Appeals were prosecuted from this judgment on behalf of claims disallowed or denied priority. These appeals attacked the validity of the Parke & Lacy Machinery Company mortgage. It was contended that the mortgage was void as being intended to delay, hinder, and defraud creditors, and that the case fell within the decision of the court in Thompson v. Huron Lumber Co., supra; the appellants insisting that the mill company was insolvent at the time this

mortgage was executed. The court distinguished the case from the Thompson Case in the following language:

"It is not clearly apparent that the corporation was insolvent at said time. It had been operating its mill up to within a few days before the execution of the mortgage. It was then being pressed by its creditors, and was unable to pay them at that time, and it is doubtful whether the general market value of its property equaled the amount of its indebtedness, but its evident desire was to continue in business, and to get the matters of the corporation in better shape by getting the title to the property which it was operating in its own hands, and it fairly appears from the record that the mortgage was executed in good faith for this purpose, and that the company, at the time the mortgage was given, intended to continue business through the mortgagee in the way of operating its mill, to whom possession thereof was transferred."

The validity of the mortgage lien was sustained.

We think the assignment in the present case has a much stronger equity in its favor than the mortgage in the case last cited; but we need not dwell upon that question, since the obviously important question in this case is whether the assignment was legal.

[5, 6] 3. Upon that question, we are of opinion that it was legal. It contained no preferences in favor of any of the then creditors of the corporation, and it had no general fraudulent intent. It was permitted by the law of the state, and was the exercise of a right which every one claims over that which is his own. As said by Mr. Chief Justice Marshall in Brashear v. West, 7 Pet. (32 U. S.) 608, 614 (8 L. Ed. 801):

"That a general assignment of all a man's property is, per se, fraudulent has never been alleged in this country. The right to make it results from that absolute ownership which every man claims over that which is his own."

In the case of In re Gutwillig (C. C.) 90 Fed. 475, 476, Judge Brown said:

"Voluntary assignments for the benefit of creditors, * * * as practiced in this and other states, do not originate in the state statutes, but in the common-law power of the debtor to dispose of his property."

In Mayer v. Hellman, 91 U. S. 496, 500 (23 L. Ed. 377) Mr. Justice Field said:

"The validity of the claim of the assignee in bankruptcy depends, as a matter of course, upon the legality of the assignment made under the laws of Ohio. Independently of the Bankruptcy Act, there could be no serious question raised as to its legality. The power which every one possesses over his own property would justify any such disposition as did not interfere with the existing rights of others; and an equal distribution by a debtor of his property among his creditors, when unable to meet the demands of all in full, would be deemed not only a legal proceeding, but one entitled to commendation. * * * The hindrance and delay to particular creditors, in their efforts to reach before others the property of the debtor, that may follow such a conveyance, are regarded as unavoidable incidents to a just and lawful act, which in no respect impair the validity of the transaction. * * * The assignment in this case was not a proceeding * * * in hostility to the creditors, but for their benefit. It was not therefore void as against them, or even voidable. Executed six months before the petition in bankruptcy was filed, it is, to the assignee in bankruptcy, a closed proceeding."

In Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, a corporation had assigned all its corporate property for the

benefit of its creditors. Within four months after the date of the assignment, the corporation, upon the petition of its creditors, was adjudicated a bankrupt, and the deed of assignment was set aside as in contravention of the bankruptcy law (clause 4 of section 3, Act of July 1, 1898; 30 Stat. 544, 546). The appellants filed a claim against the bankrupt estate and the assignee for various services rendered, among others for professional services rendered the bankrupt corporation in preparing the deed of general assignment, and the assignee thereunder in advising and counseling him in respect of his duties as assignee. The items of the various services rendered were specified in the claim, and their relation to the bankrupt estate stated. The referee, upon the evidence, found and certified that the services had been rendered as claimed, but that the same did not constitute expenses allowable as a preference, and were not otherwise a lien. The district judge sustained the referee in so far as he held the claims to be nonpreferential, and adjudged that none of the items constituted a debt provable for any purpose against the bankrupt estate. From this judgment the appellants appealed to the United States Circuit Court of Appeals, and that court certified to the Supreme Court certain questions framed with reference to the character of the different services rendered by the appellants in the administration of the estate, among others the question whether the assignment providing that the costs and expenses of administering the trust should be first paid entitled such costs and expenses to be proven as a preferential claim against the bankrupt estate. Answering this question, the court said:

"The assignment was not illegal. It was permitted by the law of the state, and cannot be taken to have been prohibited by the bankruptcy law absolutely in every event, whether proceedings were instituted or not. In re Sievers (D. C.) 91 Fed. 366; In re Romanow (D. C.) 92 Fed. 510. It had no general fraudulent intent. It was voidable only in case bankruptcy proceedings should be begun. At the time when it was made the institution of such proceedings was uncertain. It seems to us that it would be a hard and subtle construction to say, as seems to have been thought in Bartlett v. Bramhall, 3 Gray (Mass.) 257, 260, that when they were instituted they not only avoided the assignment, but made it illegal by relation back to its date, when, if they had not been started, it would have remained perfectly good. No doubt the corporation had notice of the bankruptcy law, but it could not go into bankruptcy by voluntary petition, and there is no objection to a debtor's distributing his property equally among his creditors of his own motion, if bankruptcy proceedings do not intervene. The view we take is that which has been taken by state decisions with reference to similar questions raised by creditors or under state insolvent laws. Biglow v. Baldwin, 1 Gray (Mass.) 245, 247; White v. Hill, 148 Mass. 396 [19 N. E. 407]; Clark v. Sawyer, 151 Mass. 64 [23 N. E. 726]; Wakeman v. Grover, 4 Paige (N. Y.) 23, 43; s. c., 11 Wend. 187, 226 [25 Am. Dec. 624]. See, also, Mayer v. Hellman, 91 U. S. 496, 500, 501 [23 L. Ed. 377]."

The court said further:

"The assignee is acting lawfully in what he does before proceedings in bankruptcy are begun, and, although it may be assumed that the avoidance of the assignment relates back to the date of the deed, still so far as his services, or services procured by him, tend to the preservation or benefit of the estate the mere fiction of relation is not enough to forbid an allowance for them."

The court accordingly answered the question referred to by allowing the claim as preferred in the right of the assignee.

It follows that an assignment made for the benefit of creditors by an individual or by a corporation, without fraudulent intent, is valid even where the assignment is set aside by bankruptcy proceedings commenced within the statutory period of four months from the date of the assignment; and where the assignment has been made more than four months before the commencement of bankruptcy proceedings, the assignment is a closed proceeding. It follows, also, that a preference provided for in the assignment and growing out of the administration of the assigned property by the assignee, made in good faith and without fraudulent intent, is valid; and, where an assignment with such a preference has been made more than four months before the commencement of bankruptcy proceedings, the question as to its validity is closed.

The law of the two latter cases is, in our opinion, applicable to the controlling question in this case, and determines that the assignment, with its preference in favor of the administration of the property by the assignee, was valid, and in no legal or equitable sense did it hinder or delay creditors.

[7, 8] 4. But we think that there is a further and a conclusive answer to all the objections urged against the assignment. It was made pursuant to the stipulation or agreement of all the creditors ascertainable at the time of the assignment. The Willapa Harbor State Bank signed that agreement. Its president, who was also the vice president and manager of the United States National Bank of Centralia, together with another officer of the latter, was instrumental in procuring the signature of the bankrupt corporation to the assignment and the signature of the creditors to the agreement. The promissory note which it then owned was afterward transferred to the United States National Bank of Centralia. It is upon this claim so transferred that Titlow, as receiver of the United States National Bank of Centralia, is now contesting the MacPhail claim in the name of the trustee in bankruptcy. No other creditor objects to this claim. It is true that the appeal from the order allowing this claim is brought here in the name of the trustee in bankruptcy of the estate of Creech Bros. Lumber Company, who, as such trustee under the Bankruptcy Act as amended by the act of June 25, 1910, 36 Stat. 838, 840, as to all property in the custody or coming into the custody of the bankruptcy court, is "deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon." Section 47, clause 2, subd. "a," of the act. But this authority of the trustee in a bankruptcy court does not affect the validity or equity of any other lienholder.

The MacPhail claim stands upon its legal and equitable rights, and the United States National Bank, as the owner of the note issued by the Creech Bros. Lumber Company to the Willapa Harbor State Bank, is, by reason of the act of the president of the latter bank, now estopped to deny this claim. As said by Judge Taft in Simonson v. Sinsheimer, 95 Fed. 948, 954, 37 C. C. A. 337, 343:

> It is a just ground for refusing to allow a man to complain of an act of bankruptcy that "he induced the act, or after its commission he so acted with

regard to it that he gave others the right to act on the faith of its validity so far as his subsequent conduct would affect it. * * * It would be equally unjust to allow him to repudiate as invalid, a transaction, when by his conduct he had induced others to change their position on the faith of its validity."

The position of the other creditors of the estate is no better. The assignee, immediately upon the execution of the assignment, went into possession of all the property under its terms; his possession covering a period of about 1 year and 9 months, during about 7½ months of which he had the plant in active operation for the benefit of the creditors. This possession was an actual notice to all the creditors of the estate, and placed them on inquiry as to the terms of such possession. During all this time no one objected to the administration of the estate by the assignee; but, on the contrary, the creditors acquiesced and accepted its benefits. They accepted from him over 10 per cent. of their claims, and interposed no objection to his payment of over $3,000 in insurance, over $2,000 in taxes, over $93,000 for logs, and over $46,000 for labor and other necessary disbursements, making in all an aggregate of $13,877.71 more than he had received during the administration of the estate. In this there is no claim for compensation for any services rendered by the assignee; it is for money actually expended by him in good faith for the benefit of the estate. Under the law of estoppel, the creditors cannot now object to the assignment or to the administration of the estate under its terms. Damon v. Leque, 14 Wash. 249, 252, 44 Pac. 261; Bank of California v. Puget Sound Loan, Trust & Banking Co., 20 Wash. 636, 643, 56 Pac. 395; McAvoy v. Jennings, 39 Wash. 109, 114, 81 Pac. 77; Davis v. Iowa Fuel Co., 144 Iowa, 138, 122 N. W. 815, 816, 24 L. R. A. (N. S.) 1166; Simonson v. Sinsheimer, 95 Fed. 948, 954, 37 C. C. A. 337; American Exchange National Bank v. Ward, 111 Fed. 782, 786, 49 C. C. A. 611, 55 L. R. A. 356; Memphis Savings Bank v. Houchens, 115 Fed. 96, 105, 52 C. C. A. 176; Ohio Motor Car Co. v. Eiseman Magneto Co., 230 Fed. 370, 375, 144 C. C. A. 512; Tiffany v. Boatman's Institution, 18 Wall. 375, 388, 21 L. Ed. 868; Dickerson v. Colgrove, 100 U. S. 578, 580, 25 L. Ed. 618; Jencks v. Quidnick Co., 135 U. S. 457, 465, 10 Sup. Ct. 655, 34 L. Ed. 200.

The order of the District Court is affirmed.

The petition for revision is dismissed.

## FOURTH NAT. BANK OF WICHITA, KAN., v. SMITH (two cases).

### In re COX-BLODGETT DRY GOODS CO.

(Circuit Court of Appeals, Eighth Circuit. December 11, 1916.)

Nos. 161, 4555

1. BANKRUPTCY ⟸166(3)—CLAIMS OF CREDITORS—"SET-OFF"—"PREFERENCE"—BANK DEPOSITS.

Where a bank, to which a depositor was indebted, after knowledge of the depositor's insolvency, but before a petition in bankruptcy was filed, set off against the indebtedness the amount of deposits made by the depositor in the usual course of business, the transaction was valid as a "set-off," under Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (Comp. St. 1913, § 9652), and was not a "preference," under Bankr. Act, § 60a (Comp. St. 1913, § 9644), since the making of the deposits merely created a relation of debtor and creditor between the bank and the depositor, and the application thereof to the indebtedness involved no transfer of the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251, 255, 257.

For other definitions, see Words and Phrases, First and Second Series, Set-Off; Preference.]

2. BANKRUPTCY ⟸166(3)—CLAIMS OF CREDITORS—SET-OFF—KNOWLEDGE OF INSOLVENCY.

Knowledge by the bank of the insolvency of a depositor at the time of making the set-off does not invalidate such set-off as against the depositor's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251, 255, 257.]

3. BANKRUPTCY ⟸165(1)—CLAIMS OF CREDITORS—SET-OFF—POWER OF PARTIES.

It is permissible for a bank, under proper circumstances, to set off the amount of deposits against the depositor's indebtedness to it, even before a petition in bankruptcy is filed; it not being necessary to await an order of the court, though such set-off may thereafter become subject to review and control by the court.

4. BANKRUPTCY ⟸440—PETITION TO REVISE—QUESTIONS OF LAW.

Where no question of fact arises which is necessary to the decision of the case, but only questions of law, a petition to revise is the proper method of review.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915.]

5. BANKRUPTCY ⟸440—PETITION TO REVISE—APPEAL.

Where, on the face of the record, questions of fact arose which required an appeal to be taken, though such questions did not have to be decided, a claimant in bankruptcy was justified in pursuing its remedy both by petition to revise and by appeal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915.]

Petition to Revise Order of and Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

In the matter of the Cox-Blodgett Dry Goods Company, bankrupt. From an order of the District Court denying the claim of the Fourth National Bank of Wichita, Kan., against O. Z. Smith, as trustee in bankruptcy, unless the bank would pay to the trustee the amount of the bankrupt's deposits set off by it against the indebtedness, the bank

appeals, and also petitions to revise the order. Appeal dismissed, petition to revise sustained, and cause remanded, with directions to the District Court to modify its order.

J. G. Carey and C. G. Yankey, both of Wichita, Kan. (R. L. Holmes, W. E. Holmes, R. R. Vermilion, and Earle W. Evans, all of Wichita, Kan., on the brief), for appellant and petitioner.

Jean Madalene, of Wichita, Kan. (S. B. Amidon, E. L. Foulke, and S. A. Buckland, all of Wichita, Kan., on the brief), for respondent and appellee.

Before HOOK, Circuit Judge, and REED and BOOTH, District Judges.

BOOTH, District Judge. By appeal, and also by petition to revise, reversal is sought of the order of the District Court disallowing the unsecured claim of the bank against the estate of Cox-Blodgett Dry Goods Company, bankrupt, except upon the condition that the bank return to the estate the sum of $8,698.40, which sum was found by the court to have been received by the bankrupt as an unlawful preference. The following facts are not in dispute:

On and prior to August 30, 1913, the Cox-Blodgett Dry Goods Company, hereinafter called the company, was in the wholesale dry goods business in Wichita, Kan., and doing a large business with the claimant bank, both as borrower and depositor. On the 30th of August, 1913, the company had on deposit with the bank, subject to check, about $25,000. On that day the bank presented to the company demand notes made by it, amounting to $25,000, and demanded payment. The company refused payment, whereupon the bank charged the checking account of the company with the amount of the notes. On the 2d day of September, 1913, the company applied to the bank for a restoration of its credit as a depositor, and as an inducement to the bank to reinstate its credit, and as security for the amount of indebtedness which the company would owe upon such reinstatement, agreed to assign to the bank a certain mortgage called the Tapp mortgage and to hypothecate a deed to a certain tract of land. As a result of the negotiation, the bank restored on its books the credit in favor of the company, taking new demand notes to evidence the indebtedness, and accepting the securities offered. Thereafter deposits were made by the company with the bank in the usual and regular course of business, and checks drawn against the account, until the 31st day of October, 1913, on which day the company had to its credit as a depositor the sum of $8,698.40. At that time the bank held six demand notes of the company amounting to something over $35,000. No demand for the payment of these notes had been made by the bank; but on the 31st day of October, 1913, information coming to the bank that a petition in bankruptcy against the company either had been filed or was about to be filed, the bank offset on the account of the company so much of its said indebtedness evidenced by the notes as equaled the amount of deposit of the company on the books of the bank, namely $8,698.40. On the same day a petition in bankruptcy was in fact

filed against the company. The bank filed its proof of claim against the company for an unsecured debt of $13,879. The proof of claim set forth that the bank held as security for the payment of said demand notes the mortgage heretofore mentioned valued at $8,600; the deed for the land above mentioned, the equity in which it valued at $4,000; and that credit had been given by the bank upon its claim against the bankrupt company in these amounts, leaving due the sum of $13,879, after the offset of $8,698.40.

To this proof of claim the trustee filed exceptions: First, that the taking of the mortgage above mentioned by the bank amounted to a preferential transfer from the company; second, that the taking of the conveyance above mentioned was also a preferential transfer from the company to the bank; third, that the set-off by the bank of the amount standing to the credit of the company on October 31st, $8,698.40, against the notes owed by the company to the bank, was made by the bank with knowledge of the insolvency of the company, and created a voidable preference. The trustee objected to proof being made of any claim by the bank until said preferences were surrendered.

A hearing was had before the referee, who found that the transaction between the company and the bank on the 2d day of September, 1913, covering the reinstatement of the company's credit upon the books of the bank, and the transfer of the mortgage and the land as security to the bank was not a preferential transfer, within the meaning of the Bankruptcy Act. This conclusion of the referee was approved and affirmed by the District Court. Those conclusions have been acquiesced in by the trustee, and are not before us for review.

The referee further held that the set-off by the bank of the $8,698.40 standing to the credit of the bankrupt company on the books of the bank on October 31, 1913, against the debt of the bankrupt company to the bank, did not constitute an illegal preference, and need not be surrendered by the bank as a condition to proving its claim. Upon a petition of the trustee to review this conclusion of the referee, the District Court reversed the referee, and ordered the claim of the bank disallowed, except upon the condition that the bank should pay over to the trustee the amount of the deposit offset by the bank against the notes. The views of the trial court are indicated by the following excerpts from its decision:

"The act of the bank in making the application was a transfer of the bankrupt property toward the satisfaction of a debt evidenced by the demand notes. This transfer and the right of the bank to make it must be viewed and determined as of the date it occurred, and from what the bank knew or had reasonable cause to believe as to the financial condition of the bankrupt, and by what the bank intended to accomplish by its act. It is true the mere fact that a bank in the usual course of its business, acting under its banker's lien, charges a depositor's account with payment of due or past-due paper made by the depositor and held by the bank, believing or even knowing the depositor at the time is insolvent, will not defeat such transfer. * * * However, * * * no creditor, be it a banking corporation or other person, can take or receive payment from a debtor known at the time to be insolvent, and knowing, or having reasonable cause to believe, by the taking or receiving of such payment it is thereby securing a preference in payment over other creditors of the insolvent debtor of the same class. * * * The question, therefore, pre-

sented on this record, is: Did the bank know, or did it have reasonable cause to believe, at the date it applied the deposit of the bankrupt toward the satisfaction of the demand notes [that the] bankrupt was insolvent, and by such application it would obtain a preference in payment over the other creditors? * * * From all the proofs found in the record, I am entirely persuaded the bank at the time it made application of the deposit toward the payment of the demand notes of the bankrupt, not only knew the now bankrupt company was insolvent, and either on the verge of bankruptcy, or had actually gone into bankruptcy, but that it further knew, or at least had every reasonable cause to believe, after deducting the fair market value of the Tapp note and mortgage and the Oklahoma land, which it was justly entitled to retain and apply on the debt of the bankrupt to it, from the total of such debt, if it should further, as it did, apply the deposit account on the amount of the debt remaining, thus leaving only a small amount due it on the demand notes of the bankrupt, it would thus obtain such a preference in payment over other creditors of the bankrupt estate as would preclude it from proving such small balance as a debt against the estate under the provisions of the Bankruptcy Act, unless it should first surrender such preferential payment."

[1] In our judgment, the conclusions reached by the learned trial court were erroneous in three particulars: (1) In holding that the set-off by the bank was a transfer of the bankrupt's property; (2) in holding that knowledge by the bank of the insolvency of the company at the time of the set-off was a material factor in the situation; (3) in holding that the so-called preference resulting from the set-off was a voidable preference within the meaning of that term as used in the Bankruptcy Act.

In New York County Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, Stege & Bro. had an account in that bank, and the bank held two notes made by them falling due January 26, 1900, amounting to $40,000. On the morning of January 23d, the two notes were renewed, and in the afternoon of the same day a statement was rendered to the bank, which showed the firm to be insolvent. On January 22d, 23d, and 25th, deposits were made to the amount of $6,225.25, and on January 27th the firm filed a voluntary petition in bankruptcy. "At the first meeting of creditors, February 9, 1900, the New York County National Bank filed its claim for $33,790.25. In its proof of claim the bank credited upon one of the notes, which became due on January 26, 1900, the deposit of $6,209.25. The claim was allowed by the referee in the sum of $33,750.25, being $40,000 less the amount on deposit in bank ($6,209.25), and a small rebate of interest on the unmatured notes." The District Court affirmed the order of the referee. The Circuit Court of Appeals reversed the District Court, holding that the set-off of the deposit would amount to a transfer, enabling the bank to obtain a greater percentage due to it than other creditors of the same class, and that the allowance of the claim should be refused unless the preference was surrendered. The Supreme Court of the United States reversed the Circuit Court of Appeals, and in the course of its opinion said:

"It cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes a part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by

honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character. * * * It is true that the findings of fact in this case establish that at the time these deposits were made the assets of the depositors were considerably less than their liabilities, and that they were insolvent; but there is nothing in the findings to show that the deposit created other than the ordinary relation between the bank and its depositor. The check of the depositor was honored after this deposit was made, and for aught that appears Stege Bros. might have required the amount of the entire account without objection from the bank, notwithstanding their financial condition."

The court held that the set-off was rightly made under section 68a of the Bankruptcy Act. In answer to the claim that under section 60a this transaction amounted to the giving of a preference to the bank, the court, after stating that a transfer, within the meaning of the Bankruptcy Act, must be one diminishing the assets of the bankrupt, used the following language:

"As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security. It is true that it creates a debt, which, if the creditor may set it off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences, so as to prevent set-off in cases coming within the terms of section 68a. If this argument were to prevail, it would in cases of insolvency defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full."

In the case of Studley v. Bank, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313, the Collver Company had a general deposit and checking account with the Boylston Bank. It also owed the bank $25,000, represented by five notes maturing September 12th, 20th, 30th, October 3d, and October 14th. The first three notes were paid by check on the Boylston Bank, and the note due October 3d was charged by the bank to the company's deposit account, and on the same day a renewal note for $2,500 was discounted; and the note falling due October 14th, was, on becoming due, also charged by the bank to the deposit account. The Collver Company continued to make deposits and draw checks, and on December 16, 1910, a petition in bankruptcy was filed against it. The trustee brought suit against the bank to recover $22,500, claiming that it had notice of the Collver Company's insolvency, and that the payments were transfers which had operated to give the bank a preference. The bank claimed that the payments were simply set-offs upon the mutual account, and did not constitute a preference within the meaning of the Bankruptcy Act. The referee before whom the case was tried sustained the bank's claim of set-off. This decision was affirmed both by the District Court and the Circuit Court of Appeals. The referee found as a fact that the bank had no reasonable cause to believe that a preference would result. The District Court made no findings of fact in this respect, nor did the Circuit Court of Appeals.

A finding was made by the referee, the District Court, and the Circuit Court of Appeals that the deposits were made in due course of business, and without any intent to prefer the bank. The Supreme Court, in affirming the judgment of the Court of Appeals, said:

"We find nothing in the record to indicate that the deposits were made for the purpose of enabling the bank to secure a preference by the exercise of the right of set-off. The case, therefore, comes directly within the decision in New York County National Bank v. Massey, 192 U. S. 138 [24 Sup. Ct. 199, 48 L. Ed. 380], where $3,884 deposited by an insolvent customer, in good faith, four days before the filing of the petition against him was allowed to the bank by way of set-off on notes of the bankrupt held by it. An effort is made to distinguish that case from this, by calling attention to the fact that here, by checks drawn on the account or notes charged to the account, the parties themselves voluntarily made the set-off before the petition was filed, while in the Massey Case the trustee, under the supervision of the referee stated an account and allowed the set-off as permitted by section 68a, which provides 'that in all cases of mutual debts, or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.' That section did not create the right of set-off, but recognized its existence and provided a method by which it could be enforced, even after bankruptcy."

In reference to the objection that the set-offs had been made by the parties rather than by the trustee in the bankruptcy proceedings, the court said:

"If this set-off of mutual debts has been lawfully made by the parties before the petition is filed, there is no necessity of the trustee doing so. If it has not been done by the parties, then, under command of the statute, it must be done by the trustee. But there is nothing in section 68a which prevents the parties from voluntarily doing, before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted. * * * It cannot have been illegal for the parties on September 12th, 20th, 30th, and October 3d and 14th, to do what the law would have required the trustee to do in stating the account after the petition was filed on December 16, 1910. No money passed in either instance; for, whether the checks for $5,000 were paid, or notes for $5,000 were charged, was, in either event, a book entry equivalent to the voluntary exercise by the parties of the right of set-off."

In the case of Continental Trust Co. v. Chicago Title Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268, one Prince owed the Federal Trust & Savings Bank, the predecessor of the Continental Company, on February 14, 1905, about $37,000. The bank had reasonable cause to believe that Prince was insolvent from and after February 10th, and during the transactions from that date up to and including February 15th. The bank had issued margin certificates to Prince, which evidenced indebtedness of the bank to Prince, and Prince had put these up as security for certain open trades. Prince, on February 14th, transferred these open trades to Anderson & Co. On February 15th, Anderson & Co., substituted its own securities in place of Prince's margin certificates, thereby releasing the latter, which were thereupon returned to the bank, and by it set off against Prince's indebtedness. On February 10th, the bank had called for payment of loans made to Prince. The money not being paid, the bank applied the sum of $3,095, then standing as a deposit credit on the books of the bank in favor of Prince. Thereafter deposits were made by Prince, and checks were drawn against the deposit until February 14th, when the bank applied the bal-

ance of $575.79 on the general indebtedness of Prince to the bank. A petition in bankruptcy was filed against Prince February 15th. The trustee in bankruptcy brought suit to recover, as being preferential transfers, first, the sum of $4,250, the amount of the margin certificates; and, secondly, the balance of $575.79, which had been applied by the bank against Prince's general indebtedness on February 14th. The District Court held the trustee entitled to recover, and this was affirmed by the Circuit Court of Appeals, but was reversed by the Supreme Court, the latter court in its opinion using the following language:

"To constitute a preferential transfer within the meaning of the Bankruptcy Act there must be a parting with the bankrupt's property for the benefit of the creditor and a consequent diminution of the bankrupt's estate. New York County National Bank v. Massey, 192 U. S. 138, 147 [24 Sup. Ct. 199, 48 L. Ed. 380]; Newport Bank v. Herkimer Bank, 225 U. S. 178, 184 [32 Sup. Ct. 633, 56 L. Ed. 1042]. * * * By the arrangement made, Anderson & Co. took hold of the situation, and, carrying out the deals upon which Prince was bound, cleared the certificates of any obligation to others, and they thereby became payable to Prince. What was done did not in fact diminish the estate of Prince otherwise available to the creditors in the bankruptcy administration, for the traders holding them would have had the benefit of the deposits under the terms of the certificates and the rules of the Board of Trade. It therefore appears that this essential element of a preferential transfer within the meaning the Bankruptcy Act, diminution of the bankrupt estate, is wanting. The fact that what was done worked to the benefit of the creditor and in a sense gave him a preference is not enough, unless the estate of the bankrupt was thereby diminished."

In reference to the application of the deposit credit of $575.79, the court said:

"As to the $575.79, we think the right to set off this deposit is established by the principles laid down in New York County National Bank v. Massey, supra. Here there was a deposit subject to be checked out by the bankrupt for specific purposes. The money was not placed in the bank with a view to giving it a benefit, except indirectly, because of the deposit. It was subject to Prince's check, and all of it might have been checked out for the purposes intended."

In our opinion, these three foregoing cases are decisive of the case at bar. In the present case items of deposit from September 2d to October 31st were received in the usual course of business. There is no evidence that a deposit was built up for the benefit of the bank, and there is no claim made to that effect. Checks were drawn against the deposit account, and the amount of the deposit account varied during the above period from $18,000 to $5,000.

The cases of Mechanics' & Metals National Bank v. Ernst, 231 U. S. 60, 34 Sup. Ct. 22, 58 L. Ed. 121, National City Bank v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115, and In re National Lumber Co., 212 Fed. 928, 129 C. C. A. 448, are cited by counsel for the trustee. But in all these cases the deposits in question were not received in the usual course of business, but were "built up" or deposited under unusual circumstances, for the express purpose of giving a preference to the bank. The so-called deposits were deposits merely in name, but in fact were payments.

In the case at bar the referee found:

"In the present matter there is no circumstance proven which would justify the conclusion that the bankrupt had been accumulating funds on deposit for the purpose of liquidating the bank's debt. On the contrary, every circumstance indicates that the amount to the credit of the bankrupt was a balance resulting from transactions in the usual, ordinary course of business."

This distinction between deposits made in the usual course of business, even by an insolvent depositor, and deposits made for the purpose of giving a preference to a bank, has been recently emphasized by this court in German-American State Bank v. Larimer, 235 Fed. 501, — C. C. A. —. The right of set-off being expressly recognized in the former instance, but not in the latter.

[2] It is true that in the instant case the District Court, in holding that, when attempting to make the offset, the bank knew that the company was insolvent, and had reason to believe that by making the set-off a preference would result to the bank. But knowledge by the bank of the insolvency of a depositor at the time of making the set-off does not invalidate such set-off. Indeed, in most cases such knowledge is the very reason for making the set-off. In the Massey Case, and in the Continental Bank Case, supra, the bank knew of the insolvency of the depositor before the set-off was made.

Counsel seeks to distinguish the Massey Case from the case at bar by the fact that the set-off in the Massey Case was not made until after the adjudication in bankruptcy. In the Continental Bank Case, however, the set-off was made before the petition in bankruptcy was filed, and the same was true in the Larimer Case.

As to the conclusion reached by the District Court that the bank had reasonable cause to believe that a preference would result by the making of the set-off, it is sufficient to say that such preference resulting from a set-off is not a preference forbidden by the Bankruptcy Act. The preference forbidden by the Bankruptcy Act is one resulting from a transfer which diminishes the assets of the bankrupt; but, as held in the Massey Case and in the Studley Case, supra, a set-off does not constitute such transfer. In reference to this matter, the court in the Massey Case said:

"If this argument were to prevail, it would in cases of insolvency defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full."

In Germania Savings Bank & Trust Co. v. Loeb, 188 Fed. 285, 110 C. C. A. 263, the court, in considering a similar situation, said:

"It is also true that the application upon the bank's debt of this balance of deposits, accumulated after notice of possible insolvency of the Mercantile Company, in fact enables the bank to obtain a greater dividend on its claim than creditors generally obtain. But, unless it was the intention of the parties to so accumulate deposits for the purpose of preferring the bank, the transaction did not create a preference under the Bankruptcy Act."

In the Larimer Case the trial court gave the following charge, amongst others, to the jury:

"So, if in making the application under their banker's lien, they know at the time they make their application the depositor is insolvent, and know that they will get a greater proportion of their debt by making such application than other creditors will get, of like class, why, of course, they cannot make the application."

In reference to this charge, the court said:

"To this charge an exception was taken. The effect of the charge of the court was to tell the jury, if they found the bank applied the deposit under such circumstances as would ordinarily constitute a voidable preference, then the right of the bank to a set-off under section 68a of the Bankruptcy Act was destroyed. But this would not be true if the transaction was as the bank claimed it to be; that is, a deposit in the usual course of business. And the jury was not so told. The charge as given for all practical purposes took away the bank's defense."

It is claimed by counsel for the trustee in the instant case that the notes were not due at the time of the alleged set-off, and that therefore the attempted set-off was invalid. This contention cannot be sustained. In the Massey Case, supra, the note against which the set-off was made was not due. See, also, Germania Savings Bank & Trust Co. v. Loeb, supra.

[3] It is also claimed by counsel for the trustee that the set-off can only be made by the court, and not by the bank itself, and the case of Cumberland Glass Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042, is cited in support of this contention. It was distinctly held in the Studley Case, supra, that a bank could exercise the right of set-off before bankruptcy. This was done in the case of Continental Bank v. Chicago Title Co., supra, and also in the case of German-American State Bank v. Larimer, supra. What the Cumberland Case decided was that the provisions of section 68a were not automatic, and that, after the commencement of bankruptcy proceedings, set-off was under the control of the bankruptcy court, and that it was not mandatory on the court to make a set-off or to pass upon the question, unless the parties interested took the proper steps to obtain such relief. No intimation, either in the majority or the minority opinion, is given that the parties themselves may not exercise the right of set-off prior to the petition in bankruptcy. It may be conceded that the bankruptcy court has power to investigate and review set-offs made by the parties themselves prior to the commencement of bankruptcy proceedings; but no such question as this is involved in the case at bar.

[4, 5] Upon the present record no question of fact arises which we consider necessary to the decision of the case, but merely questions of law; therefore a petition to revise is the proper method of review. It may not be amiss, however, to add that upon the face of the record questions of fact did arise which, if they were to be reviewed, required an appeal to be taken. Smith-Wallace Shoe Co. v. Ternes, 235 Fed. 282, —— C. C. A. ——. The claimant bank was therefore justified in pursuing its remedy both by a petition to revise and by appeal.

In view of the conclusions we have reached, however, the appeal will be dismissed. The petition to revise is sustained, and the cause re-

manded, with directions to the District Court to modify its order of June 30, 1915, in accordance with the views herein expressed, and allow the bank to file its proof of claim without surrendering the $8,698.40, balance of the company's deposit on October 31, 1915.

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ERIE R. CO. v. UNITED STATES (two cases).

(Circuit Court of Appeals, Sixth Circuit. March 6, 1917.)

Nos. 2869, 2870.

1. RAILROADS ⊜229—REGULATION—SAFETY APPLIANCE ACT—PROVISO.
Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531, as amended by Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 (Comp. St. 1913, §§ 8605–8615), makes it unlawful for a common carrier to haul any car not equipped with couplers coupling automatically by impact. Act April 14, 1910, c. 160, 36 Stat. 298, contained a proviso that where any car had been properly equipped as provided in the safety appliance act, and the equipment had become defective while the car was being used, it might be hauled from the place where the defect was first discovered to the closest available place where it could be repaired, but that such movement should be at the sole risk of the carrier, and should not relieve it from liability for the death or injury of any railroad employé caused by reason of the hauling of the car with defective equipment, with a subproviso that nothing in the proviso should be construed to permit the hauling of defective cars by means of chains, instead of drawbars, in revenue trains or in association with other cars that are commercially used. *Held*, that the subproviso, when given its correct grammatical construction, and also when construed according to its obvious meaning, and to effectuate the purpose of the amendment of 1910, which was to permit the hauling of bad order cars to repair shops, prohibited only the hauling of cars with chains in commercial or revenue trains, but did not prohibit absolutely the hauling of cars with chains and the hauling of bad order cars in commercial or revenue trains.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.]

2. STATUTES ⊜200—CONSTRUCTION—PUNCTUATION.
The presence of the comma in the subproviso between the provisions for hauling cars with chains and the other provisions is not determinative as to the construction, since the presence or absence of a comma in a statute, according to the whim of the printer or proof reader, is so nearly fortuitous that it is wholly unsafe as an aid to statutory interpretation.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 278.]

3. RAILROADS ⊜229—REGULATION—SAFETY APPLIANCE ACT—CONSTRUCTION.
Since the remedy of employés for injuries received because of the cars not being coupled as required, which was the remedial feature of the Safety Appliance Act, entitling it to liberal construction, is not affected by the provision in Act April 14, 1910, § 4, the amendment need not be construed strictly against the railroad, but should be liberally construed to effectuate its purpose to permit the necessary moving of cars which had become defective while in operation.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.]

4. RAILROADS ⊜229—REGULATION—SAFETY APPLIANCE ACT—CONSTRUCTION.
Even if the provision in the amendment of Act April 14, 1910, § 4, without the subproviso, did not authorize the hauling of defective cars in commercial or revenue trains, but only in special trains, the subproviso, by

expressly prohibiting the hauling of cars by chains in revenue or commercial trains, excludes other cars from the effect of the proviso

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.]

5. RAILROADS ⊂⊃229—REGULATION—SAFETY APPLIANCE ACT—CONSTRUCTION —"ANY CAR."

The fact that the proviso applies to "any car" does not exclude from its operation a train or association of cars, since the original prohibition likewise is directed only against hauling any car, and that construction of the expression would exclude all trains from the whole Safety Appliance Act.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.

For other definitions, see Words and Phrases, First and Second Series, Any Car.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Two actions by the United States against the Erie Railroad Company to recover the statutory penalties for violation of the Safety Appliance Act. Judgment for the plaintiff, and defendant brings error. Reversed and remanded for new trial.

L. A. Manchester, of Youngstown, Ohio, for plaintiff in error.

E. S. Wertz, U. S. Atty., of Cleveland, Ohio, and Mr. Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C.

Before KNAPPEN and DENISON, Circuit Judges, and EVANS, District Judge.

DENISON, Circuit Judge. These two cases present the same question, with regard to separate, but similar, incidents. In actions brought to recover the statutory penalties for violation of the Safety Appliance Act (27 Stat. 531) as amended (29 Stat. 85, and 32 Stat. 943), a verdict was directed against defendant on five counts, involving five cars; and to review judgments imposing the penalty of $100 for each violation, the railroad brings these writs of error.

It appeared without dispute that defendant's N K yard at Youngstown is an interchange yard between various railroads; that government inspectors at this yard, as these cars came into the yard, found them defective because they would not couple by impact, and marked them as "bad order"; that, after each car was so marked, the railroad hauled it, for the purpose of being repaired, from its N K yard four miles to its Brier Hill yard, in a train in which there were other cars engaged in interstate traffic, and in which there were mixed empties and loaded cars in commercial use, and none of which trains was strictly a "hospital train"; and that no one of the cars contained live stock or perishable fruit. By conceded facts, or by the railroad's offer to prove, it further appeared, or might be inferred, that the cars had serious injuries requiring major repairs; that they had once been properly equipped as provided by law, but had become defective while being used; that they were first discovered to be defective while in the N K yard; that there was no shop or repair track at that yard; that it was necessary to haul the cars to the Brier Hill yard, which did have

shops and facilities; that hauling to the Brier Hill yard was necessary to make the required repairs, and that they could not be made except at the Brier Hill yard; that the Brier Hill yard was the nearest available point where the cars could be repaired; and that no one of the cars was so hauled by means of chains instead of drawbars. The verdict was directed because the District Judge was of the opinion that, conceding all these facts to be as claimed by the railroad, there was a violation of the law.[1]

The essential parts of the statute which must determine defendant's liability are as follows:

Section 2 of the act of March 2, 1893, as amended (29 Stat. 85): "That on and after the first day of January, 1898, it shall be unlawful for any * * * common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Act of March 2, 1903 (32 Stat. 943): "* * * The provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce."

From section 4 of the act of April 14, 1910 (36 Stat. 298): "Provided, that where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section 4 of this act or section 6 of the act of March 2, 1893, as amended by the act of April 1, 1896, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employé caused to such employé by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight."

From section 5 of the act of April 14, 1910: "That except that, within the limits specified in the preceding section of this act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this act shall be held or construed to relieve any common carrier."

Prior to 1910, the prohibition in the Safety Appliance Act against hauling cars which would not couple automatically by impact seemed to be absolute and unconditional. It was obvious that cars would become defective in this particular, or be discovered to be so defective, either while they were in transit between stations or while they were upon a side track or in a yard where it was impossible to make repairs. If this occurred in transit where there was no side track, the defective car could not be set out from the train, unless it happened to be the last

[1] The record did not require the conclusion that the cars had become defective before they came to be used by defendant on its line.

car, and, if it was, it could not be left there without blocking the track, and it could not be hauled even to the nearest side track without violating the letter of the original law; so, if the defect was discovered while the car was in transit, but was of a character that could be repaired only at some other place, hauling the car to the nearest place where it could be repaired violated this same letter of the law. These practical difficulties led some courts to construe the statute as intended to permit a hauling which was necessary for the purpose of making the necessary repairs; but this court, following what seemed to be the rules of construction applied by the Supreme Court to other parts of this same statute, held that its letter must be observed, and that even such a necessary movement was forbidden, if made in connection with other cars commercially used. Southern Ry. Co. v. Snyder, 187 Fed. 492, 497, 109 C. C. A. 344.

It was not expressly decided in the Snyder Case that a bad-order car could be hauled to a repair point, if it was hauled alone and not in connection with cars commercially used. That question was not presented by the Snyder Case. So far as what this court there said may imply that such a movement would be permitted, it is not now necessary to consider whether such implication was correct. The Supreme Court in Southern Ry. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, held that it is immaterial whether the bad-order car was or not used in connection with interstate cars, and that the prohibition, which was absolute in form, was directed broadly against any railroad engaged in interstate commerce. Whether or not the distinction between hauling a bad-order car alone and hauling it in connection with cars commercially used was based on the supposed force of the words "used in connection therewith," in section 1 of the act of 1903 (Chicago & N. W. Ry. v. United States, 168 Fed. 236, 93 C. C. A. 450, 21 L. R. A. [N. S.] 690), and whether or not the logical basis of the distinction disappeared when the Supreme Court held that this clause "used in connection therewith" was redundant and ineffective, it is enough to say that the decision in Southern Ry. Co. v. United States, taken in connection with the view of the statute adopted in St. Louis, etc., Ry. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, and when both were read in the light of the unqualified prohibition of the statute, created such a situation that the Senate committee, in reporting this amendment, said:

"There is, therefore, great doubt as to the right of a railroad company to move even a defective car to a point of repair."

It should be noted, also, that if there was any special force in the word "use," as found in the act of 1893 and the amendment of 1903, so that the hauling of a car, from the place where it was found defective even to the nearest side track where it was set out, could be excused on the ground that such car was not "in use," that possibility has disappeared, through the form fixed by the amendment of 1910 for the first part of section 4, which penalizes "permitting to be used or hauled on its line any car," etc., thus reaching even any "hauling" (if any there be) which might not be "use."

[1] In this situation, Congress passed the amendment of 1910, containing the proviso in section 4. This is a clear legislative recognition that the strictness of the statute ought to be relaxed in this particular; and accordingly we find that, after this amendment was incorporated, section 2 still forbade, generally, the hauling of such defective car, but that section 4 specified, by way of exception to the general prohibition, that it might nevertheless be hauled "to the nearest available point where such car can be repaired." So far, the application of the law to the facts in this case is clear, and, by the provisions of section 4 up to this point, the hauling, if of the character claimed by defendant, was lawful; whatever uncertainty there is arises from the further proviso, which may be called a subproviso, to section 4, and which says that:

"Nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used," etc.

This exception or proviso is capable of more than one construction. It may refer only to cars where the coupling devices are so defective that the cars must be hauled by chains, instead of drawbars. This we call the first construction. If this is to be adopted, it excepts such chained-up cars from the general hauling permission given in the body of the proviso, and, as to them, restricts that permission to some method which does ont involve hauling them in association with other cars commercially used, and thus, by inference, permits the hauling of a chained-up car to the nearest available repair point by an engine devoted only to that car, or in "hospital trains," or perhaps in some other way. By what we call the second construction, the subproviso refers to three different classes of cars, and forbids the hauling of defective cars: (a) By means of chains instead of drawbars; (b) in revenue trains; or (c) in association with other cars commercially used. If this is right, defective cars cannot be hauled at all by means of chains instead of drawbars, nor can they be taken even to the nearest repair point, unless by themselves and not in association with commercial cars. This second construction is the one contended for by the government and adopted by the court below; the first is urged by the plaintiff in error.

[2] The case must be decided, practically, as one of first impression; the question has not been considered in any reported decision. We are convinced that the first construction is the right one; and several considerations persuade us to this end. As a matter of the precise use of words and punctuation, the contention of the government is unsatisfactory. It requires the insertion of the word "or" before "in revenue trains," and the word is not there; the comma cannot take its place. The presence or absence of a comma, according to the whim of the printer or proof reader, is so nearly fortuitous that it is a wholly unsafe aid to statutory interpretation. Fed. Stat. Ann. (2d Ed.) title Statutes and Statutory Construction, § 50. Further, if it was intended to present three successive classes, each modifying "defective cars," and since the word "or" (which would indicate the equal standing of the three classes) is omitted between the first two, it would be natural

to expect, and nicety of language would require, that each class be introduced by repeating the same preposition; but here, we have "by," "in," and "in." As a matter of strictest construction we are inclined to think that the adverbial phrases "in revenue trains" and "in association with" modify, not merely "hauling," but rather "hauling by means of chains." If three correlative and independent things are prohibited, transposition in the order of their mention ought to make no difference in the meaning; but this test is disastrous to the government's contention. If we thus make what, by this theory, ought to be an innocent and ineffective transposition, the proviso would prohibit the "hauling of defective cars in revenue trains or in association with other commercial cars by means of chains instead of drawbars"; and this shows the importance of the omitted "or," and brings us directly back to the first construction. In other words, "by means of chains" would then clearly apply to and modify "hauling revenue trains" and "hauling in association," etc. Thus we see that the first construction makes perfect English of the subproviso, while the second construction requires some distortion and grammatical violence.

However, to determine the meaning of a statute on such grounds is usually to be overnice; we elaborate this matter, not as entirely satisfactory support for our view, but to demonstrate that the other meaning is not required by the most literal adherence to the words and the grammar of the law. Since both constructions are open, it is merely to beg the question to say that the first is the natural and obvious one; yet this impression cannot be resisted, and is, in some measure, confirmed by observing that Mr. Justice Van Devanter said, in United States v. Erie R. R., 237 U. S. 402, 409, 35 Sup. Ct. 621, 624 (59 L. Ed. 1019), while reciting the effect of the subproviso according to what he evidently thought was the obvious meaning, that the subproviso "declares that nothing therein shall be construed to permit the hauling of defective cars 'by means of chains instead of drawbars' in association with other cars in commercial use." He evidently interprets the subproviso according to the construction which we have thought the right one; and this is some indication that it is the meaning naturally to be attributed to the language used.

[3] The construction which we adopt is, in our judgment, required by a broad view of the purpose and intent of the proviso. The general prohibition of the act had been most strictly construed. The amendment permitting hauling to a repair point tended to enlarge, and not to restrict, the rights of the carrier. The "remedy" given by the amendment was to permit hauling to a repair point, and this amendment should be construed "to advance the remedy." Since it was often necessary that a defective car should be hauled in a revenue train from the point where the defect was discovered to some place where the car could at least be set out of the train, and since this necessity undoubtedly was one of the moving causes for the amendment of 1910, we see little room for doubt that the amendment was intended to permit such hauling in revenue trains as far as might be necessary to escape that strictness in the law which the amendment implied was unreasonable. In the form in which the amendment was first reported

to Congress, it did not contain the subproviso. We do not need expert testimony to know that where the coupler was defective only in that it would not couple and uncouple automatically, but was otherwise in good order, there was practically no danger resulting from this defect to the remainder of the train; the danger was to the employés—a subject kept unchanged by the amendment. It is equally clear that when the drawbars themselves were inoperative, and would not serve to pull the car, so that it was necessary to couple with chains, distinct danger resulted to the remaining cars. The amount of slack which often would exist would tend to result in injury to the air hose and to the cars and their contents, to say nothing about other adjacent cars in the train, or about the constant danger of breaking the train in two through breaking the chains. So it was clear that, while it would be comparatively unobjectionable to permit defective cars to be hauled a short distance in a revenue train, if the drawbars were operative, and if the liability to employés were preserved, it would be a very different thing and much more dangerous to permit cars to be hauled coupled by chains to a revenue train. There was, therefore, excellent reason for distinguishing and for refusing to permit the general permission given by the main body of the proviso to extend to the cars coupled by chains. From this point of view, the subproviso and its interpretation according to the first construction are most natural and tend to carry out the probable if not the certain intent of Congress.

In getting the right viewpoint for the amendments of 1910, it is further to be remembered that, under the former acts, the conflict between the canons that a penal statute should be strictly construed and a (so-called) remedial statute liberally was resolved in favor of the latter view largely—and, it seems, mainly—in order to give effect to the supposed dominant intent of the law that the employés' right to recover for personal injuries should not be impaired by any relaxation of the restrictions; and this right the 1910 amendments expressly and fully preserve. However we interpret "nearest available point," and even if "hospital trains" of chained-up cars may be moved to a repair point, and even if defective cars not chained may be hauled in a revenue train to the nearest available repair point, this underlying purpose to give the employé an unimpaired right of action is not touched; he may recover, regardless of the fact that the movement to the repair point was perfectly lawful. The rule disappears when its reason does; hence the rule of construing strictly against the railroad the provisions of the act, as that rule was established before 1910, has its force distinctly lessened, at least, as applied to this amendment.

Another consideration leading to the same result is that many cars are injured so that the drawbars will not work and so that chains must be used; these injuries occur everywhere and anywhere on the road; the necessity for moving, to suitable repair places, cars with this kind of injury, is often more apparent than with the cars that have less injuries; yet, upon the second construction, that favored by the government, cars so injured cannot be moved at all, and as to them the whole broad purpose of the proviso of section 4 utterly fails; they must be left where they are, beyond the reach of repair, and perhaps blocking

the traffic; they cannot even be chained together to make a "hospital train" and be hauled away for repairs. It would be even unlawful to chain up a single one to an engine and pull it away. The construction which leads to such results cannot be right; and yet the government's contention rests upon the proposition that the hauling of defective cars is absolutely prohibited (a) if in revenue trains; (b) if in association with other commercial cars; and (c) if the drawbars are so injured that chains must be used.

[4] Even if it be thought that the body of the proviso of section 4, omitting this subproviso, ought not to be interpreted so as to permit defective cars to be hauled even a few miles in a revenue train, that would not be controlling, when we give the subproviso what we must think its true meaning. When it prohibits hauling certain kinds of defective cars in revenue trains, and does not extend the prohibition to other kinds, and where it is obviously attempting to make very precise and accurate regulations, it must follow from the familiar canons of construction that those other kinds are not included within the prohibitions; and this brings us to the same result, viz., that cars not so defective as to require chains in the place of drawbars may be hauled in revenue trains to the nearest available place of repairs.

We are cited to some comment in the committee's report to the Senate, as tending to show that it was not intended to allow damaged cars to move in connection with those commercially used. As to this comment, it may be said, first, that it is ambiguous, and very likely was intended to refer only to hauling generally, and not to refer to hauling only to the nearest repair point; and, second, that the comment was made before this subproviso was a part of the act. We get no help from this report. It may as well be argued that the later insertion of the subproviso was expressly intended to cure a defect indicated by this comment.

[5] It is said that, because the permission of the proviso of section 4 extends only to "any car," it should not be thought of as reaching a train or an association of cars, or, in other words, that general permission to haul a car does not extend to hauling it in a train or in any way except alone. This construction is fatal to the whole purpose of the act, because the original prohibition of section 2 and the penalties of section 4 are not directed against hauling trains having defective cars, but are against hauling "any car." Consequently, if a car alone and a car in a train are essentially different things, and if the language "any car" reaches the former and not the latter, sections 2 and 4, the main sections of the act, do not reach trains including defective cars, but only such a car as a separate unit; and, of course, this construction is not right.

These views require that the judgment shall be reversed, and the case remanded for a new trial.

## PACIFIC COAST CASUALTY CO. v. GENERAL BONDING & CASUALTY INS. CO.*

(Circuit Court of Appeals, Ninth Circuit. March 5, 1917.)

No. 2735.

1. INSURANCE ⟸146(3)—POLICIES—CONSTRUCTION.
Ambiguous terms in an insurance policy will be construed most strongly against the insurer which prepared the policy.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295.]

2. INSURANCE ⟸146(3)—POLICIES—CONSTRUCTION.
An indemnity policy insuring employers should be construed so as to uphold and not defeat its express object.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295.]

3. INDEMNITY ⟸9(1)—CONSTRUCTION—LIABILITY OF INSURER.
Defendant issued an employer's liability policy insuring a corporation against loss and expense arising on account of accidents to any of its employés and providing that, if suit should be brought against the corporation, defendant would at its own expense settle or defend the suit whether groundless or not, that the moneys expended in such defense would not be included in the limits of the liability fixed by the policy, and that the corporation should not assume any liability or interfere with any negotiation for settlement or any legal proceeding nor incur any expense or settle any claim except at its own cost without the written consent of defendant. The policy further provided that no action would lie for any loss or expense unless it was brought for loss or expense actually sustained and paid in satisfaction of a final judgment within 90 days from the date of judgment and after trial of the issue. An employé of the corporation sued for bodily injuries, and, after a defense conducted by defendant, judgment went for the employé, whereupon defendant instructed its counsel to appeal, but informed counsel that it would not furnish a supersedeas bond staying execution. The insured corporation declined to furnish a supersedeas bond, whereupon counsel and the local agent of defendant secured a supersedeas bond from plaintiff, executing in the name of defendant an indemnity contract. The premium for the bond was paid by defendant, and, the judgment being affirmed on appeal, it was satisfied by plaintiff; execution against the insured corporation being returned unsatisfied. *Held*, that it was the duty of defendant to give a supersedeas bond, the insured not being allowed to incur any obligation without its written consent, and hence plaintiff, having satisfied the judgment, was entitled to recover the amount thereof from defendant.
[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 16.]

4. PRINCIPAL AND AGENT ⟸166(2)—AUTHORITY OF AGENT.
In such action, defendant was chargeable with the knowledge of the acts of its attorney and agent, and, by availing itself of the supersedeas bond executed by plaintiff, ratified the procuring of the bond.
[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 629, 633.]

5. INSURANCE ⟸202—INDEMNITY INSURANCE—ASSIGNMENT.
Where a loss has occurred which was covered by an employer's liability policy, the insured may, judgment covered by the policy having been rendered, assign the policy in consideration of the assignee satisfying the judgment, and the assignee may recover thereon against the insurer.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 471.]

6. INDEMNITY ⟸9(2)—POLICIES—CONSTRUCTION.
An employer's liability policy insured the employer to the extent of $5,000 against loss and expense arising from claims for damages on ac-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing denied May 14, 1917.

count of injuries suffered by employés and obliged the insurer to defend at its own expense any suit against the employer, declaring that moneys expended in such defense would not be included in the limits of the liability fixed by the policy. An employé recovered a judgment against the employer for $5,000, and the insurer, desiring to secure a stay of execution pending an appeal, procured a supersedeas bond from plaintiff executing an indemnity contract obligating the insurer to indemnify plaintiff against all loss, costs, charges, counsel fees, damages, and expenses whatever. The judgment was affirmed on appeal, and plaintiff satisfied the judgment which included accruing interests and costs. *Held*, that plaintiff is not entitled to recover sums paid on account of the interest accruing from the time of rendition of the judgment to affirmance; the indemnity contract when construed with the policy not including such item.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 17.]

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action by the General Bonding & Casualty Insurance Company, a corporation, against the Pacific Coast Casualty Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed on condition that plaintiff enter a remittitur; otherwise reversed and remanded, with directions to grant new trial.

Myrick & Deering and James Walter Scott, all of San Francisco, Cal., for plaintiff in error.

R. S. Gray, of San Francisco, Cal., and Locke & Locke, of Dallas, Tex., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The General Bonding & Casualty Insurance Company, plaintiff below, here called the "Bonding Company," recovered judgment against the Pacific Coast Casualty Company, here called the "Pacific Company." The Pacific Company sued out writ of error. The case as found by the District Court is this:

The Pacific Company of California issued to Elmo Rock Company a policy of employer's liability insurance by which the Pacific Company insured the Rock Company, a Texas corporation, for the term of a year ending June 18, 1912, on account of an accident to any of its employés "against loss and expense arising from claims upon the assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of the policy." Under the policy the Pacific Company agreed that, if suit should be brought against the Rock Company on account of an accident, the Pacific Company would at its own expense settle or defend the suit whether groundless or not, and that the moneys expended in such defense would not be included in the limits of the liability fixed by the policy. The policy also contained this clause:

"The assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at its own cost, without the written consent of the company."

The policy further provided that no action would lie for any loss or expense thereunder unless it was brought for loss or expense actually

sustained and paid in satisfaction of a final judgment within 90 days from the date of judgment and after trial of the issue.

In 1911 when the policy was in force, one J. B. Sowders, an employé of the Rock Company, suffered personal injuries in crushing rock for the Rock Company. Sowders sued the Rock Company in the state courts of Texas. The Pacific Company defended and managed and controlled the action in accordance with the provisions of the policy, conducting the defense through John Davis, Esq., of the firm of Meador & Davis, attorneys at law of Dallas, Tex., who were generally employed by the Pacific Company in litigation in the neighborhood of Dallas. In June, 1912, Sowders recovered judgment against the Rock Company for $5,000 with interest and costs. By letter dated June 28, 1912, the Pacific Company advised Meador & Davis to proceed with an appeal in the case, the letter also saying, "But you will understand that we do not furnish a supersedeas bond staying execution." Meador & Davis then requested the Rock Company to furnish a supersedeas bond, but the company refused to do so upon the ground that the Pacific Company should do this. Davis wrote again urging that the Rock Company furnish the bond. A copy of this correspondence was forwarded to the Pacific Company at San Francisco, and on July 30, 1912, it wrote to Meador & Davis, saying:

"We indorse your action taken in this matter and will ask you to proceed with the appeal, but the assured must furnish its own supersedeas bond."

Leeds, managing partner of Miller-Stemmons Company of Galveston, agents of the Pacific Company, then urged the Bonding Company to make a supersedeas appeal bond. That company agreed to give the bond if indemnity bond were obtained from the Pacific Company, and later indemnity bond was procured through Messrs. Meador & Davis, and supersedeas bond was executed on August 6, 1912. The indemnity contract was signed, "Pacific Coast Casualty Company, by John Davis, Its Attorney at Law and in Fact." The contract, after reciting the bringing of suit by Sowders against the Rock Company, the desire to appeal from the judgment, and that a supersedeas bond of $11,000 was required to perfect the appeal, and that the General Bonding Company had agreed to execute the supersedeas bond, provided that the Pacific Coast Casualty Company would indemnify the General Bonding Company against any and all loss, charges, fees, damages, and expenses which might be sustained by reason of having executed the supersedeas bond as surety. The premium for the supersedeas bond was paid to the Bonding Company by the Pacific Company through the agents of the Pacific Company in Galveston, Tex. The lower court found that Stephenson, who was president of and acted for the Bonding Company, did not know of any limitations upon the authority of Davis, but dealt with him believing that his authority was that which was "usual in such cases and was apparently possessed" by Davis; but both Davis, attorney, and Leeds, who was the managing partner of the agents of the Pacific Company, knew of the transaction with Stephenson and of the giving of the indemnity contract already referred to. In due time the judgment in favor of Sowders against the

the Rock Company was affirmed on appeal, and judgment was rendered against the Rock Company and the General Bonding Company as surety, upon which judgment execution was issued, and under it the real and personal property of the Rock Company was levied upon. Thereafter, in a judicial proceeding in the state court a receiver was appointed for the Rock Company, and the sheriff turned over the property levied upon to the receiver under orders of the state court and made a return of his execution as unsatisfied, without having sold the property. Thereupon an alias writ was issued commanding the sheriff to make the amount of the judgment and interest and costs out of the property of the Bonding Company. Thereafter in October, 1913, the Bonding Company paid to the owners of the judgment in Sowders v. Rock Company the money due on the judgment, including interest and costs, and in consideration of payment of the judgment the owners thereof assigned the judgment to the Bonding Company and the receiver of the Rock Company under order of the state court assigned to the Bonding Company the employer's liability policy issued by the Pacific Company. Afterwards the Bonding Company demanded from the Pacific Company the payment of $5,560.90 in settlement of its obligations under the policy of employer's liability insurance and the contract of indemnity. Payment was refused, and this action followed.

The District Court held that: (1) When the Pacific Company authorized Davis, its attorney, to take an appeal, it empowered him to do all that was necessary to make the appeal effective, notwithstanding the clause in the letter of the company to Davis saying that the assured must furnish the supersedeas bond; and (2) that under the evidence the Pacific Company by payment of the premium on the bond and the acceptance of the benefit of the bond for the purpose for which it was issued ratified the acts of its own agents and should not be heard to question them.

[1, 2] In testing these rulings we must bear in mind that the policy of insurance was prepared by the Pacific Company, and therefore if its terms are at all ambiguous it will be construed strongly against the company making it. The purpose of the contract was to insure the Rock Company against loss and expense arising from claims upon the Rock Company for damages on account of bodily injuries accidently suffered by an employé during the period of the policy; hence the duty of the courts, when called on to interpret the provisions of the contract, is to uphold and not to defeat the expressed object. American Surety Company v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977.

[3] It is provided that, if a claim is made on account of an accident, the assured shall give notice as provided for reporting accidents, and the insuring company at its own expense will settle or contest the claim. Further provision requires the assured if sued on account of an accident to forward to the company, immediately, every process or paper served on it, and that the company at its own expense shall settle or defend the suit whether groundless or not, and that the moneys expended in defense shall not be included in the limits of the liability

fixed under the policy. It is also important to remember the provision that the assured shall not assume any liability nor interfere with any legal proceeding, nor incur any expense nor settle any claim except at its own cost, without the written consent of the company.

The Pacific Company, acting upon its clear right under the terms of the policy, controlled and conducted the defense in the suit of Sowders against the Rock Company for damages. The provisions of the policy contemplated that the Rock Company should refrain from interference with any of the legal proceedings in that action, and the record discloses that the Rock Company undertook no responsibility in connection with the trial or proceedings. Under such a situation, it became the right of the insuring company, if not satisfied with the judgment of the trial court awarding Sowders a recovery, to appeal the case; but in doing so it had the correlative duty of protecting the Rock Company from injury while the appeal was pending. It was not for the Rock Company to stay proceedings by giving the necessary bond, because in giving a supersedeas bond the Rock Company would have been assuming a liability from which it was expressly relieved by the provisions of the policy. We do not doubt that it might have given such a bond, as it might have done other things relating to the legal proceedings connected with the action in which the judgment was recovered, provided it had obtained the written consent of the insuring company. But, as it is not contended that there was such written consent, we need not dwell upon that point. The provision in the policy that action would not lie against the company for loss or expense under the policy, unless it should be brought for loss or expense actually sustained and paid in satisfaction of a final judgment within 90 days from the date of judgment, was inserted for the benefit of the company, with a view to preventing settlement of a claim by the assured company with the expectation of holding the insuring company liable before a court of last resort had passed upon the validity of the claim. In this way the Pacific Company could be assured that the claim was one provided for by the policy and upon which liability would ensue. But the protection which was afforded to the Pacific Company by such a clause is to be considered with the obligation it assumed, to conduct at its own expense any legal proceedings brought against the assured Rock Company. The way by which the assured could be relieved of any liability in connection with the legal proceedings was for the Pacific, the insuring company, to give the supersedeas bond necessary to prevent the levy of execution pending an appeal which the Pacific Company had the right to take. It would be unjust to hold that the Rock Company could not recover unless the judgment of Sowders against it had been affirmed by the highest court of the state of Texas, yet to say that the Pacific Company was alone authorized to carry on the defense, and if unsuccessful appeal, but decline to give the bond to make the appeal effective as against execution under the judgment. Rochester Mining Company v. Maryland Casualty Company, 143 Mo. App. 555, 128 S. W. 204.

We therefore hold that it was incumbent upon the Pacific Company to give the supersedeas bond, and that it is but just that the Bonding

Company which paid the judgment should have recovery against the Pacific Company.

[4] We believe, too, that the knowledge of Davis and Leeds that the Bonding Company had made the supersedeas bond and that they made it in consideration of the payment of a premium by the Pacific Company, and the execution by the Pacific Company through Davis of the indemnity agreement, was knowledge to be imputed to the Pacific Company, and our opinion is that the Pacific Company, by availing itself of the bond made by the Bonding Company, ratified the action of Davis and Leeds in procuring the bond of supersedeas.

[5] There is some contention that the policy sued on was not assignable, but we find no merit in the point, inasmuch as the policy before us was one of insurance against loss, and after liability became fixed the assured could assign the policy to the Bonding Company in consideration of the Bonding Company paying the judgment against it. Maryland Casualty Co. v. Omaha Electric Light & Power Company, 157 Fed. 514, 85 C. C. A. 106.

[6] The judgment of the state court for $5,000 carried interest with it at the rate of 6 per cent. per annum from the date of rendition, June 19, 1912, and the supersedeas bond dated August 6, 1912, given by the Bonding Company of Texas in order to stay execution, was for the performance of judgment and payment by the Rock Company of "all such damages" as the Court of Civil Appeals in Texas might award against the Rock Company; and the indemnity bond here sued on obligated the Pacific Company to indemnify the Bonding Company against all "loss, costs, charges, counsel fees, damages and expenses whatever" which the Bonding Company should sustain or be put to in consequence of having executed the supersedeas bond.

The rule to be applied is that which strictly follows the limitation of the contract and that, where a liability is limited to $5,000 and there is a covenant that the insuring company will defend and that the moneys expended in defense shall not be included in the limits of the liability fixed under the policy, such sum as has been expended in the necessary conduct of the litigation may be recovered, but that the interest which accrued after the original judgment was rendered in the state court and pending the appeal in the Court of Civil Appeals in Texas was not an expense nor outlay incident to the defending of the suit. The question directly involved was presented in Maryland Casualty Company v. Omaha Electric Light & Power Company, 157 Fed 514, 85 C. C. A. 106, where the Court of Appeals of the Eighth Circuit cited the conflicting cases and held that a contract to pay the cost of making a defense might fairly contemplate attorney's fees, court costs, stenographer's fees, and other expenditures necessary and directly related to the presentation of the defense, but did not include the collateral and indirect results of doing so. Munro v. Maryland Casualty Co., 48 Misc. Rep. 183, 96 N. Y. Supp. 705; Davison v. Maryland Casualty Co., 197 Mass. 167, 83 N. E. 407; National & Providence Worsted Mills v. Frankfort Marine, etc., Ins. Co., 28 R. I. 126, 66 Atl. 58.

It should follow that the bond of indemnity, when construed with the policy of insurance, does not include liability for the payment of any greater sum than the Pacific Company was liable for when the judgment of the lower court in Texas was affirmed by the Court of Civil Appeals. It results that all sums paid on account of interest from the time judgment was rendered up to the time of the affirmance of the judgment by the Court of Civil Appeals should not have been included in the judgment of the District Court. The court costs proper, which appeared to have been $160.80 paid on October 25, 1913, were properly charged, and in this suit the Pacific Company should be charged with interest on the aggregate amount of $5,160.80 from the date when the Bonding Company paid this sum to the date of the final judgment in the present case, and the Bonding Company is entitled to a recovery of its costs in this action. There should therefore be a remittitur in accordance with the views herein expressed, and the following order becomes appropriate: The judgment of the District Court will be reversed unless within 30 days after the filing of this opinion the Bonding Company files, in the clerk's office of the District Court for the Northern District of California wherein the judgment herein was rendered, the remittitur conforming with the views herein expressed, and within 10 days thereafter files with the clerk of this court evidence of the filing of such remittitur in the District Court. If such remittitur and such evidence be filed, judgment will then be entered affirming the judgment below for $5,160.80 together with costs, to bear interest at the rate of 7 per cent. per annum from October 22, 1913, the date of the payment by the Bonding Company. If such remittitur and evidence should not be filed within the times aforesaid, the judgment will be reversed, with directions to grant a new trial.

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## MARTIN v. DEVELOPMENT CO. OF AMERICA.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1917.)

No. 2822.

1. CORPORATIONS ⟸1—HOLDING COMPANIES—NATURE OF.
   A holding company, which owns the stock of another corporation, is to be treated as a separate entity, unless such separate corporate existence is a mere sham, or is used as an instrument for concealing the truth, or is a mere instrumentality of such other company.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1, 3–6.]

2. CORPORATIONS ⟸585—SEPARATE EXISTENCE—HOLDING COMPANIES.
   In determining whether a holding company is liable for the debts and contracts of the corporation whose stock it held, the fact that the holding company exercised a control by reason of its stock ownership is to be considered, although it is not of itself enough to establish liability on the theory of a merger.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2332–2337.]

3. CORPORATIONS ⟸215—HOLDING COMPANIES—LIABILITY.
   Defendant holding company, having a contract to purchase mines, organized the bankrupt corporation and caused title to be taken in its name.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The development and operation of the mines were conducted in the name of the bankrupt corporation; defendant causing it to issue bonds secured by a deed of trust upon all its property, including shares of stock in subsidiary companies organized. The proceeds of the bonds and stocks of the bankrupt, which were received by the defendant, were used in buying and developing and operating the mine properties. Before the bankruptcy of the mining company, the holding company sued to foreclose the deed of trust on its property, and after bankruptcy judgment was rendered. There was no concealment in the transactions; the bankrupt company incurring debts on its own credit. *Held* that, notwithstanding the holding company, through an agent, bought in the property on foreclosure sale had after bankruptcy, such company could not, there being no concealment or merger, be held liable for the debts and contracts of the bankrupt company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 826–828, 845–848, 852, 854.]

Appeal from the District Court of the United States for the District of Arizona.

Bill by John H. Martin, as trustee in bankruptcy of the Imperial Copper Company, a corporation, against the Development Company of America, a corporation. From a decree dismissing the bill, complainant appeals. Affirmed.

The plaintiff, Martin, trustee in bankruptcy of the Imperial Copper Company of Arizona, brings this bill in equity against the Development Company of America, a Delaware corporation, owning property and transacting business in Arizona. The bill alleges that the defendant Development Company held a contract for the purchase of certain mining properties in Pima county, Ariz., for the sum of $515,000, and that thereafter, on or about May 11, 1903, the defendant created and caused the said Imperial Copper Company, a corporation, to be organized under the laws of Arizona for the purpose of consummating said purchase for the use and benefit of defendant Development Company; that all of the incorporators, directors, officers, etc., of the Copper Company were at all times employés of the Development Company, and until on or about March 31, 1915, owned all of the capital stock of the Copper Company; that until the latter's adjudication as a bankrupt, in 1911, it elected all the directors, officers, etc., of the Copper Company from its own (Development Company's) employés, directors, etc., and transacted all the business and handled and appropriated to its own use all the moneys derived from the operation of the said mining properties, and caused the title to the mining properties involved to be taken in the name of and operated by the Copper Company for the use and benefit of the Development Company in order to facilitate the business of the latter in developing the mining properties; that F. M. Murphy, of Arizona, was president of the Development Company, and is now, and has been since November 9, 1909, the president of the Copper Company, and that the Development Company created and used the Copper Company as an auxiliary, subsidiary, branch, agent, and instrumentality in carrying on its mining business; that the Development Company in 1903 caused the Copper Company to execute a first mortgage or deed of trust upon all the mining property referred to, to secure a $2,000,000 bond issue of the latter, for the use and benefit of the Development Company; that all such bonds were issued and delivered to the latter company, which used the proceeds of their sale in its business of operating mining properties, and also used the capital stock of the Copper Company, of the par value of $5,000,000, to the same purpose; that the Development Company, in 1903 and 1904, also caused to be organized under the laws of Arizona two "dummy corporations," known as the Arizona Southern Railroad Company and the Southern Arizona Smelting Company, elected all their officers, directors, etc., and at all times controlled their affairs as departments of its own business, and caused all the shares of the capital stock to be issued to and held in the name of the said

Copper Company, and then (in 1904) caused all the shares to become subject to the lien of the Copper Company mortgage as additional security for the before-mentioned $2,000,000 bond issue.

It is alleged on information and belief that on July 3, 1911, the Development Company, being then a holder of the majority of the bonds and capital stock of the Copper Company, instituted a suit in the district court of the First judicial district of the territory of Arizona to foreclose the mortgage or deed of trust on all of the mining properties and on the shares of stock of the Railroad and Smelting Companies; that on December 28, 1914, it obtained a decree of foreclosure and order of sale; that the Development Company then caused all of said mining properties and shares of stock to be sold under the foreclosure, and to be bid in, in the name of Leo Goldschmidt, at the price of $90,000 for the mining properties and $12,000 for the Railroad and the Smelting Company stock, all this for the use and benefit of the Development Company and Murphy, its president, and that they (Development Company and Murphy), as the real parties in interest in the purchase at the foreclosure sale, are now negotiating for the sale of all the above-mentioned properties and stock to the American Smelting & Refining Company of New Jersey, which company is now in possession of and working the mining properties; that on July 5, 1911, a petition in bankruptcy was filed against the Copper Company by certain creditors, and on July 25, 1911, it was adjudged a bankrupt; that the total of allowed claims in said bankruptcy proceeding is $1,280,686.22; that at the first creditors' meeting, held on August 12, 1911, M. P. Freeman was elected trustee, and acted as such until July 2, 1914, at which time he resigned, and plaintiff was elected and qualified as such trustee.

Plaintiff then proceeds to allege, on information and belief, that there was some character of agreement between the Development Company and Murphy, its president, on the one hand, and the creditors of the bankrupt company, on the other; that it was to the effect that the bankruptcy proceedings should lie dormant to enable the Development Company and Murphy to raise sufficient funds with which to discharge said debts, and that the creditors, relying upon the promises made by the Development Company and Murphy, allowed the proceedings to lie dormant until 1914, and until the qualification of the plaintiff as trustee, and that any seeming delay was caused by the Development Company and Murphy themselves, whom he alleges, on information and belief, controlled the bankruptcy proceedings until plaintiff was elected trustee; that the action of the Development Company in causing the mining properties and railroad and smelting stock to be sold at foreclosure resulted in stripping the Copper Company of practically all of its assets, with the exception of certain personal property for which $500 was bid at public and $1,400 at private sale, and that insufficient moneys and property have come into plaintiff's hands, as trustee, to pay any dividends upon claims filed and allowed by the referee; that by reason of the matters set forth the Development Company became and is liable for all of the debts of the Copper Company, and that all of the said mining properties and shares of stock purchased at the foreclosure by the Development Company, or for its use and benefit, are liable for all of said debts.

The prayer asks that plaintiff have judgment for $1,280,686.22, the amount of the allowed claims in the bankruptcy proceeding, and that it be decreed that all the mining properties and shares of stock in the Railroad and Smelting Companies be liable for the claims of creditors of the Copper Company, and that such claims of creditors be decreed to be liens upon the properties acquired by the Development Company under the foreclosure proceeding, etc., and for alternative relief. The District Court dismissed the bill for lack of equity, and the trustee in bankruptcy appeals.

Francis M. Hartman and Edwin F. Jones, both of Tucson, Ariz., for appellant.

Everett E. Ellinwood, John M. Ross, and Leslie C. Hardy, all of Bisbee, Ariz., and Selim M. Franklin, of Tucson, Ariz., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] Passing the question of the right of Martin, as trustee, to maintain this suit against the Development Company, we believe that the facts stated do not make the Development Company liable for the debts and defaults of the Copper Company. A holding corporation has a separate corporate existence, and is to be treated as a separate entity, unless facts are averred which show that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth, or where the organization and control are shown to be such as that it is but an instrumentality or adjunct of another corporation. Pittsburgh & Buffalo Co. v. Duncan et al., 232 Fed. 584, 146 C. C. A. 542; In re Watertown Paper Co., 169 Fed. 252, 94 C. C. A. 528.

[2, 3] The Development Company, appellee, back in 1903, had a contract to purchase certain mines described, and caused the Copper Company to be organized. The Development Company acquired the mines, and caused title to be taken in the name of the Copper Company, and caused the development and operation of the mines to be conducted in the name of the Copper Company. Other companies were also organized at the direction of the Development Company, and the capital stock of these companies was issued to the Copper Company. Later, but back in 1903, the Development Company caused the Copper Company to issue $2,000,000 of bonds, secured by deed of trust upon all of the property of the Copper Company, including the shares of stock in the Smelting and Railroad Companies owned by the Copper Company. All the bonds and all the capital stock of the Copper Company were issued and delivered by the Copper Company to the Development Company, and the Development Company used the bonds and stocks and proceeds of the sale of the bonds and stocks in buying, developing, and operating the mining properties.

It is alleged that the Development Company long since disposed of the bonds and shares of stock of the Copper Company and used the proceeds in development and operation of the mining properties. No facts are alleged which show a concealment in these transactions, and none can be presumed under the showing made. The stockholders who purchased became the owners of the assets of the Copper Company, subject to the debts of the corporation. Legal title of the mining properties was always in the Copper Company, and development and operation were carried on in its name. It incurred debts amounting to over $1,000,000 in its own name, and finally in 1911 was declared a bankrupt. Under such a state of facts the contracts of the Copper Company cannot bind the Development Company, for each corporation was separately organized, and operated under separate, distinct, organization without such interrelationship as would make the Copper Company but an instrument or adjunct of the Development Company.

The fact that the Development Company exercised a control over the Copper Company, through its stock ownership or identity of directorate, is to be considered, but by itself is not enough to establish a merger, or to make the Copper Company in its contracts the agent

of the Development Company. In Clere Clothing Company v. Union Trust & Savings Bank, 224 Fed. 363, 140 C. C. A. 49, this court applied the rule that there may be a virtual relationship of principal and agent between two corporations; but the facts of that case showed a systematic purpose and scheme whereby, from the organization of one corporation down to the time of its bankruptcy, it was acting solely in the capacity of agent of another company, and it was held that in presenting its claim it was deliberately attempting to prove debts against itself, in fraud of legitimate creditors of the bankrupt corporation.

In Linn & Lane Timber Company v. United States, 196 Fed. 593, 116 C. C. A. 267, we find another case where this court held to the rule that, when proper showing is made, equity will go beyond corporate form to ascertain whether a corporation is being used as a fraud. But again the facts showed that one of the purposes for which the corporation was formed was to conceal fraudulently therein titles to the lands which were the subject of the suit, and to keep the title so concealed until the time when the statute of limitations should bar an anticipated suit by the government to set aside the patents. Here, upon petition of creditors, the Copper Company was duly adjudged a bankrupt. There is no averment that the creditors ever looked to the Development Company as their debtor. Furthermore, it appears that the mining properties were sold under decree in foreclosure of a mortgage, and which never has been and is not herein assailed as fraudulent or illegal. The Copper Company was a party to the foreclosure proceedings, which, while instituted before the bankruptcy petition was filed, were not brought to decree until several months after the trustee in bankruptcy was appointed. Martin, Trustee, v. Bankers' Trust Company, Trustee (Ariz.) 156 Pac. 87. Martin, as trustee, intervened.

The allegation, made upon information and belief, that at the foreclosure sale the property was bought by one Goldschmidt, who was the mere agent of the Development Company, and the prayer that all of the properties be decreed to be part of the assets of the Copper Company, bankrupt, cannot avail the trustee, if the Development Company is not liable for the debts of the unsecured creditors of the Copper Company; and as we must conclude that there is no such liability the appellant is not entitled to relief.

The judgment is therefore affirmed.

## In re SOUTHERN ARIZONA SMELTING CO.

### FREEMAN v. MARTIN.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1917.)

No. 2824.

SALES ⟸4(1)—SMELTING OF MINERALS—PURCHASE OF ORE.

A smelting company, desiring to acquire a smelter and site, entered into a contract with a mining company whereby such company agreed to erect a smelting plant and convey it, with the site, to the smelting company in return for the stock of the smelting company. The contract further provided that the mining company should deliver to the smelting company all kinds of ore produced by its mines to be smelted and reduced, the smelting and marketing to be done by the smelting company at the actual cost thereof, plus 5 per cent. interest on the cost of the property and plant, and provided that the ores should be sold to a third company, which was a party to the contract. No sale price for the ore was fixed, and no arrangement was made of any amount to be paid the smelting company receiving the ore, and, when it was reduced, transferring drafts for the purchase price to the mining company. The mining company also furnished funds for the smelting company's purchase of other ores. *Held* that, notwithstanding the smelter returns, delivered on the furnishing of ores, referred to them as being bought by the smelting company, no sale was made; the smelting company being only a bailee, and title to the slag, etc., remaining after smelting, did not pass to the smelting company.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 7.]

Appeal from the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

In the matter of the bankruptcy of the Southern Arizona Smelting Company, a corporation, bankrupt. Suit by John R. Martin, as trustee in bankruptcy of the Imperial Copper Company, a corporation, against M. P. Freeman, as trustee in bankruptcy of the Southern Arizona Smelting Company, a corporation. From a decree for complainant, defendant appeals. Affirmed.

See, also, 231 Fed. 87, 145 C. C. A. 275.

Martin, as trustee in bankruptcy of the Imperial Copper Company, bankrupt corporation, brought suit against Freeman, as trustee in bankruptcy of the Southern Arizona Smelting Company, a corporation bankrupt, to determine the ownership and right of possession of many tons of flue dust and of slag, the residue and by-product of many tons of copper ore shipped by the Imperial Copper Company in the years 1908, 1909, and 1910 to the Southern Arizona Smelting Company, and which ores were by the Smelting Company, in the years before mentioned, smelted in its furnaces and reduced to copper bullion. The question presented to the lower court involved the ownership of the flue dust and slag. The findings of fact, which are not challenged, are very voluminous and may be summarized in this way:

The Copper Company was organized in 1903 to carry on mining operations, including smelting, etc. On May 11, 1904, the Copper Company authorized bonds to be issued, and executed a deed of trust to the Bankers' Trust Company of New York, conveying all the property it owned or might own as security for the bonds. On August 6, 1906, the Southern Arizona Smelting Company, the corporation bankrupt herein, was organized to mine, smelt, etc. When the Smelting Company was organized, in 1906, the directors of the Imperial Copper Company were E. B. Gage, W. F. Staunton, A. N. Gage, H. M.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Robinson, Selwin Eddy, F. M. Murphy, and V. L. Mason; the officers being E. B. Gage, president, W. F. Staunton, vice president and general manager, and A. N. Gage, secretary and treasurer. During the years 1907, 1908, 1909, and 1910, the following named persons were directors of the Smelting Company: E. B. Gage, W. F. Staunton, A. N. Gage, H. M. Robinson, F. M. Murphy; the officers of the Smelting Company being E. B. Gage, president, W. F Staunton, vice president and general manager, and A. N. Gage, secretary and treasurer.

On August 14, 1906, the Copper Company and the Smelting Company made a written contract. This agreement recited that, whereas the Smelting Company desired to acquire a smelter site, then owned by the Copper Company, and to have erected thereon a smelter, and especially desired to obtain contract for the ores of the Copper Company in order to have a basis on which to operate the smelter for outside customers' ores, it was agreed that the Copper Company would on a site owned by it build a smelter plant, to be erected and operated under the supervision of the Smelting Company's general manager, and upon completion the Copper Company agreed to sell the smelter site and plant, and "to furnish the Smelting Company with all ores of every kind produced from the mines of the Copper Company * * * that may be desired by the Smelting Company to be smelted and reduced by the Smelting Company" for six months from the date of the beginning of the operation of the smelter. The smelting, reduction, and marketing of such ore so delivered by the Copper Company was to be done by the Smelting Company at the actual cost thereof, plus 5 per cent. interest on the cost of the property and plant to the Smelting Company. In consideration of this agreement the Smelting Company was to issue to the Copper Company 7,995 shares of Smelting Company stock, fully paid, in payment for the real estate and plant to be conveyed, "and the contract for furnishing of the ore by the Copper Company to form the basis for the Smelting Company's operations in custom ores." The Smelting Company agreed to "take and reduce the ores so to be furnished by the Copper Company upon the terms and at the prices for smelting" set forth. The agreement was signed by the Imperial Copper Company, by E. B. Gage, president, and attested by A. N. Gage, secretary, and by the Smelting Company, by Ben Goodrich, president, and A. N. Gage, secretary. The court found that the Copper Company built the smelting plant and conveyed the same to the Smelting Company, and caused 7,995 shares out of 8,000 of capital stock to be issued and delivered to the Copper Company in accordance with the contract.

When the Smelting Company was ready to commence operations, it made a tripartite contract, dated December 16, 1907, with the American Metal Company of New York and the before-mentioned Imperial Copper Company. This agreement provided that the Smelting Company would sell upon the terms set forth to the American Metal Company the entire output of copper, then, or at any time during the existence of the agreement, "smelted, owned, or controlled" by it, which it guaranteed would not be less than 1,250,000 pounds monthly. Various clauses relating to delivery, drafts, etc., are included in this contract; but it is unnecessary to set them out. As a further inducement for the American Metal Company to enter into the agreement, the Copper Company guaranteed to the Metal Company the prompt and faithful performance by the Smelting Company of the terms of the agreement. This agreement was signed by the Southern Arizona Smelting Company, by E. B. Gage, president, and A. N. Gage, secretary, and by the American Metal Company, Limited, by J. Langeloth, president, and Julius Goldman, secretary, and by the Imperial Copper Company, by E. B. Gage, president, and A. N. Gage, secretary. On April 13, 1908, the Copper Company and the Smelting Company made another agreement. In this last-mentioned agreement it was agreed that the Copper Company, as a part of the agreement of August 14, 1906 (heretofore referred to), would make necessary improvements and extensions, and would accept in payment therefor 1,000 shares of the fully paid stock of the Smelting Company to be delivered as provided. In pursuance of this agreement, the Copper Company erected the plant and the Smelting Company issued to the Copper Company the 1,000 shares of stock about November 10, 1908. The smelter plant and railroad thereto, operated from about January, 1908, until about August

15, 1910, when it was closed down. Between 1908 and 1910, when the smelter ceased operation, the Copper Company shipped all ore which it extracted from its mines, and had the same smelted and reduced to bullion by the Smelting Company, in accordance with the terms of the original contract of August 14, 1906, and the bullion was sold by the Smelting Company to the American Metals Company according to the tripartite contract already referred to, dated December 16, 1907. The manner of transacting the business was as follows:

The Imperial Copper Company shipped its ore to the Smelting Company in carload lots. Both companies made assay of the ore so shipped. The assay of the Smelting Company controlled, unless there was a great variation, when the sample of each company was given to an umpire, who assayed the same, and the assay of the umpire was taken as final. Shipments of ore were made every day by the Copper Company to the Smelting Company; smelter returns upon each lot of ore sampled and assayed by the Smelting Company were made by it and given to the Imperial Copper Company. The form of return was: "Southern Arizona Smelting Co. Bought of Imperial Copper Company," etc. The net value of each ore shipment shown on each smelter return was credited to the account of the Imperial Copper Company on the books of the Smelting Company, and the amount was entered on the books of the Copper Company as representing the value of the ore so shipped by the Copper Company to the Smelting Company. The bullion was shipped by the Smelting Company and sold to the American Metal Company, the proceeds of the sales of the bullion being eventually received by the Copper Company, and by it were credited on its books to the account of the Smelting Company. Account sales were rendered to the Smelting Company by the American Metal Company. The practice was for the Smelting Company to get a bill of lading from the railroad company for each car of bullion which it shipped to the American Metal Company, which bill of lading the Smelting Company indorsed and delivered to the Copper Company, with the smelting assay, showing approximate value, etc., attached thereto. The Copper Company would then draw a draft on the Metal Company in favor of the Development Company (a corporation referred to as a borrower from the American Metal Company) for 90 per cent. of the gross value, which draft the Copper Company would send to the Development Company in New York. The Copper Company would then also draw a draft for like amount on the Development Company and deposit the same to the Copper Company's credit with the Phœnix National Bank in Arizona. The amount of the draft covering the transaction was credited by the Copper Company on its books to the Smelting Company, and the Smelting Company made entry on its books of the total monthly amounts of such drafts as a charge against the Copper Company. When the Metal Company rendered its account for the bullion shipped, the balance was paid to the Copper Company in like manner as set forth, and such balance was credited by it on its books to the account of the Smelting Company, and each month the Copper Company charged the Smelting Company with the amount so received by it.

The Smelting Company kept no bank account. It made out vouchers, which were approved by its superintendent and by him sent to the Copper Company, which paid the vouchers and charged the amount against the Smelting Company, and made entries on the books of the Copper Company, and entries were also made on the books of the Smelting Company. Accounts between the companies were balanced monthly. The Smelting Company kept its own books of account and operating books, showing all amounts paid for it by the Copper Company.

The Smelting Company did a general smelting business. When the Smelting Company purchased and paid for ores received from and smelted for persons other than the Copper Company, it drew orders on the Copper Company, and such orders were paid by the Copper Company and charged against the account of the Smelting Company. After the Smelting Company closed down, vouchers were presented to it and paid by the Imperial Copper Company up to July 5, 1911, when the Copper Company was put into bankruptcy. At that time the books show that the Copper Company had paid out for the Smelting Company $26,887.71 in excess of all the amounts of money which it had credited to the account of the Smelting Company.

It is unnecessary to set forth in detail the substance of the other findings of the court, further than to say that they pertained to the financial transactions of the Copper Company and of the Smelting Company, and to litigation instituted in 1911 in the state courts in Arizona by the Bankers' Trust Company against the Copper Company to foreclose a deed of trust and lien upon the shares of stock which had been pledged by the Copper Company to the Bankers' Trust Company to secure the payment of certain bonds. In this litigation, Martin, as trustee, intervened, and it resulted that foreclosure was decreed by the state court and shares of the Smelting Company's stock were sold to one Goldschmidt, and sale confirmed and the stock transferred in April, 1915. Martin v. Bankers' Trust Company (Ariz.) 156 Pac. 87.

As conclusions of law, the United States District Court has found that the Smelting Company was a subsidiary of the Copper Company, created and used by the Copper Company for its convenience in the transaction of its business; that the ore shipped by the Copper Company to the Smelting Company, and the title thereto, as well as the title to all of the flue dust and slag dump, remained in the Copper Company; and that Martin, as trustee, is entitled to possession of the property. Decree in accordance with the findings and conclusions was made, and Freeman, as trustee in bankruptcy of the Smelting Company, appeals.

Selim M. Franklin, of Tucson, Ariz., and Everett E. Ellinwood, John M. Ross, and Leslie C. Hardy, all of Bisbee, Ariz., for appellant.

Francis M. Hartman and Edwin F. Jones, both of Tucson, Ariz., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The point in the case being, who has the title and right of possession to the dust and slag involved, we will first consider the rights of the parties under the contract of August 14, 1906. The recitals contained in that agreement refer to the Smelting Company as organized for the purpose of carrying on a general smelting and reduction business and purposes incidental thereto, and to the Copper Company as a producer of ores carrying copper and other valuable materials. Reference is also made to the fact that the Copper Company had acquired a valuable smelter site, and to the desire of the Smelting Company to acquire the smelter site and "have erected thereon a smelter plant," and to the special desire of the Smelting Company "to obtain a contract for the ores of the Copper Company in order to have a basis on which to operate the smelter for outside customer's ores." The consideration for the agreement was based upon the covenants and agreements made and to be kept by the parties. The covenant of the Copper Company was to erect a smelting plant, and, upon completion, to sell and convey it to the Smelting Company, with certain land, embracing 640 acres, and also "to furnish the Smelting Company with all ores of every kind produced from the mines of the Copper Company * * * that may be desired by the Smelting Company to be smelted and reduced by the Smelting Company," the "smelting, reduction, and marketing of such ores so delivered" to be done by the Smelting Company at the actual cost thereof, plus 5 per cent. interest on the cost of the property and plant to the Smelting Company, to wit, $800,000. In consideration of these things, the Smelting Company agreed to issue to the Copper Company 7,995 shares of its stock in payment for the

real estate and plant to be transferred, "and the contract for the furnishing of the ore by the Copper Company to form a basis for the Smelting Company's operations in custom ores," and the Smelting Company also agreed "to take and reduce the ores so to be furnished by the Copper Company upon the terms and at the prices for smelting set forth in the agreement."

We do not find any contract for the sale of the ores to the Smelting Company in these covenants. The contract specifically binds the Copper Company to sell and transfer by deeds, bills of sale, and other instruments to the Smelting Company the land and smelting plant; but there is a marked contrast between the language used in agreeing to sell the land and smelter, and that which pertains to the ore to be furnished for smelting. The land and plant were to be sold, but with respect to the ore the covenant was simply "to furnish" the Smelting Company with all ores that "may be desired by the Smelting Company to be smelted and reduced by the Smelting Company." No sale price for the ore is fixed, and no arrangement is made for any amount to be paid as a purchase price.

But, furthermore, next after the covenants just referred to is the provision that "the smelting, reduction, and marketing of such ores so delivered" is to be done by the Smelting Company at the actual cost thereof, plus 5 per cent. interest on the cost of the property and plant to the Smelting Company, to wit, $800,000. Here again there are no words of agreement to sell the ore to the Smelting Company, but the imposition of an obligation upon the Smelting Company to do three things—smelt, reduce, and market for a compensation specified in clear terms as the value of the service. In providing for the marketing, as well as the smelting and reduction, we think it was evidently intended that the Smelting Company was to act as the agent of the Copper Company. Just what the actual cost of smelting and reduction might be would be dependent upon cost of the materials bought by the Smelting Company. When these sums would be ascertained, the percentage named was to be added. The Copper Company, under obligation to pay to the Smelting Company all costs of smelting, was entitled to receive the total product of the ore, and this product, we believe, would properly include the flue dust and slag.

It is argued by the appellant that the agreement of December 16, 1907, which was the contract between the Smelting Company, the American Metals Company, and the Copper Company, should be considered in connection with the contract of August 14, 1906, and that, when so considered, it shows an intention on the part of the Copper Company to sell its copper to the Smelting Company. But it was the original contract of August 14th which required the Smelting Company to market as well as smelt the ores delivered by the Copper Company under the terms of the contract of that date. When, therefore, the Smelting Company, fulfilling its original covenant to market the product of the ore, agreed with the American Metals Company to sell and deliver all of the copper bullion "smelted, owned, or controlled by it" at certain prices, and the Copper Company guaranteed to the Metals Company the prompt and faithful performance by the Smelt-

ing Company of the terms and provisions of the agreement on the part of the Smelting Company to be performed, the Copper Company did not transfer its ownership in the property to the Smelting Company, but at most guaranteed that the Smelting Company would deliver and sell all copper smelted, owned, or controlled by it to the Metals Company under the terms named in the agreement, which would include the bullion owned by the Copper Company but in the possession of the Smelting Company, to be marketed by the Smelting Company as agent for the Copper Company.

The circumstances bear out the view that we have taken of these contracts. When a shipment of bullion was made by the Smelting Company, the bill of lading was attached to a draft drawn in favor of the Copper Company and turned over to it, and the proceeds of these drafts were received by the Copper Company; the Copper Company paying all the expenses of the Smelting Company. The Smelting Company turned over the draft for the product of the ore to the Copper Company, and seems not to have claimed any other nor greater compensation than the cost of the smelting, plus the 5 per cent., as agreed in the contract of August 14, 1906. As we look upon the guaranty by the Copper Company of the performance of the contract on the part of the Smelting Company as not a transfer of the title to the property to the Smelting Company, which merely held for the Copper Company, the true construction of the tripartite agreement is that the Smelting Company, in the sale of the bullion, acted solely as the agent of the Copper Company and for its benefit, and with knowledge on the part of the Copper Company, and the assurance by it that the Smelter Company would market with the Metals Company. In re Galt, 120 Fed. 64, 56 C. C. A. 470; In re Columbus Buggy Company, 143 Fed. 859, 74 C. C. A. 611.

It is evident that there was the closest relationship between the Copper Company and the Smelting Company, and it is not unreasonable to regard their interrelated situation in connection with the apparently studied use of the language in the August contract which effected a sale of the land, and that which required the delivery of the ore to the smelter and the smelting and marketing by the Smelting Company. It is true that, in the smelter returns made to the Copper Company, the caption of the form used was, the Smelting Company "bought" of the Copper Company; but we do not think this circumstance conflicts with the reasons for concluding that the whole contract was as we have construed it. Sturm v. Boaker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093.

Appellants cite Chisolm v. Eagle Ore Sampling Company, 144 Fed. 670, 75 C. C. A. 472. The question there involved arose upon the construction of a contract for the reduction of ore between the complainant in the case and a smelting company. The Sampling Company agreed to deliver to the Mill Company all of the ore which it received from leasers and mines, the ores to be delivered upon the schedule of treatment rates, which included freight deliveries, etc. Settlement for all ores shipped was to be based upon the Mill Company's weights and samples, and payments for all ore delivered were to be made by the

Mill Company promptly upon agreement as to assay value upon the basis of $20 per ounce for gold, less treatment charges as set forth in the agreement. The Court of Appeals said that the true construction of the contract, regarding solely the letter thereof, was not altogether clear, but the features pertaining to settlements and payments of freight charges and requirements for payment upon agreement as to assay values were held to indicate the characteristics of a sale rather than those of a bailment for treatment and return of the content values of the specific ore delivered. The court was confirmed in this view by the actions of the parties under the contract, which disclosed that the checks had been drawn "in payment" for the ores.

Our view being that the contract in question was in the nature of a bailment and not of a sale, we think it follows that the Copper Company is the owner of the flue dust and slag involved, and we affirm the decree based upon the finding to such effect. This conclusion renders it unnecessary to review the further conclusion of the lower court that the Smelting Company was a subsidiary and adjunct of the Copper Company.

Affirmed.

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WOLF v. EDMUNSON et al.

(Circuit Court of Appeals, Ninth Circuit. March 5, 1917.)

No. 2848.

1. WITNESSES ⟸268(2)—CROSS-EXAMINATION—SCOPE.

In an action to recover advances made under a contract for the sale of hops to be grown, where defendants counterclaimed, setting up plaintiff's breach of contract in failing to receive the hops when tendered, a witness for plaintiff, who claimed that the hops were not up to the standard prescribed in the contract, having testified that the color of the hops indicated an overripe and underripe condition, might properly be cross-questioned as to the general average condition of the crop, to show that he was testifying to a fact he could not possibly know.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 932.]

2. SALES ⟸397—ACTIONS—EVIDENCE.

In such case, defendants, who contended that their hop crop was improperly rejected, might testify that the grading of hops by inspectors varied.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1136.]

3. APPEAL AND ERROR ⟸201(2), 259—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Where there was no objection to a statement by the court in admitting evidence, and no exception was reserved at the time, the matter cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1251, 1498-1502; Trial, Cent. Dig. § 84.]

4. APPEAL AND ERROR ⟸206(2)—REVIEW—PRESENTATION OF GROUNDS IN COURT BELOW.

In an action involving a contract by plaintiff to purchase defendants' hop crop, where defendant, who had established his competency as to the quality of his crop, in response to a question whether he was able to de-

liver the amount of hops specified in the contract, testified that he considered he had more than enough hops of the required quality to satisfy the contract, and no objection was made to the answer on the ground that it was not responsive to the question, and no motion was made to strike, it cannot thereafter be attacked on the ground that the answer was nothing more than an estimate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1273, 1286–1289.]

5. EVIDENCE ⟸525—OPINION EVIDENCE—CHEMICAL ANALYSIS.

In an action for advances made by plaintiff under a contract to purchase defendants' hops, plaintiff contended that the hops raised by defendant were not of the standard prescribed in the contract, but that defendant refused to accept a reduction in price according to the contract, and disposed of the hops elsewhere. Defendant asserted that his hops were of the best quality, and that plaintiff rejected them because the market price of hops had decreased. Witnesses for plaintiff testified that the best hops were bright and flaky, of good, even quality, and that they contained much lupulin, which is the main qualification of good hops. A witness called by defendant testified as to the chemical analysis of hops to determine the amount of lupulin or pollen. *Held* that, in view of an instruction that the question for the jury was the merchantable value of hops, testimony as to the chemical analysis of the hops and the amount of the lupulin found was admissible, although hop buyers determined that fact by other means.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2333.]

6. APPEAL AND ERROR ⟸110—REVIEW—QUESTIONS PRESENTED.

The denial of a new trial will not be reviewed by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 740–748.]

In Error to the District Court of the United States for the District of Oregon; C. E. Wolverton, Judge.

Action by Max Wolf against J. M. Edmunson and another who counterclaimed. Judgment for defendants, and plaintiff brings error. Affirmed.

Action to recover $3,001, advanced by Klaber, Wolf & Netter, the predecessors in interest of the plaintiff in error, under a contract for the sale to that firm of 30,000 pounds of the 1912 crop of hops to be grown upon the land of the defendant in error M. J. Edmunson. Plaintiff in error alleged breach of contract on the part of the defendants in error in failing to deliver hops of the quantity and quality described in the contract. The answer of the defendants in error alleged breach of the contract by the predecessors of plaintiff in error in failing to accept hops tendered in accordance with the terms of the contract, and set up, by way of counterclaim, that defendants in error were damaged to the extent of $3,900 through the default of the predecessors of plaintiff in error. Judgment for defendants in error for $400. The parties will be designated hereafter as plaintiff and defendant, as in the court below.

On May 29, 1912, the defendants entered into a contract with plaintiff's firm whereby they agreed to sell and the firm to purchase at 25 cents per pound 30,000 pounds of their 1912 crop of hops grown upon the Edmunson farm, near Goshen, Or. The hops were to be of "first quality, i. e., of sound condition, good and even color, fully matured, but not overripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage." It was agreed that the buyer should have the privilege of inspecting all of the hops, either on the farm of the seller or at any place the hops might be stored or located,

and selecting therefrom the quantity sold under this contract. It was also agreed that "if in the judgment of the said buyer the quality of all or any portion of the hops tendered under this contract by said seller should be inferior, from any cause whatever, to the quality of hops above specifically called for, it shall be the duty of the seller to tender to said buyer the said hops raised, and the said buyer may have the right of accepting the entire quantity contracted for, or any part less than the entire quantity contracted for, at a reduction in price, which reduction shall be equal to the difference between the market value of such hops tendered under this contract by said seller and the market value of such hops at the time of the execution of this contract as are herein specifically called for to be delivered." It was further agreed that "if, from any cause whatever, the said seller should deliver or tender for delivery a quantity of hops less than the quantity above contracted for, it shall be the duty of the seller to tender to said buyer the said hops raised, and the said buyer may have the right of accepting the quantity tendered, and shall be entitled to damages for the amount short delivered, which damage shall be equal to the difference in market value at the time of delivery of this contract between the quantity and quality above called for and the quantity and quality actually tendered or delivered." The seller agreed to deliver to buyer all hops accepted under this agreement, free of all liens and incumbrances, f. o. b. cars or warehouse at Goshen, Or., as the buyer might elect. In accordance with the terms of the contract, plaintiff's firm, on May 1, 1912, advanced to defendants the sum of $1,200, and on August 31, 1912, the sum of $1,800, as part payment for the hops.

It was alleged in plaintiff's complaint, filed in the United States District Court for the District of Oregon on June 19, 1915, that during the month of October, 1912, defendants furnished samples from the hops grown on the premises during the year 1912, and, finding them of inferior quality and not according to the specifications of the contract, plaintiff's firm inspected the hops fully and completely, and found them slack-dried, bad and uneven in color, of unsound condition, not fully matured, not cleanly picked, not properly dried or cured, and affected by vermin damage, whereupon the firm rejected the said hops as first quality hops as defined by the contract. It was further alleged that defendants refused to tender the hops to plaintiff's firm at any reduction in price, and refused to act any further under the contract, or comply with any of the terms or provisions thereof, and, without the knowledge or consent of plaintiff's firm, proceeded to and did sell the hops to other parties in violation of the contract. It was further alleged that since selling the hops to other parties defendants have refused to repay to plaintiff the sums advanced under the contract, aggregating $3,001, and this action is brought for the purpose of recovering the advances so made.

Defendants answered, alleging a tender by them of sufficient hops to fill the contract, and denying that they were not first quality as specified therein. It was further denied that defendants sold these hops to other parties at any time before March, 1913, but alleged they were stored in the warehouse until that time, in readiness to fill plaintiff's order under the contract. It was alleged that plaintiff's firm abandoned the contract upon the sole ground that the market price of hops was much lower than the contract price. Further answering, and by way of counterclaim, defendants alleged they were damaged to the extent of $3,900 by reason of the wrongful refusal of plaintiff's firm to accept the hops tendered by defendants, and prayed that judgment be entered in their favor for the excess of $900 above the amount of the advances received from the plaintiff's firm, and for their costs.

Plaintiff replied, denying the various allegations of the answer, with the exception that it was admitted the market price of hops in October, 1912, was lower than the contract price.

The case was tried in the District Court before a jury, who returned a verdict in favor of the defendants in the sum of $400, and judgment was entered upon such verdict for $400 and costs. A motion for a new trial was then made by plaintiff, upon the ground that the verdict was against the evidence, which motion was denied. Plaintiff alleges error in the rulings of

the lower court, admitting certain evidence on behalf of the defendants, and denying plaintiff's motion for a new trial.

J. M. Williams and Louis E. Bean, both of Eugene, Or., for plaintiff in error.

Manning, Slater & Leonard, of Portland, Or., for defendants in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] 1. It is assigned as error that the court permitted Ross H. Wood, called as a witness on behalf of the plaintiff, to answer the following question on cross-examination:

"Q. What you men mean to get at is the general average of the crop?"

The witness answered:

"A. Well, yes. There was some of them green in each sample, and some of them were ripe—mixed—as you were talking a while ago about where those were dumped off the kiln floor."

This witness had testified that he had bought these hops and received them, arriving at the valuation of the hops on the samples that he had of the crop out of the different bales. The witness was referring to his purchase of the hops in March, 1913, for H. L. Hart, after they had been rejected by Klaber, Wolf & Netter (plaintiff's predecessors in interest) in the previous October as a delivery under the terms of the contract. The objection is that the question and answer related to the color of the hops, and it is said that no one could possibly tell, describe, or even guess what the average color of this crop of hops was.

This witness was testifying for the plaintiff as to the overripe and underripe condition of the hops as indicated by their color, and if it was true, as the plaintiff now contends, that the witness could not testify as to the average color of the crop, then manifestly it was proper for the defendant to obtain from the witness on cross-examination the admission that he was testifying to a fact he could not possibly know. It was plainly proper cross-examination.

[2] 2. It is next assigned as error that the court permitted the defendant Edmunson to answer the following question on his direct examination:

"Q. Now, what is your experience with hop inspectors, as to their being uniform in their judgment as to the quality of hops?"

To this question the witness answered:

"A. I find that they vary considerably. One will call a hop prime, and the other medium, etc. They will vary as much as one grade, and some vary two grades."

This witness had testified that, at the time of this transaction, he had been in the hop business for 22 years, had raised hops for a long time, and for the last 10 or 15 years had been mixed up with the dealers in one way or another, sampling and inspecting hops. He was testifying

to a fact within his experience as a hop producer and dealer. The evidence was plainly competent, relevant, and material.

[3] The objection now urged is that the court, in overruling the objection, said:

"I think that is an inquiry about the quality in effect of the hops."

The court was right. The inquiry was for the purpose of determining the value of the inspectors' testimony as to the quality of the hops, which was the issue to be determined. However, as there was no objection to this statement by the court when it was made, and no exception taken to it at the time, it must be treated as wholly without merit.

[4] 3. It is next assigned as error that the court permitted the defendant Edmunson to answer the following question:

"Q. Now, what do you say as to whether, at the time that Mr. Hinkle inspected these hops on the 31st of October, that you had 30,000 pounds of hops there of the quality described in that contract?"

The objection to this question was that it was incompetent, irrelevant, and immaterial, and as calling for a conclusion of the witness. It was calling for the conclusion of the witness only in the sense that he was asked to state the quantity of hops he had on hand; and as to the quality, he had already furnished evidence of his qualification to testify as to the quality of the hops. The witness answered this question:

"A. I *considered* that I had more than enough hops, of the quality that would be sufficient, that would go on the contract. There was perhaps 50 bails, or 60, between 50 and 60 bales, hops extra, besides enough. I had over 40,000 pounds, according to my recollection, in the whole crop."

The objection now made to the answer is that it was nothing more than an estimate, and not a positive statement; that the witness said he "considered" that he had more than enough, etc. (probably using a provincialism); but the question called for the statement of a fact. If it was not responsive to the question, the plaintiff should have insisted that the witness make it responsive, or that the court strike it out. As no objection was made to the answer, and no exception was taken to it, and no effort made to have it made responsive or struck out, we must treat this assignment as without merit.

[5] 4. The next five assignments of error relate to the testimony of Bert Pilkington, a witness called on behalf of the defendant. This witness testified that he resided at Corvallis, Or., and was employed in the State Agricultural College at that place; that his occupation was that of a chemist; that one of the particular features of his work was a revision of the methods for the chemical examination of hops, the object being to obtain a process of chemical analysis whereby hops would be given examination according to their worth. This process had for its purpose the determination of the chemical constituents of hops with respect to their brewing qualities. Among these constituent elements were certain resins and lupulin, or pollen. The objection urged by the plaintiff against this testimony was that it was an attempt to introduce a standard for inspection different from that used by the hop men. The method of the hop men appears to be, from the evi-

dence, the "rubbing nose method," and consists in the use of the senses of smell, touch, and sight. Netter v. Edmunson, 71 Or. 604, 613, 143 Pac. 636.

The testimony in this case concerning the chemical elements of hops came first from the witnesses for the plaintiff. The witness H. A. Hinkle, called by the plaintiff, testified that he had been in the hop business about 21 years, and had been inspecting and grading hops about 18 years. He was employed by the plaintiff in October, 1912, to inspect the hops in this case for him; that the grades of hops were choice, prime, and medium. On cross-examination, he testified that a choice hop was bright and flaky, free from mold, good, even color, fully matured, not damaged by vermin or anything like that, full of lupulin, and of good flavor; that a prime hop was a grade lower than a choice hop; that a prime hop need not be so fat, nor quite so bright, as the choice hop. When asked what he meant by "not quite so fat," he answered, "Not quite so much lupulin in it." He was then asked, "What is the lupulin in a hop?" He answered, "It is the pollen on the inside. It is the powder substance of a hop; the main qualifications of a hop." This witness admitted that he told Edmunson that, if these hops would come up to prime, he would take them.

Hal V. Bolam, a witness for the plaintiff, had been in the hop business for 26 years, and a hop buyer and inspector for 20 years. He testified that he examined four samples of hops from the Edmunson yard in 1912; that the grades of hops were choice, prime, and medium; that the Edmunson hops were immature, lacking in good lupulin, flavor was poor, either from faulty curing or other defect, and partly, probably, from the immature nature of the hops. On cross-examination, he said that the hops did not have sufficient lupulin to make them a mature hop; that "a hop may not be large, but it must contain lupulin. The lupulin is the pollen, which you find in the center of the hop cone. There is a powder or pollen in the center of the cone of the hop."

James Hayes, a witness for the plaintiff, had been a hop grower and buyer for about 15 years. In 1912 he was the buyer for Klaber, Wolf & Netter. He inspected the Edmunson hops in October, 1912, with the witness Hinkle. He testified that the hops were of poor quality. Upon cross-examination, he was asked what constituted "the material part of a hop for brewing purposes." He answered, "The lupulin, I suppose." He testified further that hops sell according to their color and appearance, etc.; that they should be rich in lupulin; if they do not have lupulin, he supposed they would be worthless; he did not think it would be possible for a hop to have good color, etc., unless it had lupulin in it. He did not think, however, that the lupulin made the color.

The witness Ross H. Wood, who was called by the plaintiff, testified that some of the hops were immature. When asked how he arrived at that judgment, he said:

"Because they were of green color and thin. There was not very much lupulin in them—in other words, much pollen."

All this testimony was given without objection, and was before the jury when the witness Pilkington was called by the defendant. When the objection was made to the testimony of Pilkington upon the chemical elements of the hops, the court said:

"There has been testimony here, coming from the witnesses produced by the plaintiff, touching the amount of resin, or pollen, as it has been described, or lupulin, that is contained in these hops, some saying that it had more and some less, and that seems to be the prime quality of the hop. If this witness is competent to testify concerning the quantity of that lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury."

We think this evidence was admissible on the part of the defense. The contract called for a first-class hop, and specified as one of the elements that the hop should be "fully matured." The evidence on the part of the plaintiff tended to show that the defendants' hops were immature, lacking good lupulin, and that lupulin was the main qualification of a good hop. Manifestly the defendants were then entitled to show, if they could, that the Edmunson hops contained a sufficient percentage of lupulin to make them first-class hops; and this was the purpose of the Pilkington testimony—that is to say, to show the percentage of lupulin in the hops by chemical analysis. But the witness stated that he did not know what a choice hop was, measured by the commercial rule. The court was careful to advise the jury in its instructions that the chemical value of the hop was not a controlling test. These instructions carefully defined the questions presented by the pleadings; the terms of the contract as entered into between the parties; the elements of quality and quantity of the hops constituting the subject of the contract; referred to the testimony concerning the same, and the action of the parties in complying or attempting to comply with the contract. In these instructions there was a paragraph which, we think, correctly and clearly submitted to the jury the real question of fact for their determination, and, at the same time, they practically disposed of all the objections to the testimony which we find in this record. The paragraph related to the merchantable quality of the hops according to the custom of the hop trade. The court said:

"I will state further, in this connection, gentlemen of the jury, that these hops were raised for the market, and the contract was made with the market value in view, and, in considering the quality of these hops, you will consider them as merchantable, as the parties themselves desired that the hops should be sold in the market and should be so treated, so that the merchantable value is the thing you are to consider, and not, strictly speaking, the real inherent or chemical value."

To these instructions no objections were taken; indeed, they submitted the case to the jury with such clearness, fairness, and precision that objections, so far as we can see, were out of the question.

[6] 5. The refusal of the court to grant a new trial presents no question for review.

The judgment of the District Court is affirmed.

SAM YICK et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 19, 1917.)

No. 2542.

1. CRIMINAL LAW ⊜37—PUNISHABLE OFFENSES—CRIMINAL ACTS INDUCED BY GOVERNMENT OFFICERS.

While the mere aiding of one in the commission of a criminal act by a government officer or agent may not preclude the conviction of the person committing the crime, where the officers of the law have incited the person to commit the crime charged, and lured him on to its consummation with the purpose of arresting him in its commission, the law will not authorize a verdict of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 42.]

2. CRIMINAL LAW ⊜844(2)—TRIAL—SUFFICIENCY OF EXCEPTIONS TO INSTRUCTIONS.

Exceptions to the charge of the court in a criminal case *held* sufficiently specific to direct the court's attention to the particular point objected to when taken in connection with an instruction requested by defendants and refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2025.]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Criminal prosecution by the United States against Sam Yick and Jung Kim, alias Junk Chung. Judgment of conviction, and defendants bring error. Reversed.

Mott & Dillon and Isidore B. Dockweiler, all of Los Angeles, Cal. (Thomas A. J. Dockweiler and G. C. O'Connell, both of Los Angeles, Cal., of counsel), for plaintiffs in error.

Albert Schoonover, U. S. Atty., and J. Robert O'Connor and Clyde Moody, Asst. U. S. Attys., all of Los Angeles, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The plaintiffs in error were convicted under an indictment charging them with the crime of conspiracy, in that they did on the 24th day of August, 1911, within the county of Kern, in the Southern district of California, willfully, unlawfully, and feloniously conspire and agree, together with divers other persons to the grand jurors unknown, to unlawfully bring and cause to be brought into the United States from divers places in the republic of Mexico "certain Chinese persons, to wit, Dock Yook, See Chew, and Wah Sung, each being a Chinese person, and any and all other and additional Chinese persons who were then and those who would thereafter be in said republic of Mexico, desiring and intending to enter the United States," none of whom being entitled under the laws of the United States to enter this country. The indictment also set out certain alleged overt acts of one of the alleged conspirators, consisting of the purchase of a certain railway ticket by him in pursuance of the conspiracy for his transportation from Bakersfield to the city of San Diego, and in further pursuance of the alleged conspiracy his leaving that city for the

town of Tia Juana, Mexico, for the purpose of arranging to bring three certain named Chinese persons across the international boundary into the United States.

It appears from the evidence introduced on the trial by the government that one Morse was its local inspector of immigration at Bakersfield during the times in question, having gone there in that capacity about the 1st of January, 1911, and that in the performance of his duties he had frequent occasion to see the defendant Sam Yick (whom he speaks of in his testimony as the principal Chinaman in that vicinity) in regard to Chinamen in and around Bakersfield; that on the 8th day of May, 1911, he had a talk with Sam Yick in reference to smuggling Chinese into this country, having gone to Yick's store to inquire about a Chinaman named Woo Jung Sing; that Yick told him he knew the Chinaman, and that he was on a ranch about five miles out of Bakersfield, and that he would take the inspector out to see him, as he wanted to have a talk with the latter anyway; that Yick did so the afternoon of the same day. We insert the following from the testimony of the inspector in regard to that trip:

"On the way out he asked me what salary I was getting, and whether I had a family to support, and if I could save any money off the salary I was getting, and if I had any opportunity to make money on the side, and how much money I made on the side; but I answered, rather shortly, I didn't consider it any of his business, and for the time being the subject was dropped. Then I went out there and examined this man, and on the way back he brought up the matter again, and he asked me if I didn't want to make more money than I was making, and I asked him how he meant. Well, he said that I arrested a good many Chinese around Bakersfield, and that if I would bring those Chinese in his store, instead of taking them to jail, he would pay me $100 for each one brought there, if I would release them. I asked him who would pay the money, and he said he would individually. Well, he said these Chinese would pay the money back to him, and he would charge them interest. He would make something off it, and I would make $100. I told him I would consider it. Then he said, if I wanted to make more money than that, if I could prepare papers for some Chinese that were in Mexico, so as to enable them to get to Bakersfield, he would be able to give me a good deal of business in that line, and I asked him where the Chinese would come from. Well, he said he had some friends in Juarez, Mexico, that wanted to come to Bakersfield; that he had letters from them in reference to coming here, and he wanted to know if I couldn't prepare papers purporting to show that these men were native-born citizens of the United States that would allow them to pass the inspectors on the way. He asked me how many inspectors there were between El Paso and Bakersfield, and I told him there were a great many located along the way, and he said I understood about making these papers, and ought to be able to make a paper that would pass inspection down there; and I told him it would be pretty hard to do, but I would see what I could determine on it—see what could be done; and then he said it was so hard to bring them from Juarez that the best proposition would be to bring them in from down at Tia Juana, from Ensenada; that there was a lot of Chinese there that would come. Prior to this I had asked him, or he had told me, how much there would be in it for these Chinese in Juarez. He said there were two or three there that he knew would come, and probably more would come if they could; and he said, if I could fix up these papers so that they would pass, I would get $150 for each paper; and he said it would be easier to get them in from Ensenada, if it looked good to me, and I wanted to accept money that way, that he would bring in a good many Chinese from Ensenada, that he would write down immediately and see how many there were there, that he knew of several that would come

and he knew there were a good many more, and that if I could get the Chinese in from Ensenada and bring them to Bakersfield and pay for them he would pay me $250 for each Chinese so brought in; and I told him I had never drawn up any papers of that sort, and would have to get some data as to the best way to draw them up, and so forth, and he asked me if I couldn't use my seal. He supposed that I had a seal similar to the commissioner's seal."

That testimony clearly tended to show an attempt by Sam Yick to bribe the inspector. The record further shows that on the same day, May 8th, Morse reported the matter to his superior officer at Los Angeles, who, after consultation with the then Assistant United States Attorney there, instructed Morse "to go ahead and try to apprehend him (Sam Yick) by going in with him"; that the next conversation that Morse had with Yick was in the store of the latter in Bakersfield about 9 o'clock in the evening of May 17th, in response to the request of Sam Yick, which is thus stated by Morse in his testimony:

"Mr. Giddings went to Sam Yick's store with me on the night of May 17th and stayed outside the store. I went into the store and saw Sam Yick. He took me to a room in the rear of the store and asked me if I had not been able to prepare any papers by that time. I told him that I had not done anything on it up to that time, that I had been busy; and he said that he had thought the matter over and concluded that he could make a good deal of money by going into the business, that he had already written to Ensenada to make arrangements for the Chinamen to come from there, and that he had in mind in particular four whom he knew would be glad to come right away, and that $250 apiece would be available for these four as soon as they arrived here at Bakersfield, and he asked me if I would be able to have the papers prepared for them by the time they got to Bakersfield. I told him that I did not know for certain. He told me to go to work and get the papers ready as soon as I could, because the men would be ready to come over at any time; he said I would not be expected to assist in getting the men over, that he would look out for that end of it altogether; but he said that he would expect me to get the men past the immigration officers on the way. He asked me who inspected the trains at San Diego, and if I knew some way I could get the men past the inspecting officer there, and he asked me if I couldn't get the inspecting officer at San Diego to go in with me on the proposition; he said that if I got $200 I could afford to give him (the inspecting officer at San Diego) $50, and if I got $250, I could afford to keep $200 and give this other man $50. I told him that I thought, perhaps, it could be arranged that way; he then told me that he would send a man down to San Diego to carry these men to Bakersfield, and he suggested that I should have the inspector in San Diego come up to Bakersfield and meet the man who was to go down to guide the Chinese coming across, so that the San Diego inspector would know him in case he saw him with the Chinese and would not arrest them. He said that he had written for the photographs of the four Chinese that were to come over, and he was expecting to hear from them at any time, and as soon as he heard from them he would let me know. Mr. Giddings is the man in whose house I was living in at Bakersfield at the time, and during this conversation I had with Sam Yick at his store Mr. Giddings was right across the street from the store; he walked from his house down to the store with me."

The next conversation Morse had, according to his testimony, with Yick, was in the evening of August 10th, in the back room of the latter's store, in which conversation, according to the testimony of the witness, Yick said he had heard from Ensenada two or three times since he had last seen the witness, and had received the photographs of

four Chinese, who he said were ready to come as soon as they could get the papers prepared for them, and asked the witness whether he had made arrangements with the inspector at San Diego to pass them when they were brought to that city. "And at that time," said the witness, "he told me who was going to be the guide, who would go down after them. He said that Jung Kim would. Jung Kim was his partner in the store there, and I was acquainted with him. And he showed me the photographs of these four Chinese, and told me to prepare the papers as soon as possible. I told him I didn't think it would hardly—that I couldn't prepare the papers right here, that arrangements were not made, and that if they expected to bring their Chinese up right away they could bring them up, and I would see to preparing the papers later on. He said they would have to have some means of identification; and in talking it over it was decided that the photographs would be used as a means of identification, and that the names of these Chinese would be written on the photographs. But he said, before he went any further, he would have to talk with another man, and see whether or not they would want to bring them in before they had their papers; and he said to come and see him a couple of nights after that, and he would know whether he wanted to go in on that proposition, or wait until the papers were prepared."

The next conversation had by Morse, according to his testimony, with Yick, was held at his store in the evening of August 12, 1911, and in relating that conversation the witness testified, among other things, as follows:

"At this conversation on August 12th Sam Yick also asked me to make arrangements to have the inspector from San Diego come to Bakersfield to make final arrangements for bringing the Chinese over. Afterwards, on the 24th of August, Mr. A. G. Bernard, the inspector at San Diego, came to Bakersfield. After his arrival, at 8 o'clock in the evening of August 24th, Mr. Bernard and I went to Sam Yick's store; at first only Bernard, Sam Yick, and myself were present, and all that was said at first was to introduce Bernard to Sam Yick. Very shortly afterwards the defendant Jung Kim came in. Thereupon Sam Yick introduced Mr. Bernard to Jung Kim, and told Mr. Bernard that Jung Kim was the man he was going to send down, and he pointed out to him that one way of recognizing Jung Kim again was by reason of the fact that he had a double thumb on his right hand. Sam Yick then went on to say that, if ever it was necessary to send a message about the Chinese, they would be referred to as so many pieces of goods; he also questioned Mr. Bernard about the number of immigration officers in San Diego and how they did the inspection of trains, and how many inspectors there were between San Diego and Bakersfield. He also questioned Mr. Bernard in reference to where the soldiers were located at Tia Juana and below, between there and Ensenada, and asked if things were calm enough down there so that the Chinese could be brought through. He also inquired of Bernard the best way to bring in the Chinese, and if it was likely that any of the other inspectors would be around at the wrong time and arrest the Chinese, and in case of this happening if he (Bernard) would be able to get them out. He told Bernard that all arrangements were made with me, and that I would pay Bernard, and whatever he got he would get through me. At this conversation also, and while Mr. Bernard was there, Sam Yick stated that he didn't want to send photographs as a means of identification, as they were likely to get broken, and that it would be better to furnish some kind of an identification card to show who the Chinese were, instead of a photograph, and he said that he would write the names of the Chinese on a slip of paper in Chinese

characters and would have me write the names on the slips in English to show Mr. Bernard who they were; these slips were to be furnished in duplicate, the originals to be sent to Ensenada to the Chinese, and the duplicates to be sent to Inspector Bernard to be compared with the originals when the Chinese came over. Sam Yick said these slips would be brought to me at my house the next night. On the night of August 25th Sam Yick and Jung Kim came to my house. I was then rooming in Kern, on Baker street, what is now East Bakersfield, at Mr. Giddings' house. Before they came I had raised the window of my room about six inches and placed Mr. Giddings outside. It was probably about 8 o'clock in the evening when Sam Yick and Jung Kim came. They told me that they had written four cards in Chinese characters, and said that the names of the Chinese were Dock Yook, See Chew, Wah Sing, and Ah Sing. I took each piece of paper as they named them, and above the Chinese characters I wrote these same names in English, and put my initials underneath the Chinese characters; they only had the original slips, and these I returned to them after writing on them the names in English and my initials."

As has been seen, the indictment alleges the conspiracy to have been entered into on the 24th day of August, 1911, being the day on which Inspector Morse took Inspector Bernard to Yick's store, and at which time Yick introduced to them the plaintiff in error Jung Kim as "the man he was going to send down" to guide the Chinamen from Mexico into this country. If the testimony thus given on behalf of the government was true (a question, of course, for the determination of the jury), the officers of the law, instead of proceeding against the plaintiff in error Sam Yick for the attempted bribery of the inspector (with the best of motives, no doubt, but wrongly as we conceive), planned and induced him to enter into a scheme with them by which the Chinamen referred to in the indictment should be brought into the United States, and in the execution of which scheme so concocted they were, according to the evidence, so brought.

We see nothing in the foregoing testimony of Inspector Morse, nor in any other evidence in the record, tending to show that the idea of a *conspiracy* originated with Sam Yick. Taking the testimony to be true, the crime he committed was the attempted bribery of the government inspector to prepare false papers for the admission of Chinese persons not entitled to enter the country; and the scheme which culminated in the conspiracy alleged in the indictment to have been formed on the 24th day of August, 1911, by the plaintiffs in error and other persons to the grand jurors unknown was, according to the evidence, devised by the officers of the law, and had its origin in the letter of Inspector Morse, of date May 8, 1911, to his superior officer. And it was so contended in the court below on behalf of the plaintiffs in error, and, further, that the plaintiff in error Jung Kim was not a conspirator, but a mere employé of Sam Yick in the transactions in question.

The first point here made on behalf of the plaintiffs in error is that the instruction of the court below in respect to the first of these matters was erroneous and prejudicial to them; and, in the view we take of the case, it is unnecessary to state any other point relied upon for a reversal of the judgment. The instruction referred to is as follows:

"The court further instructs you that the fact, if it be a fact, that government officers incited or aided defendants to commit the crime charged against them, if they did commit it, is no bar to a prosecution by the government.

The court further instructs you that persons engaged in a criminal conspiracy, such as here charged, may be held guilty of the crime, even though they were incited to it by government officers, or were acting in the belief that government officers or agents were co-operating with them, and notwithstanding the parties so engaged were depending upon such officers to protect them from arrest, and to aid in carrying out the objects of the conspiracy. If, therefore, you find from the evidence, beyond a reasonable doubt, that there was a conspiracy between the defendants, as alleged in the indictment, and that the defendant Jung Kim committed either of the overt acts therein charged, it will be your duty to find the defendants guilty, notwithstanding officers of the government participated, if they did participate, in any of the acts committed by defendants, or either of them."

[1] It is, of course, not a matter for this court to say what conclusion the jury would or should have drawn from the testimony tending to show that the alleged conspiracy was first suggested by the officers of the law, and that they lured the alleged conspirators on to commit the necessary overt act or acts and thus consummate the alleged crime; all of those matters being exclusively for the determination of the jury. And while it may be true that the mere aiding of one in the commission of a criminal act by a government officer or agent does not preclude the conviction of the party committing the crime, yet where the officers of the law have incited the party to commit the crime charged and lured him on to its consummation, the law will not authorize a verdict of guilty.

[2] The contention that the exception to the instruction was not sufficiently specific we think without merit. The distinct and only effect of it was to tell the jury that such inducement on the part of a government officer did not preclude the prosecution or conviction of the defendants. We are aware of the well-established rule that a general exception to a charge which does not direct the attention of the court to the particular portion or portions of it to which objection is made raises no question for review by the appellate court; the reason being that the attention of the trial court should be drawn to the portion or portions complained of, to enable the court to correct any error that it should find had been made. Indeed, rule 22 of the trial court in the instant case expressly provides:

"Rule 22. *Bills of Exceptions to Charge of Court, When and How Made.*—The party excepting to the charge of the court to the jury must specify distinctly the several matters of law in the charge to which he excepts. Such matters of law, only, will be inserted in the bill of exceptions, and allowed by the court. All exceptions to the charge of the court to the jury shall be specified in writing immediately on the conclusion of the charge, and handed to the court before the jury leave the box. The bill of exceptions must be prepared in form, and presented to the judge within ten days after verdict, and, in default thereof, the exceptions will be deemed waived."

Now, turning to the record, we find it expressly declared in the minutes of the court as follows:

"The requirements of rule 22 of practice of this court as to presentation of written exceptions to the judge's charge before the jury leave the box having been waived in open court by counsel for the respective parties, it is ordered that the instructions requested by defendants be and they are hereby refused, except in so far as the same may have been embodied in the instructions given by the court; and it is further ordered that exceptions be and

they hereby are noted herein to each and every of the instructions given by the court, and to the refusal of the court to give each and every of the instructions requested by defendants, which the court refused to give; whereupon, at the hour of 10:48 o'clock a. m., the jury retired to consider their verdict."

Among the instructions so requested and refused are the following:

"The jury is instructed that, if you find from the evidence that Inspector A. P. Morse and Inspector A. G. Bernard were accomplices or co-conspirators with the defendants in this case, their testimony ought to be viewed with distrust, and their evidence as to the oral admissions of the defendants in this case ought to be viewed with caution; and you are further instructed, even if you find from the evidence that Inspector A. P. Morse and Inspector A. G. Bernard were accomplices or co-conspirators with said defendants, a conviction cannot be had on their testimony alone, unless they are corroborated by other evidence, which in itself and without the aid of their evidence tends to connect the defendants with the commission of the offense charged in the indictment; and the corroboration is not sufficient for a conviction if it merely shows the commission of the offense or the circumstances thereof. Section 1111 of the California Penal Code; also section 2061, subdivision 4, of the California Code of Civil Procedure.

"No conspiracy can exist without at least two persons being conspirators therein. One person cannot constitute a conspiracy. Therefore, if you find from the evidence that the acts charged by the government in the indictment to have been committed by the defendant Jung Kim were performed by said defendant Jung Kim simply as an employé, servant, or agent of the defendant Sam Yick, and were performed by said defendant Jung Kim without any common design, purpose, or understanding on the part of said defendant Jung Kim and said defendant Sam Yick, then I instruct you that said defendant Jung Kim cannot be considered a conspirator with said defendant Sam Yick; and if you further find that the acts performed by Inspector A. P. Morse and Inspector A. G. Bernard were performed solely for the purpose of entrapping the defendants, and without any common design, purpose, or understanding with said defendant Sam Yick, or said defendant Jung Kim, and without any unlawful intent on the part of said Inspector A. P. Morse and said Inspector A. G. Bernard, then I instruct you that said Inspector A. P. Morse and said Inspector A. G. Bernard cannot be considered as co-conspirators with said defendant Sam Yick, and that it necessarily follows that the proof of the commission of the conspiracy alleged in the indictment is reduced to one person, to wit, Sam Yick, and that one person alone cannot form or constitute a conspiracy, even though you find that all of the acts charged in the indictment were done by the defendant, and you must return a verdict of acquittal as to both of the defendants. U. S. v. Newton [D. C.] 52 Fed. 275, at page 280 and page 286."

It is thus seen that the defendants requested the court to instruct the jury, among other things, that, if they should find that the government inspectors named in the testimony were accomplices or co-conspirators with the defendants, their testimony should be viewed with caution and distrust, and the defendants could not be convicted upon such testimony alone; and, further, should they find that the defendant Jung Kim was a mere employé of the defendant Sam Yick, then Jung Kim could not be considered a conspirator, in which event, should they further find that the government inspectors mentioned performed the acts disclosed by the evidence solely for the purpose of entrapping the defendants and without any understanding with either of the Chinamen, and without any unlawful intent on the part of either of

the inspectors, then that there could be no conviction, whatever the evidence might show that Sam Yick did, since there could be no conspiracy without the participation of at least two persons. The court, according to the record that has been set out, refused to so instruct the jury, itself directed the entry of an exception on behalf of the defendants to the ruling, and, to the contrary, in respect to the acts of the inspectors, distinctly instructed the jury in effect that, if the government officers did instigate or induce the defendants to commit the offense alleged against them, it constituted no bar to the prosecution by the government, to the giving of which latter instruction the court itself, according to the record, also directed the defendants' exception thereto to be entered.

We think that the attention of the court was by the proceedings above referred to, of necessity, called to the correctness of the instruction given, and at the proper time excepted to, and that is here assigned as error. In the recent case of Woo Wai v. United States, 223 Fed. 412, 137 C. C. A. 604, we distinctly adjudged that it is against public policy to sustain a conviction for crime where the party or parties are induced to commit it by officers of the government who thereafter ensnare and apprehend them in such commission. In addition to the authorities there cited in support of that conclusion, see, also, Taylor v. United States, 193 Fed. 968, 113 C. C. A. 543, decided by this court prior to the decision in Woo Wai v. United States, supra; United States v. Healy (D. C.) 202 Fed. 349; United States v. Jones (C. C.) 80 Fed. 513; United States v. Adams (D. C.) 59 Fed. 674; United States v. Whittier, Fed. Cas. No. 16,688, 28 Fed. Cas. 594.

For the reason above stated, the judgment is reversed, and the case remanded to the court below for a new trial.

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## CO-OPERATIVE RAW FUR CO. v. AMERICAN CREDIT INDEMNITY CO.

(Circuit Court of Appeals, Sixth Circuit. March 9, 1917.)

No. 2894.

1. APPEAL AND ERROR ⊜1053(5), 1059—HARMLESS ERROR—FAILURE TO STRIKE EVIDENCE—IMMATERIAL EVIDENCE.

In an action on a credit indemnity bond, where plaintiff alleged that defendant's agent had delivered a rider to be pasted on the bond which would cover the particular loss for which the suit was brought, but which had been lost, the admission of defendant's evidence that its agent had no authority to bind the company by such a contract, and the exclusion of plaintiff's evidence as to the agent's authority, was not prejudicial, where, though the court did not withdraw the evidence from the jury's consideration, he assumed in his charge that the agent had authority to make the contract, and expressly submitted to the jury only the question whether the claimed rider was delivered by the agent to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180, 4208.]

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⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. TRIAL ⊂⊃255(5)—REQUEST FOR CHARGE—WITHDRAWING EVIDENCE.
Where the parties were represented at the trial by counsel, it is not error for the court to omit to withdraw immaterial evidence from the jury, where no request was made that it be withdrawn.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 633.]

3. APPEAL AND ERROR ⊂⊃263(3), 719(7)—PRESERVATION OF GROUNDS OF REVIEW—CHARGE—FAILURE TO WITHDRAW EVIDENCE—EXCEPTION.
The omission in the charge to withdraw immaterial testimony from the consideration of the jury will not be considered on writ of error, where the charge was not excepted to for that reason, and no error was assigned.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1518, 1525, 2975, 3490.]

4. APPEAL AND ERROR ⊂⊃1033(3)—HARMLESS ERROR—ADMISSION OF EVIDENCE—EVIDENCE FAVORABLE TO PLAINTIFF IN ERROR.
Where plaintiff's amended declaration, filed after the first trial had commenced, alleged that defendant's agent had delivered to plaintiffs a rider, to be pasted on the credit indemnity bond, which would cover the loss sued for, the admission at the trial on the amended declaration of that part of the opening statement of plaintiffs' counsel at the former trial, in which he stated that such a rider had been delivered, was favorable, and not prejudicial, to plaintiff.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4054, 4055.]

5. WITNESSES ⊂⊃406—IMPEACHMENT—INCONSISTENT STATEMENTS—ORIGINAL PLEADING.
At the trial on an amended declaration, which alleged that defendant's agent had delivered to plaintiffs a rider, for their credit indemnity bond, which would cover the loss sued for, but which had been lost, and plaintiffs' officer had testified that he had told counsel about the lost rider before the original declaration was filed, the original declaration was admissible to contradict that witness, and to show that the lost rider was an afterthought, born of necessity.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276–1279.]

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by the Co-operative Raw Fur Company against the American Credit Indemnity Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Adolph Sloman, of Detroit, Mich., for plaintiff in error.
Henry C. Walters, of Detroit, Mich., for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and HOLLISTER, District Judge.

HOLLISTER, District Judge. Plaintiff below (plaintiff in error) was a dealer in raw furs at Detroit. American Credit Indemnity Company insured against bad debts. Plaintiff declared on two indemnity policies (called "bonds") issued by the defendant to it. The declaration showed that on December 24, 1910, it sold and shipped certain furs to one Annis, who afterwards became bankrupt. In the event of a recovery the amount was agreed upon.

The term of the first bond was February 1, 1911, to January 31, 1912, and the insurance was against actual loss sustained through the

insolvency of debtors occurring during the term of the bond on sales of merchandise shipped and delivered during the term of the bond, and it was provided that the bond did not cover any loss occurring prior to the payment of the premium, nor any loss occurring after its expiration. It was, however, agreed by rider pasted on the bond that losses occurring during the term of the bond on goods sold, shipped, and delivered between December 15, 1910, and January 31, 1911, should be covered by the bond, if otherwise coming within its provisions.

The Annis shipment was within the period covered by the rider, but the bond provided that notice of insolvency of a debtor must be given the defendant during the term of the bond and within 20 days after the insured received information, and if the information was received too late for notice before the expiration of the term, the notice might be given within 20 days after its expiration. Annis filed a petition in bankruptcy February 21, 1912, of which notice was given February 27, 1912. The term of the bond ended January 31, 1912. Clearly there was no liability under this bond.

The bond carried a clause entitled, "Advantages of Subsequent Bond," reading:

"In case this Company issues to the Indemnified a new bond, and the premium therefor is paid prior to the expiration of this Bond, losses occurring during the term of the new Bond on sales of merchandise shipped and delivered within the twelve months next prior to the expiration of this Bond shall be covered and may be proven under the new Bond. * * *"

The second bond was for the term February 1, 1912, to January 31, 1913. It insured against loss occurring during the term of the bond on sales of merchandise shipped and delivered during its term, but carried a rider agreeing that covered losses occurring during the term, but after the payment of the premium, upon sales, shipments and deliveries made from February 1, 1911, to February 1, 1912, might be proved under the bond. This rider embodied the advantages quoted above. In other respects, however, the terms and provisions of the bond were to remain in full force and effect. These and the rider could not include the Annis shipment. The new bond was not in any way a renewal or continuation of the first bond, but was a new and separate contract, having no reference to the first, and there is no ambiguity in either, or in both read together.

When the case came on for trial, counsel for plaintiff in his statement to the jury referred to an agreement between one Mullen, the agent of the defendant at Detroit, and one Slesinger, of the plaintiff company, that the latter would be furnished with a rider to the second bond covering, as did the rider on the first bond, the shipment to Annis of December 24, 1910. Counsel stated, also, that within a few days after the agreement Mullen appeared with a slip of paper—the rider referred to—which was to be attached to the policy, "but was put away in the safe and was lost, at least we have not been able to find it." Thereupon the court held, and rightly, that on the declaration no cause of action appeared. The plaintiff was permitted to amend, and the case was continued for further proceedings.

The amended declaration alleged that a rider, to be attached to the second bond, was furnished by Mullen to plaintiff in terms covering losses on goods shipped and delivered from December 15, 1910, to February 1, 1911, "Which rider has become mislaid, or misplaced, but plaintiff expects to produce the same on the trial of said cause, or if unable to, to make proof of its contents." The effect of defendant's pleas and notice was a denial of liability on the bonds, which included a denial of the claim that another rider had been delivered, to be attached to and to become a part of the second bond. The case came on for trial on the issues tendered by the amended declaration and defendant's denials. The rider was not produced, but there was testimony (flatly contradicted) tending to show its contents and delivery.

The court permitted defendant to offer in evidence, over objection, a contract between defendant and its agent limiting his authority, and showing want of it to bind his company by contracts not authorized. Plaintiff's offer of evidence (assumed here to be competent and of probative force), tending to show authority in the agent to contract for his company as alleged, was denied, over plaintiff's objection. The court, over objection, permitted the defendant to introduce the original declaration as an admission against the claim, made by plaintiff's counsel in his opening statement at the abortive trial and alleged in the amended declaration, that the rider in question was furnished to be attached to the second bond. Counsel for defendant was permitted, over objection, to offer the entire statement (covering 15 pages of the printed record) of plaintiff's counsel when the case first came on to be heard, including colloquies between court and counsel and the statement of all the plaintiff expected to prove, including much—indeed, most of it—immaterial to the one issue submitted by the court to the jury: Whether or not the rider had been furnished. The reason this statement was permitted to be read by counsel for defendant was that counsel for plaintiff, in the examination of his witness Victor Slesinger, said:

"When this case came on for trial in this court before a jury at a former term, our counsel in his opening statement before that jury mentioned the fact of that rider being missing."

When the judge came to charge the jury, he told them the bonds were not complicated or difficult to understand; that their terms required careful reading, "but they are such as may be understood by persons connected or conversant with the business in connection with which the policies are used or sold"; and that, if plaintiff was entitled to recover at all, it was because of the alleged rider. He assumed that Mullen had authority, and he unequivocally and with emphasis directed the jury to consider the one question, which he charged them was the only question in the case: Whether the rider had been furnished or not. To avoid any possible misunderstanding, he said:

"Now, in order to make certain that you do dispose of this case on just that very issue, I have prepared and will hand you and you will take to your jury room this written question, which, as I say, is the only question in this case: Was a rider of the character claimed by the plaintiff delivered by Mr. Mullen to be attached to the second policy * * *? If you find that the rider was

delivered, you answer the question 'yes' and then you will return a verdict in favor of the plaintiff. * * * If you find that the rider was not delivered, then you answer 'no' and return a verdict in favor of the defendant, no cause of action."

Upon answer in the negative, judgment was rendered for defendant, to which plaintiff prosecutes this proceeding in error.

[1] Clearly enough, on the assumption by the court of the agent's authority, all of the testimony one way or the other on that subject became irrelevant and immaterial. The defendant gained nothing by the introduction of the contract between it and its agent; the plaintiff lost nothing by the exclusion of the testimony tending to show the agent's authority. We think it the better practice that such irrelevant testimony should be withdrawn from the jury's consideration, lest there should, by any possibility, be some misunderstanding on their part as to the issues to be decided by them; and for this reason we think the court might properly, in the charge or during the progress of the case, have told the jury to disregard all that testimony. But, in view of the unequivocal, unmistakable, and reiterated way the court put to the jury the sole issue in the case, we think the plaintiff could not have been prejudiced because these matters were not withdrawn from their consideration.

[2] But, in any event, we think no error intervened because the court did not rule such matters out on his own motion. It may be that if the plaintiff were trying its own case, without counsel, the court might feel disposed to protect the plaintiff against its want of knowledge of proper practice in the trial of cases by advising the jury relative to many things which ordinarily the court would not refer to in a charge when both sides were represented by counsel learned in the law. In this case, however, it was the affirmative duty of counsel, in case the withdrawal of the evidence was thought desirable, to call the court's attention to the fact that under the sole issue presented all testimony irrelevant thereto, through which the rights of his client might be prejudiced if it remained in the case, should be withdrawn, and, in case of an adverse ruling, to note an exception.[1]

[3] The charge not having been excepted to because of the omission to withdraw that testimony from the jury's consideration, and no error being assigned therefor, the omission in the charge will not be considered here.[2]

[4] And so it is with the statement complained of. We see no reason for its admission in evidence, even that part of it referring to the rider; but, as that made good plaintiff's claim of originally relying to some extent upon the rider, although it was not included in the original declaration, that part of it could have done the plaintiff no harm. Nor could those parts be to its injury which were purely a statement of its claim. Those were only a repetition of that which plaintiff's counsel

[1] Alexander v. United States, 138 U. S. 353, 355, 11 Sup. Ct. 350, 34 L. Ed. 954, and cases cited.

[2] Isaacs v. United States, 159 U. S. 487, 491, 16 Sup. Ct. 51, 40 L. Ed. 229; Hardesty v. United States, 168 Fed. 25, 26, 93 C. C. A. 417 (C. C. A. 6).

must have said to the jury in his opening statement on the final trial; but the colloquies between court and counsel and the matters having to do with Mullen's authority, became irrelevant under the court's charge. When, by the court's charge, the issues were narrowed to the one question of fact, it was then the duty of plaintiff's counsel to call the court's attention to such parts of the statement as presented irrelevant issues.

[5] For several reasons the original declaration was properly admitted in evidence. Slesinger testified that he had told his counsel about the lost rider before the declaration was filed. Yet the declaration was silent as to that all-important fact. It is true his counsel dwelt upon it in his original statement, but it is difficult to explain why counsel left it out of a declaration otherwise carefully drawn. The inference is that Slesinger did not tell his counsel about the rider until after the declaration was filed. The declaration tended to contradict Slesinger on a highly important subject, and to show that the lost rider was an afterthought born of necessity. It was admissible for both of these reasons, and was also in the nature of an implied admission. The authorities directly to the point are not as numerous as one might suppose, and on the general subject are somewhat contradictory. However, the admission in evidence of pleadings withdrawn and superseded by amended pleadings, for the purposes indicated, is justified, we think, upon sufficient grounds. Of course, matters contradictory, or showing motive, or by way of admission, are open to explanation, and should, with the explanation, be submitted to the jury. The question goes rather to the weight of evidence than to its admissibility. The decisions in the note [8] bear more or less directly on the subject.

This discussion covers all of the assignments of error, except a number even less consequential. On the whole case, we are satisfied no reversible, if any, error intervened, and the judgment below will be affirmed, at the costs of plaintiff in error.

[8] Walser v. Wear, 141 Mo. 443, 463, 464, 42 S. W. 928; Ryan v. Dutton (Tex. Civ. App.) 38 S. W. 546; Starkweather v. Kittle, 17 Wend. (N. Y.) *20, *22; Estate of O'Connor, 118 Cal. 69, 50 Pac. 4; Galloway v. Railway Co. (Tex. Civ. App.) 78 S. W. 32; Stone v. Cook, 79 Ill. 424, 429; Meade v. Black, 22 Wis. *241; Younglove v. Knox, 44 Fla. 743, 749, 750, 33 South. 427; Barthel v. Crippen, 156 Mich. 20, 120 N. W. 15.

## SOUTHERN RY. CO. v. DERR.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1917.)

No. 2836.

1. NEGLIGENCE ⟸121(2)—ACTIONS—BURDEN OF PROOF.
Negligence cannot be inferred merely from the fact of disaster; the burden being on plaintiff to establish by proof that negligence did exist.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225, 271.]

2. MASTER AND SERVANT ⟸286(24)—INJURIES TO SERVANT—ACTION—JURY QUESTION.
In an action for injuries received by a servant on the falling of a boiler when a railroad rail used as a skid broke, the question whether there should have been a careful inspection or test of the rail before using is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1029.]

3. NEGLIGENCE ⟸136(5)—JURY QUESTION—EVIDENCE.
A case may not be submitted to the jury, where there is at most only a balanced probability that actionable negligence existed.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 282–284.]

4. MASTER AND SERVANT ⟸286(18)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.
In a personal injury action by the servant of a railroad company, hurt when a rail which he and others were using as a skid to transfer a boiler from one car to another broke, evidence of the company's negligence *held* insufficient to go to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1025.]

5. MASTER AND SERVANT ⟸265(6)—INJURIES TO SERVANT—PRESUMPTIONS—RES IPSA LOQUITUR.
The rule that the doctrine of res ipsa loquitur does not apply to actions by servants has no application to an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]), which abolished the fellow-servant rule.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 898, 955.]

6. MASTER AND SERVANT ⟸265(6)—INJURIES TO SERVANT—RES IPSA LOQUITUR.
As a master is bound only to exercise reasonable care for his servants' safety, the doctrine of res ipsa loquitur, while applying to actions under the federal Employers' Liability Act, cannot be carried to the extent that it is carried in a passenger's action against a carrier; and whether it can aid a servant depends upon the facts of the particular case, and hence will not, in an action by a servant for injuries received by the breaking of a railroad rail which was used as a skid, warrant a finding of the master's negligence, the accident not speaking for itself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 898, 955.]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by William Derr against the Southern Railway Company.

Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Caruthers Ewing, of Memphis, Tenn., for plaintiff in error.
Jere Horne, of Memphis, Tenn., for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and SESSIONS, District Judge.

DENISON, Circuit Judge. In an action brought by Derr, in the court below, against the railway company, it appeared that Derr was employed by it to assist in transferring, from one car to another, a steam boiler which was being transported in interstate commerce. Jurisdiction rested upon the federal Employers' Liability Act. The two cars were set alongside each other, upon slightly diverging tracks, so that the cars were 3 feet apart at one end and 8 feet apart at the other. The defendant's foreman directed Derr and other laborers to take two pieces of ordinary 56-pound rail, which lay in a pile of used rails in the yard, and place them, as skids, upon the two cars, so as to slide the boiler across upon them. When the boiler was about midway, the rail with the longer span broke and Derr received the injury for which he sought to recover. Against defendant's objection that there was no evidence tending to show negligence, the court submitted that issue to the jury, which found for Derr; and whether this ruling is correct is the only issue to be considered.

The bill of exceptions contains all the evidence; and the case is remarkably barren of the proof usual in such cases. The distance spanned by each rail does not appear. No witnesses competent to speak expressed an opinion that such a rail was too small to carry this boiler, nor that it was in any degree likely to become unfit for that purpose because it had been used, nor that the presence of a section of such a rail in a pile in a yard indicated that it was likely to have been used to such an extent as to affect in the least its ability to resist a breaking strain. One piece of the rail, displaying the break itself as exhibited looking in one direction, was put in evidence and is a part of the bill of exceptions. The question, therefore, was whether, from the fact that the rail broke, from the fact that it was a used rail, selected without very careful inspection, from looking at the broken end, and with the aid of only common knowledge as to what inferences might be drawn from these facts, the jury was authorized to find that there was negligence.

[1-4] That negligence cannot be inferred merely from the fact of disaster is too firmly established as a general rule to call for citation of authority, beyond a reference to Patton v. Railway, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. The burden is on the plaintiff to establish, by proof, that negligence did exist. Whether any exception exists which justifies applying to this case the rule res ipsa loquitur, or any analogous principle, will be hereafter discussed. There was no oral evidence as to whether this rail had been used much or little. Such wear as appears upon the tread conveys to the ordinary man no safe indication as to the extent of use. It is a matter of common

knowledge that rails which have been used in one place are transferred and used in other places with safety for years, and that a 56-pound rail will carry a great weight. Track use of a rail may tend to cause crystallization or develop latent defects, so that it will be more unsafe than a new rail to use as a skid; or track use may demonstrate its soundness and freedom from latent defects, and so make it more suitable for this use than a new rail would be. Aided by proper testimony, a jury could judge which of these theories should be rightly applied in a particular case; without such testimony, it can only guess. So of inspection of such a rail to be used for such purposes. The standard of reasonable care may require that such a rail, before being devoted to such a use, should be looked at carefully, foot by foot, on all sides, or should be sounded, foot by foot, or otherwise tested; but we cannot think a jury may, without any evidence, infer the duty to make some such test from the mere fact that the rail has been used upon the track. Perhaps men of experience might draw that inference; the ordinary man cannot safely do so.

Unless a rail of this size was too small for this use, or unless a rail might be unfit merely because it had been used, then there was no negligence, unless the defect which caused the rail to break was of a character which should have been discovered by such inspection as should have been made. It was for the jury to say, depending upon the character which is attributed to this rail, whether there should have been a careful and detailed inspection or test, or whether such superficial observation as the foreman actually gave was enough to satisfy the existing obligation. In either event, the next question for the jury would be whether the inspection so found to be due would have discovered the defect. The break itself as shown on the rail, gives no help in answering these questions. Its peculiarities may or may not indicate that the defect could have been seen or ascertained by inspection or test; to a man of only ordinary knowledge, they indicate nothing upon these subjects. Without the aid of testimony, this, also, must be guesswork; and a case may not be submitted to the jury where there is, at the most, only a balanced probability that the actionable negligence existed. Richards v. Mulford Co. (C. C. A. 6) 236 Fed. 677, — C. C. A. — and cases cited.

It is not improbable that plaintiff may be able to produce evidence upon some or all of these theories of negligence sufficient to take them to the jury; but we think the facts themselves do not make a prima facie case, nor authorize the necessary inference.

**[5, 6]** We come now to the rule of res ipsa loquitur. It has long been established that, in actions by passengers against carriers, the occurrence of an injury (in the usual surroundings) made a prima facie case of negligence; while in actions by employés against carriers the rule was otherwise. Inasmuch as the fact that many accidents are caused by the negligence of a fellow servant, thus preventing the accrual of a right of action to the injured employé, was one of the reasons for holding that the maxim res ipsa loquitur was not applicable to an action by an employé, and inasmuch as this situation has now been changed by statute in actions under the federal Employés' Lia-

bility Act, there is strong ground for saying that the old decisions, to the effect that the maxim can have no application in an employé's action, are not here to be observed. We are quite content to assume the correctness of this position; but, when we concede that the maxim may apply to such an action, it by no means follows that it does apply to the same extent and with the same force as in a passenger action. The distinction is obvious. Passenger actions involve a duty to exercise a very high degree of care, amounting almost to insurance, and the instances where the accident does not depend upon some negligence of the railroad or of some employé are so rare that a general rule may well rest upon the general fact. In an employé's action, the defendant's obligation is only to use ordinary or due care to provide a safe place to work or proper instrumentalities and methods, and it must be admitted that an unknown, but considerable, fraction of the injuries to employés are either true accidents or assumptions of risk, or are proximately caused only by plaintiff's carelessness; hence there is, in truth, no such common and dominant probability of negligence as in the passenger cases. We think we give the plaintiff in an employé's case all the benefit of the maxim to which he is entitled when we say that it may apply to aid him; but whether the event does speak, and what it says, depend upon the facts of the particular case.

The maxim and its reasons and the extent of its application were very fully discussed by Judge (later Mr. Justice) Lurton, speaking for this court in Cincinnati Co. v. South Fork Co., 139 Fed. 528, 532, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533. That discussion remains entirely satisfactory and unaffected, so far as we know, by any later authoritative decisions.[1] Judge Lurton said (139 Fed. 533, 71 C. C. A. 316, 1 L. R. A. [N. S.] 533):

"Manifestly a presumption of negligence does not arise upon mere evidence of an injury sustained. The inference logically as well as legally deducible is necessarily dependent upon the nature of the accident, the surrounding circumstances which characterize it, and the relation of the parties. * * * Many accidents do not speak for themselves. The maxim 'res ipsa loquitur' does not, therefore, apply when the circumstances in evidence are of doubtful solution. * * * In other words, the presumption is one which arises, not from the mere naked fact of an injury, but from the circumstances which characterize the injury. * * * In each action for a tortious injury the question as to what evidence will make a prima facie case of negligence and require an explanation from the defendant will depend upon the nature and circumstances of the injury and the measure of care due from the defendant."

Applying these principles to this case, and in the manner and for the reasons above stated, we think the plaintiff's proof failed to show a satisfactory, tangible, and substantial basis upon which the conclusion of negligence could be so supported that it would be an inference and not a guess. We have the less hesitancy in reaching this result, because it seems clear that, upon a new trial, the parties will be able

[1] See, also, Sweeney v. Erving, 228 U. S. 233, 239, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905; Lee Line Steamers v. Robinson (C. C. A. 6) 218 Fed. 559, 563, 134 C. C. A. 287, L. R. A. 1916C, 358.

to show facts and practices and trustworthy opinions which do not appear upon the present record and which will clarify the issue and make it capable of deliberate and intelligent consideration.

The judgment is reversed, and the case remanded for a new trial.

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## REPUBLIC IRON & STEEL CO. v. HINES.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1917.)

No. 2897.

1. TRIAL ⊂=296(6)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action against an employer, who had not elected to come under the Ohio Workmen's Compensation Law, so that under 102 Ohio Laws, p. 529, § 21—1, he was liable for injuries to an employé, caused by the negligence of any of his employés, and could not rely on the defenses of contributory negligence or assumption of risk, error in stating in the charge that the employé assumed no risk which, standing alone, might mislead the jury to believe that he did not assume the risk of injury not resulting from the negligence of his employer or fellow servant, was harmless, where in the same paragraph there was an express reference to the employer's negligence as necessary to recovery, and in the preceding and following paragraphs the jury were explicitly charged that plaintiff could not recover until he had shown by substantive evidence that defendant or his employés were negligent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

2. MASTER AND SERVANT ⊂=286(4)—INJURIES TO SERVANT—EVIDENCE—NEGLIGENCE OF MASTER—DEFECTIVE APPLIANCES.

In an action for injuries to a steel mill employé, evidence *held* sufficient to warrant submitting to the jury the question whether defendant was negligent in furnishing plaintiff with light caps for use in covering open molds after they had been filled.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1011.]

3. MASTER AND SERVANT ⊂=286(27)—INJURIES TO SERVANT—EVIDENCE—NEGLIGENCE OF MASTER—DEFECTIVE METHOD.

In an action for injuries to a steel mill employé, caused by the spurting of hot metal from a mold, evidence *held* sufficient to warrant submitting to the jury the question whether defendant was negligent in not using aluminum in the mold to counteract the tendency to spurt.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1032.]

4. MASTER AND SERVANT ⊂=286(41)—INJURIES TO SERVANT—EVIDENCE—NEGLIGENCE—FAILURE TO WARN—PROXIMATE CAUSE.

In an action for injuries to a steel mill employé, evidence *held* to warrant submitting to the jury the question whether plaintiff was so inexperienced that the master's failure to warn was negligence, and whether such failure proximately caused the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1046–1048.]

5. APPEAL AND ERROR ⊂=216(1), 263(3)—PRESENTING QUESTIONS BELOW—FAILURE TO CHARGE—EXCEPTION—REQUEST.

Defendant cannot object on appeal to the court's omission to instruct the jury that failure to warn, to be actionable, must have been the proximate cause of injury, where he did not request such instruction, nor except to the charge for failure to contain it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1518, 1525; Trial, Cent. Dig. §§ 627, 636.]

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

6. TRIAL ⊜296(3)—INSTRUCTIONS—OMISSION IN CHARGE—CURE BY OTHER CHARGE.

In an action for injuries to an employé, where plaintiff alleged three grounds of negligence, and the court in its charge on two of them expressly required a finding that the negligence, if any, was the proximate cause of the injury, the omission of such express statement in the charge as to the third ground of negligence, though in another paragraph the court had stated that plaintiff contended that he was injured as a direct result of that negligence, which omission was not called to the trial court's attention, was harmless.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

In Error to the District Court of the United States for the Northern District of Ohio; John H. Clarke, Judge.

Action by James Hines against the Republic Iron & Steel Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. A. Manchester, of Youngstown, Ohio, for plaintiff in error.

Wm. R. Stewart, of Youngstown, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Defendant in error, while employed on the platform of the pouring floor in one of the mills of plaintiff in error in Youngstown, Ohio, was severely burned by the spurting of molten steel from one of the molds, and on trial by jury, in an action to recover for such injuries, obtained verdict and judgment. We shall designate the parties as they stood below, and shall consider the assignments of error in the order of their discussion in defendant's brief.

[1] 1. The injury occurred September 27, 1913, while the Ohio Optional Compensation Law was in force. Defendant was eligible to the provisions of the act, but did not elect to come under it. Section 21—1 of that act (102 Ohio Laws, p. 529) makes the employer in such case liable to its employés for damages for personal injuries resulting from the negligence of the employer, or of its officers, agents, or employés, and in terms eliminates as to such employer "the defense of the fellow servant rule, the defense of the assumption of risk, [and] the defense of contributory negligence." See Crucible Steel Forge Co. v. Moir (C. C. A. 6) 219 Fed. 151, 155, 135 C. C. A. 49; Brownell v. Sweeney (C. C. A. 6) 223 Fed. 513, 139 C. C. A. 58. Defendant requested no instruction upon the subject of assumption of risk. The court, on its own motion, charged that:

"Plaintiff assumed no risk in working on the platform provided by defendant, and you should not hold him responsible for the negligence of any employé or for any negligence on his part, and, if you find from the evidence that plaintiff was injured through the fault or negligence of a fellow workman, the defendant is liable to him for such injury."

The instruction that the "plaintiff assumed no risk in working on the platform" was excepted to, and is criticized here upon the ground that, notwithstanding the statute, plaintiff did assume the ordinary risks and dangers of operation not resulting from defendant's negligence, and which plaintiff knew or should have known.

Standing alone, the statement that "plaintiff assumed no risk in working on the platform" might have misled the jury; but it did not stand alone. Not only did the paragraph of which it was a part itself contain express reference to the defendant's negligence as necessary to recovery, but at the close of the paragraph immediately preceding that which contained the criticized instruction the jury was explicitly charged that plaintiff could not recover until he "has shown by substantive evidence that the defendant was negligent in some one or more of the three particulars" submitted as grounds of alleged negligence; and, in addition, the paragraph containing this criticized instruction was immediately followed by a still further and equally explicit instruction that recovery could not be had if plaintiff has failed to prove that "the defendant was negligent in any of the three respects" referred to, or if defendant "has satisfied you that it was not negligent in any of the respects claimed." In considering the effect and meaning of the charge, all of its elements must be taken into account; and to assume that under the instructions quoted the jury would understand that plaintiff did not assume the risks of ordinary and nonnegligent operation would be unwarrantably to question the jury's intelligence. The instruction was, to say the least, nonprejudicial.

In the process of pouring, the molds were brought to the required place adjacent to the platform by means of a railway track located several feet below the platform; the molten steel being poured into the molds from a ladle containing several tons, carried by a crane. The molds which were being filled at the time of the accident were of the open top type, 7 feet or so in height, and with lateral dimensions of 24 inches by 32 inches, the tops of the molds being slightly above the level of the platform. It was plaintiff's duty to place caps or covers upon the molds after the molten steel had been poured into them, and afterwards to chill the molds by turning water into them. At the time he was injured the molds had been filled, and plaintiff was in the act of preparing to turn on the water, when the molten metal spurted from the top of one of the molds, causing the injuries in question. The grounds of defendant's alleged negligence submitted to the jury were: (1) The use of a cover which was too small and too light; (2) failure to use aluminum in the molds to quiet the boiling and prevent spurting; and (3) failure to warn plaintiff of the dangers incident to his employment. As to each of these three allegations of negligence its submission to the jury is excepted to as unsupported by substantial evidence.

[2] 2. *The Caps.* The spurting of metal from molds is due to the presence of gases in the molten metal. The object of the plate or cover is to chill or "freeze over" the metal to prevent "bleeding," with resulting sponginess of the upper end of the ingot, which has to be sheared off. There was evidence that several large manufacturers used heavy covers of cast iron, sometimes weighing 300 to 400 pounds, the covers being wedged down tight; that others used no covers at all,

especially on large "open top" molds. Defendant used on the latter type of molds a soft steel plate, weighing only 25 to 35 pounds, and not fastened down; the molds, however, were equipped for wedging down the cover. There was testimony that these small steel plates had a tendency to warp, not found in the heavy cast iron plates. Defendant, on its part, presented testimony that the light cap is fully as effective as a heavy one in preventing spurting, and indeed that actual explosion is avoided by noncapping; also tending to show a more modern practice in favor of the light, unfastened plate; and, were the question to be determined on theoretical grounds alone, the proposition that greater protection, against explosion at least, is found in the use of heavy fastened plates, would perhaps not be highly persuasive. But there was direct testimony that the heavier cap is safer, and express testimony of witnesses of reasonable experience in certain large plants that they never knew of an explosion, or of spurting enough to hurt any one, when heavy cast iron plates were used; while there was testimony that "spurting," and the blowing off of caps from the large molds, frequently happened at defendant's plant, and that another workman had been hurt three weeks before plaintiff's injury by the blowing of the cap from a small mold. The evidence taken together failed to show conclusively that defendant, in using the lighter caps, was conforming to a practice prevailing generally among prudent manufacturers. It was at least consistent with a more or less experimental departure from a former, and still more generally followed, practice. Taking into account the weight to be given the testimony of the various witnesses, both on theoretical and practical grounds, the testimony thus presented a question of fact, upon which reasonable minds might differ, whether or not defendant, in using the small and light caps, exercised due care for the protection of its employés. It was thus not error to submit the question to the jury.

[3] 3. *The Use of Aluminum.* Aluminum placed in small quantities in the molds while being filled tends to quiet the "wildness" of the metal and the tendency to "spurt." Its use for this purpose was quite common. The quieting effect is said to be due to its absorption of the gases in the "heat." Defendant had for a long time used aluminum for this purpose. There was evidence, however, that it left a spongy end upon the ingot that had to be sheared off, and some testimony that it had a deleterious effect upon the metal, at least for some purposes; that silicon (which is much cheaper than aluminum) placed in the ladle had the same quieting effect as aluminum; that some customers, in ordering steel, specified the nonuse of aluminum; and that defendant had used silicon considerably in place of aluminum. Silicon was used in the heat in question. The specifications for the product then being manufactured neither called for nor excluded aluminum. There was no dispute over the proposition that the use of aluminum directly tended to reduce the danger of explosion and of spurting. It also appeared that low carbon steel was more likely to "spurt" than high carbon, and there was testimony that the heat in question was low carbon.

Defendant had for a long time used aluminum in the making of good steel. The testimony of its bad effect generally upon the product, and that silicon was as effective a deterrent of spurting, was not conclusive. Plaintiff testified that aluminum was used during all the time he worked for defendant, except from about September 1st to September 27th (the date of the the accident), and that until the accident there was no spurting or explosion within his knowledge. (The other workman, who was burned 3 weeks before plaintiff was hurt, did not work on the same "turn" with plaintiff.) It not only cannot be said to appear conclusively that manufacturers generally had adopted or regarded silicon as a proper substitute for aluminum in all cases, but it was open to conclusion that the more general practice was to use aluminum, especially in pouring low carbon steels, unless where silicon was expressly specified. It was thus not error to submit the question of due care as respected the nonuse of aluminum.

[4] 4. *The Failure to Warn.* Plaintiff entered defendant's employ about 3 months before the accident. While he had worked 16 years in iron and steel mills, he testified that he had never worked around molten steel in molds, and gave testimony tending to show that before the accident he had no knowledge or information of the tendency of molten steel to spurt from the molds. His testimony as to defendant's failure to warn him of the attendant danger is undisputed. Indeed, the employé to whom plaintiff was caused to report for work, and who (as pourer) worked with plaintiff on the platform, testified that he told plaintiff nothing about the likelihood of the mold's exploding or of the metal's spurting out on him; that the witness had seen the metal bubble out, "but did not think to tell him about that."

In view of the testimony referred to, the contention that it was error to submit the question of failure to warn is without merit. Casey-Hedges Co. v. Oliphant (C. C. A. 6) 228 Fed. 636, 639, 640, 143 C. C. A. 158. Whether plaintiff was familiar with the risk of metal spurting was a question for the jury.

We are not impressed with the suggestion that the failure to warn could not have proximately caused the accident, because warning could not have prevented it, in the fact that plaintiff was several feet away from the mold at the time of the spurting, and in the act of turning on the water.

[5, 6] In this connection defendant criticizes the alleged omission to instruct the jury that failure to warn, in order to be actionable, must have been the proximate cause of the injury. There was no request for such instruction, and no exception to the alleged failure to so instruct, and defendant recognizes that it is not in position to insist on that point. Denison v. McNorton (C. C. A. 6) 228 Fed. 401, 407, 142 C. C. A. 631. But the point itself has no merit. In the instructions respecting both the matter of caps and the failure to use aluminum, proximate cause was expressly included as an element of the right of recovery. In the actual instructions respecting the effect of failure to warn the reference to proximate cause was omitted, but in the paragraph immediately preceding that instruction the court, in stating plaintiff's contention, included as an element of that claim:

"And that as the direct result of this failure on the part of defendant to notify him of this danger the plaintiff received the injuries of which he complains in this case."

The failure to include these words in the following paragraph was doubtless inadvertent, and they would no doubt have been added had attention been called to their omission. The omission was not prejudicial.

The judgment of the District Court is affirmed.

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## LEAHY v. DETROIT, M. & T. SHORT LINE RY.

(Circuit Court of Appeals, Sixth Circuit. March 12, 1917.)

No. 2920.

1. NEGLIGENCE ⟸1—WHAT CONSTITUTES.
"Negligence" is the failure to do what a reasonably prudent person would have done under the circumstances, or the doing of what such person under the existing circumstances would not have done.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1.
For other definitions, see Words and Phrases, First and Second Series, Negligence.]

2. NEGLIGENCE ⟸121(2)—PRESUMPTION—ACCIDENT.
The mere fact that injury has resulted does not establish negligence on the part of the alleged wrongdoer.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225, 271.]

3. NEGLIGENCE ⟸121(1)—ACTIONS—BURDEN OF PROOF.
A party charging negligence as the ground of action has the burden of proving it.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217, 220, 224, 227.]

4. TRIAL ⟸178—MOTIONS FOR DIRECTED VERDICT—DISPOSITION.
In disposing of motions to direct a verdict, the trial court cannot weigh the evidence, but must take that view which is most favorable to the party against whom the motion is made, and, if in such case reasonable men may honestly draw different conclusions, the motion must be denied.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401–403.]

5. RAILROADS ⟸350(1)—CROSSING ACCIDENTS—ACTIONS—EVIDENCE—JURY QUESTION.
In an action for the wrongful death of plaintiff's intestate killed when struck by one of defendant's cars at a highway crossing, evidence of defendant's negligence *held* insufficient to carry the case to the jury.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1152.]

In Error to the District Court of the United States for the Western Division of the Northern District of Ohio; John H. Clarke, Judge.

Action by Mary A. Leahy, as administratrix of the estate of Gertrude Helen Delaney, against the Detroit, Monroe & Toledo Short Line Railway. There was a judgment for defendant, and plaintiff brings error. Affirmed.

G. W. Ritter, of Toledo, Ohio, for plaintiff in error.

G. D. Welles, of Toledo, Ohio, for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and EVANS, District Judge.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

EVANS, District Judge. This litigation resulted from a deplorable accident which occurred at the intersection of the defendant's track and the Matzinger road, near the city of Toledo. The track ran north and south and the road east and west, crossing at right angles. Three sisters were instantly killed. One of them was Gertrude Helen Delaney. The plaintiff was appointed administratrix of her estate, and began this action in the court of common pleas of Lucas county, from which it was removed to the court below upon the petition of the defendant, which is a Michigan corporation.

Omitting certain allegations which were struck out of the petition because held to be immaterial, the basis of the plaintiff's claim for damages resulting from the death of her intestate is stated in the petition as follows:

"Plaintiff says that, at the time said electric car ran into and collided with said automobile, said electric car was negligently being propelled by defendant at a high and dangerous rate of speed, to wit, in excess of 35 miles an hour, and that defendant negligently failed to give said decedent proper and sufficient warning, or any warning, of the approach from the south of said car that so ran into and collided with said automobile, and that said defendant negligently failed to give to the driver of said automobile proper and sufficient warning, or any warning, of the approach from the south of said car that so ran into and collided with said automobile.

"Plaintiff says that the death of said decedent was caused directly and proximately by the said negligence of the said defendant."

The defendant by its first defense put in issue each of the allegations above set forth.

After the testimony had all been heard, the defendant moved the court to arrest the evidence from the jury and direct a verdict in its favor. This motion was sustained, the verdict and judgment were entered accordingly, and the plaintiff brought the case here. The vital question thus presented is whether the evidence was sufficient to show negligence on the part of the defendant.

[1-3] The settled definition of "negligence" is that it is "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done." Railroad Co. v. Jones, 95 U. S. 441, 24 L. Ed. 506; The Nitro-Glycerine Case, 15 Wall. 536, 21 L. Ed. 206.

In the latter case (15 Wall. 537, 21 L. Ed. 206), the Supreme Court also said:

"The mere fact that injury has been caused is not sufficient to hold" one accused of negligence. "No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of."

Indeed, the clearly established rule in such cases is that the onus is on the plaintiff.

[4, 5] With these well-settled propositions in mind, we approach the consideration of the question whether the learned trial judge was correct in holding that plaintiff's allegations of negligence had not been established by the testimony.

It was conceded that the defendant operated a trolley line of railway between Toledo, Ohio, and Detroit, Mich., and that for operating and propelling its cars it used electricity as its motor power.

The intersection of defendant's track and the Matzinger road was in the open country. There was only one dwelling house in the immediate vicinity, which was a frame house located along the west side of the defendant's track and about six feet from its west rail. It faced north, and its front was 51 feet from the Matzinger road. West of the dwelling and appurtenant to the premises were a cider mill and two barns, the last of the latter being about 300 feet west of the intersection. There were also a number of trees on the premises, and the danger of approaching the intersection from the west was increased by the presence of these structures and the trees near the south side of the road.

Frederick P. Leahy, a resident of Toledo, owned and operated a Ford automobile. In the afternoon of Sunday, July 6, 1913, he took his brother-in-law and three of his wife's sisters as his guests for a ride in his automobile. The brother-in-law sat with him and to his right on the front seat, and the three sisters sat on the rear seat; plaintiff's intestate sitting between the other two. The automobile, moving along the Matzinger road, approached the intersection from the west. Leahy did not stop the automobile, but did lower its speed and decrease its power as it came near the defendant's track at the crossing. He testified that he looked and listened before doing so, and that he did not then see nor hear the approach of any car from the south; but he drove the automobile upon the defendant's track, and before it had passed entirely over the track the automobile was struck near its rear axle by one of defendant's cars which rapidly approached the intersection from the south, and the three young women were thereby killed—one of them being the plaintiff's intestate. When the automobile approached the track at the intersection its top was thrown back. It was going at a speed of about 10 miles an hour. The driver of the automobile had shortly before seen one of defendant's cars go northward. When he first saw the car that struck him, it was within a short distance of him, probably alongside the dwelling house, and the car was then running rapidly, probably 20 or 25 miles an hour, and could not have been stopped in time to avoid the collision.

There was evidence showing that, if a person was located near the center of the Matzinger road at a point 10 feet west of the crossing, there was no obstruction which could, if he looked, prevent his seeing at least 310 feet southwardly along the defendant's track; and that, if he was located at a distance of 15 feet west of the intersection, there was no obstruction which could prevent his seeing at least 150 feet southwardly along the track. There was evidence tending to show that before the car collided with the automobile its whistle had been sounded in the usual way of two long and two short blasts at the usual place about 900 feet south of the crossing; that a similar signal was blown about 150 feet from the crossing; and that the driver of the automobile, who is the husband of the plaintiff and the brother-in-law of her intestate, had previous knowledge that the de-

fendant operated an electric railroad and that there was an alarm signal bell at the intersection.

There was also evidence tending to show that several years before the accident the defendant had installed an electric signal alarm system known as the Hoschen bell, which was operated by means of a block called a cut-in generator; that by this device, when a car runs over the block, the impact causes the signal bell, wherever located, to ring and to continue ringing until after it has been passed by the car which caused it to begin; that in this instance the block was located at least 1,300 feet south of the crossing; that this system of alarm bell signals is used by defendant; that it is regarded as the most useful and effective means of signaling for crossings; that it is used by many trolley lines; that the system was, at the time of the accident, in good repair; that when the defendant's car which struck the automobile passed over the block it caused the bell at the crossing to begin to ring; that it did then begin to ring; that it did so continuously until after the accident; that it was ringing at the time the automobile approached the crossing and when it was driven upon defendant's track; that the motorman on defendant's car, after seeing that the driver of the automobile intended to drive it upon the track, when the car was a short distance away, endeavored to stop his car, but could not do so because he was too near the automobile when it came upon the track in front of the car; that the car was being run at about its ordinary speed for that point, namely, about 25 miles per hour, until the motorman saw the danger and tried to avoid it; and that defendant had no gate nor watchman at the crossing because it had installed the electric alarm signal system instead, and regarded it as better.

There was evidence showing that at the crossing and facing the west there was a large diamond-shaped sign with the words thereon, "Look out for the Cars—Railroad Crossing"; that this sign was on a pole about 10 feet high; that there was nothing to prevent passengers in the back seat of the automobile from seeing that sign; that there was nothing more to obstruct the view of or prevent the hearing by persons in the back seat than there was of those in the front seat of the automobile; and that nothing was said to the driver of the automobile by plaintiff's intestate to the effect that the bell was ringing and that the driver should look out.

In this summary of the testimony we have taken the view of it which is most favorable to the plaintiff, and none of it was in any essential respect contradicted. It should be stated, however, that the driver of the automobile testified that he listened, but did not hear, the bell ringing until after he had driven upon the track. Many witnesses, including some of those called for the plaintiff, having explicitly testified that, in fact, the bell was ringing, plaintiff's counsel, answering an inquiry from the court, in effect stated that he did not intend to contest that point further. Accepting this, the court charged the jury that it was entirely undisputed that the bell was ringing a considerable time before the accident, and no exception appears to have been taken to that part of the charge.

This being the situation, the questions presented by the motion to direct a verdict for defendant were neither complex nor difficult. They must, nevertheless, be considered in subordination to the well-settled rule that in disposing of motions to direct a verdict the trial court cannot weigh the evidence, but must take that view of it which is most favorable to the party against whom the motion is made, and deny the motion if the evidence, when thus viewed, will warrant the conclusion that fair-minded men might honestly draw different conclusions therefrom. Marbury v. Ill. Cen. R. Co., 176 Fed. 9, 99 C. C. A. 483, and cases cited; Carolina, etc., R. Co. v. Stroup, 239 Fed. 75, — C. C. A. —, decided by this court February 6, 1917.

The plaintiff in her petition distinctly charged the defendant with negligence in three respects: First, that when the collision occurred the defendant was negligently operating its car at a high and dangerous rate of speed, namely, 35 miles an hour; second, that it failed to give decedent proper and sufficient warning of the approach from the south of the car that struck the automobile; and, third, that it failed to give the driver of the automobile proper and sufficient or any warning of the approach from the south of its car which collided with the automobile. The burden rested upon the plaintiff to establish by a preponderance of the testimony at least one of these specifications of negligence. The evidence upon these various phases of the negligence charged when viewed in a light most favorable to the plaintiff must be subjected to the test to which we have referred, viz. whether fair-minded men, in considering it, would probably have reached different conclusions upon the question of whether the defendant had done anything which an ordinarily prudent man would not have done under the circumstances, or whether the defendant had omitted to do anything which an ordinarily prudent man would have done under the circumstances. The uncontradicted testimony was that the car was running at about its usual speed when it approached the crossing. As the intersection was in the open country, we think the court below, in view of the evidence, was justified in concluding, as matter of law, that the rate of speed of the car was not improper. And there was neither claim made nor testimony offered by the plaintiff that defendant's motorman, after discovering the automobile upon the track in front of the car, had failed to do all that he reasonably could have done to avoid the accident.

The uncontradicted evidence was that the usual whistle signals were given and repeated by the motorman on the car at the places where they were usually given. The evidence was not contradicted that a plainly legible and visible sign was placed at the crossing on a board which was fastened to a pole about ten feet high, and which warned all persons that there was a railroad crossing, and to look out for the cars. While there was neither gate nor watchman at the intersection, it is not disputed that the defendant, several years previous to the accident, had installed as a substitute for them an electric alarm bell, designed to begin ringing when an approaching car was 1,300 feet away, and to continue to ring until the car had passed the intersection. This system was extensively used by trolley lines and was regarded

as the best and most reliable mode of attracting the attention of all persons approaching such crossings, inasmuch as, when it started ringing, the bell continued loudly to proclaim a warning to all persons who were approaching the intersection until the approaching car had passed. The question was whether all this was what a reasonably prudent man would have done under the circumstances. And not only was there an installation of this alarm bell, but the proof was uncontradicted that the bell was ringing before, at the time, and after the collision of the automobile with defendant's car. In these circumstances, we are of opinion that only one conclusion could have been reached by fair-minded men when considering the evidence, and that conclusion would be that, though the decedent and the driver of the automobile might not in fact have heard the ringing of the bell, and might not, in fact, have seen the car before the automobile got upon the track, nevertheless that the plaintiff had entirely failed to prove the negligence she had charged in her petition. We are of opinion that there was no other conclusion that could properly have been reached by the court below, and that, in directing a verdict for the defendant, no error was committed.

The defendant's second defense was that the plaintiff's intestate had contributed to her injuries by her own negligence in the various respects specified in the answer. As what we have said disposes of the case, we need not consider any of the questions arising upon this defense.

Various other errors were assigned by the plaintiff and have been considered, but it will serve no useful purpose to discuss them.

The judgment is affirmed, with costs.

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## SWISS BANKVEREIN v. ZIMMERMANN et al.

(Circuit Court of Appeals, Second Circuit. February 6, 1917.)

No. 103.

1. TRIAL ⊜142—QUESTIONS FOR JURY—INFERENCES FROM WRITINGS.

Where, from numerous letters and cable messages exchanged between the parties, different inferences might be drawn as to whether the original instructions to defendant to apply the proceeds of drafts indorsed by plaintiff to the payment of sight drafts in plaintiff's favor had been modified, so as to authorize defendant to credit the proceeds of the indorsed drafts to the general account of the drawer of the sight drafts, and there was a dispute as to whether plaintiff's agent told the defendant, before the last instructions had been received, that the sight drafts had been returned, the question was for the jury, and not for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337.]

2. EVIDENCE ⊜275—DECLARATIONS OF AGENT—KNOWLEDGE OF PRINCIPAL.

Where defendant had received drafts indorsed by plaintiff, with instructions to apply the proceeds to the payment of sight drafts drawn by plaintiff, but refused to accept the former because they were indorsed by plaintiff without recourse, in determining whether the subsequent correspondence between the parties, as result of which drafts indorsed by plaintiff

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

without restriction were sent to defendant, modified the original instructions, so as to authorize defendant to credit the proceeds of the new drafts to the general account of the drawer, instead of to the payment of the sight drafts, a statement by plaintiff's agent, who presented the sight drafts, that they had been returned to plaintiff, can be considered, though it was not known to plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1057.]

3. APPEAL AND ERROR ⟸719(5)—QUESTIONS PRESENTED—ERROR NOT ASSIGNED—"PLAIN ERROR."

Error in excluding that statement from the jury's consideration, unless it was known to plaintiff, was a "plain error," which the Circuit Court of Appeals can notice without assignment, under Circuit Court of Appeals, Second Circuit, Rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), especially where it was fully presented to and considered by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2974, 3490.]

4. TROVER AND CONVERSION ⟸22—PROCEEDS OF DRAFT—LIABILITIES OF PARTY.

Plaintiff's claim against defendant for the conversion of funds remitted to cover a sight draft, and against the drawer of the sight draft, are different claims, not creating the relation of principal and surety between defendant and the drawer of the drafts, so that a receipt in settlement of the latter claim is no defense to an action on the former.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 152–162, 167–169.]

In Error to the District Court of the United States for the Southern District of New York.

Action by Leopold Zimmermann and others against the Swiss Bankverein. Judgment for plaintiffs, and defendant brings error. Reversed, and remanded for new trial.

Alexander & Green, of New York City (Charles W. Pierson and Campbell Locke, both of New York City, of counsel), for plaintiff in error.

Engelhard & Pollak, of New York City (Walter H. Pollak, of New York City, of counsel), for defendants in error.

Before WARD, ROGERS and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an action treated in the court below as brought by Zimmermann & Forshay, bankers of New York City, against the Swiss Bankverein of London, to recover damages for the conversion of five French drafts, the property of the plaintiffs, on the Banque Franco-Americaine of Paris, for 25,000 francs each, dated February 15, 1910, and payable 90 days after acceptance. It arose out of the following facts:

February 21, 1910, Uhlfelder, Thompson & Co., in New York, wrote to the defendant, Swiss Bankverein, in London, England, the following letter:

"Swiss Bankverein, London, E. C., England—Dear Sirs: We beg to advise that we are remitting you through Messrs. Zimmermann & Forshay Fcs. 125,000 90 days sight, drawn on the French-American, Paris, which please sell at best unless we arrange otherwise by cable. Please note that we have

drawn against this remittance £4,927–/– to the order of Messrs. Zimmermann & Forshay, which please honor on presentation. The first of these bills have been sent for acceptance to the drawees.

"Yours truly, Uhlfelder, Thompson & Co.
"D. GG. Levieh.

"P. S. Since the above-mentioned draft has been accepted as under date of February 28th you will have to allow us interest for the days run off."

March 7, 1910, the defendant, Swiss Bankverein, wrote to Messrs. Uhlfelder, Thompson & Co. the following letter:

"Messrs. Uhlfelder, Thompson & Co., New York—Dear Sirs: We duly received your favor of the 21st ulto., and as advised, have received bills for Fcs. 125,000 90 d/s. on Paris, against which you have drawn on us check for £4,927. This latter check was presented to us by the London County & Westminster Bank, with the above drafts attached. As these drafts were indorsed by Messrs. Zimmermann & Forshay 'without recourse,' we regret that we were unable to negotiate them, and must ask you to consult us in future when intending to send us such remittances. We cabled you on Saturday: 'With reference your letter dated 21st Feb., cannot negotiate indorsed by without recourse,' which we hereby confirm, and in reply thereto you cabled us: 'Zimmermann & Forshay are withdrawing "without recourse" pay draft.' To which we replied: 'Will pay after have received for your account properly indorsed drafts,' which we also beg to confirm,

"Swiss Bankverein.
"X. Castelll."

March 7, 1910, the defendant sent to Uhlfelder, Thompson & Co. the following cablegram:

"Will pay after have received for your account properly indorsed drafts."

March 5, 1910, the plaintiffs, Zimmermann & Forshay, sent to the defendant the following cablegram:

"We withdraw our mention 'without recourse' one hundred twenty-five thousand (125,000) francs Paris, will send next week properly indorsed copies."

March 8, 1910, Zimmermann & Forshay wrote to the defendant the following letter, received by the defendant March 19, 1910:

"Swiss Bankverein, London—Dear Sirs: With reference to Messrs. Uhlfelder, Thompson & Co.'s draft for £4927 on your good selves, which was refused payment for the reason, 'Refer to drawer,' we, after having communicated with the drawers, cabled you on the 5th inst., as follows: 'We withdraw our mention "without recourse" one hundred twenty-five thousand (125,000) francs Paris, will send next week properly indorsed copies,' which we hereby confirm. We inclose herewith five (5) thirds of exchange of twenty-five thousand (25,000) francs, each, at ninety (90) days' sight on the Banque Franco-Americaine, Paris, regularly indorsed by us. We trust that this will place the matter in order.

"Yours very truly, Zimmermann & Forshay."

March 9, 1910, the plaintiffs wrote to the defendant the following letter:

"Swiss Bankverein, London—Dear Sirs: With reference to our letter of yesterday we beg to inform you that we expected to receive the third of exchange in time to mail them for the S/S Lusitania, but owing to one of the officers of the company who issued these drafts being out of town, we were unable to do so. We, therefore, inclose them herewith, together with our said letter of yesterday.

"Yours very truly, Zimmermann & Forshay."

March 19, 1910, the defendant sent to Uhlfelder, Thompson & Co. the following cablegram:

"Have received from Zimmermann Fcs. 125,000 Frambani—are awaiting instructions."

March 21, 1910, Uhlfelder, Thompson & Co. sent to the defendant the following cablegram, which was received by defendant on the same day:

"Please credit our account for francs."

March 21, 1910, the defendant sent to Uhlfelder, Thompson & Co. the following cablegram, which was received by them on the same day:

"F. 125,000 Indorsed by Zimmermann & Forshay. Cannot negotiate for your a/c unless instructed. Zimmermann & Forshay."

March 21, 1910, the plaintiffs sent to the defendant the following cablegram, which was received by defendant on the same day:

"Refer to our letter of the 8th inst., credit account of Tomebell (i. e. Uhlfelder, Thompson & Co.) proceeds Fcs. 125,000."

March 22, 1910, the plaintiffs wrote to the defendant the following letter, which was received by the defendant March 29, 1910:

"Swiss Bankverein, London—Dear Sirs: We beg to inform you that upon the request of Messrs. Uhlfelder, Thompson & Co., of this city, we cabled you yesterday, as follows: 'Refer to our letter of the 8th inst., credit account of Tomebell proceeds Fcs. 125,000,' which we hereby confirm, and trust that the matter will now be in order.

"Yours very truly, Zimmermann & Forshay."

April 18, 1910, Uhlfelder, Thompson & Co. sent to the defendant the following cablegram:

"Refer to your letter of 7th March. Have you paid our draft for £4000 £900 27 Zimmermann & Forshay claim unpaid. Why unpaid? Telegraph immediately."

April 19, 1910, the defendant sent to Uhlfelder, Thompson & Co. the following cablegram:

"Drafts not re-presented."

April 19, 1910, Uhlfelder, Thompson & Co. sent to the defendant the following cablegram:

"Refer to your telegram of 19th take up draft from L'don Cty & Westminster Bk."

April 19, 1910, the defendant sent to Uhlfelder, Thompson & Co. the following cablegram:

"Cable received, we reply that your credit balance is £1,600, remit by telegraph."

April 20, 1910, Uhlfelder, Thompson & Co. sent to the defendant the following cablegram:

"Pay London County & Westminster Bank, Ltd., for account of Zimmermann & Forshay, New York, about balance of account. Telegraph amount—send statement of account."

April 20, 1910, the defendant sent to Uhlfelder, Thompson & Co. the following cablegram:

"Refer to your telegram of 20th. Have paid London County £2,000."

All the foregoing facts are stipulated, and we come now to a further fact which is disputed. The Swiss Bank says that upon receipt of the thirds of exchange of the French drafts March 19th, and before it cabled to New York for instructions, it applied to the London County & Westminster Bank to re-present the sight draft and were answered that it had gone back to New York. The plaintiffs deny this. There is no evidence whatever of bad faith on the part of either the Swiss Bank or Zimmermann & Forshay, and we think there is none on the part of Uhlfelder, Thompson & Co. Zimmermann & Forshay did not actually intend that the proceeds of the French drafts should be applied to the general credit of Uhlfelder, Thompson & Co., although it could well be found that the Swiss Bank did so, supposing that such was the intention of Zimmermann & Forshay.

The complaint is capable of being read either as for breach of the Swiss Bank's promise to accept the sight draft upon receiving the French drafts with an unrestricted indorsement or as for damages for conversion of the drafts. The trial judge submitted the cause to the jury as one for conversion; that is, for payment by the Swiss Bank of the proceeds of the French drafts belonging to the plaintiffs to Uhlfelder, Thompson & Co. without authority and in violation of the bank's implied contract to return the drafts to the plaintiffs if it did not pay the sight draft. We think the liability of the defendant in either case would be the same. Its defense does not depend directly upon negligence of the plaintiffs, but upon the proposition that, whether they intended to do so or not, they did, by their written communications and their conduct, change the original understanding as to the French drafts and direct the defendant to pay over their proceeds to the general credit of Uhlfelder, Thompson & Co. Obviously, if this is made out, there can be no liability upon the defendant to pay over again.

[1] The plaintiffs contend that on the foregoing state of facts, the trial judge could rightly have directed the verdict in their favor. We do not concur in this at all. The French drafts were the property of Zimmermann & Forshay and indorsed by them. They, as well as Uhlfelder, Thompson & Co., intended them to protect the Swiss Bank in paying Zimmermann & Forshay's sight draft. Unquestionably this was the understanding at first of all parties. The proceedings, however, were dislocated by the protest of the sight draft after the refusal of the Swiss Bank to pay the same when presented. Then followed a situation which could not be disposed of by the court as matter of law. It became a question of fact whether the effect of the acts and writings of Zimmermann & Forshay and their agent, the London County & Westminster Bank, subsequent to the protest of the sight draft, changed the original understanding and constituted a direction to the Swiss Bank to give Uhlfelder, Thompson & Co. general credit for the proceeds of the French drafts. And because different inferences

might be drawn, even from the writings, the question was one, not for the court, but for the jury. Zimmermann & Forshay's actual intention was not as important as was the intention they expressed to the Swiss Bank by what they wrote and did.

[2] A most material and significant fact, if the jury found it to be such, was the statement of Zimmermann & Forshay's agent, the London County & Westminster Bank, when the Swiss Bank asked it to re-present the draft, that it had gone back to New York. The fact that the thirds of exchange had come direct from Zimmermann & Forshay to the bank, instead of through the London County & Westminster Bank, was quite consistent with the truth of this answer. A jury might hold that the Swiss Bank had a right to infer that there was no intention to re-present the sight draft and that Zimmermann & Forshay and Uhlfelder, Thompson & Co. had settled all matters between them.

But the trial judge instructed the jury that this statement of the London County & Westminster Bank to the Swiss Bank, even if made, was not to be considered by them at all, unless Zimmermann & Forshay had actual knowledge that the London County & Westminster Bank had made it. This was in our opinion error. In a legal sense the situation was just the same as if the Swiss Bank by cable had put the question of re-presenting the sight draft to Zimmermann & Forshay, and they had replied that it was in New York. If thereupon the Swiss Bank had asked what it was to do with reference to the French drafts, and Zimmermann & Forshay had answered, "Credit Uhlfelder, Thompson & Co.'s account with them," many persons would find that they had changed the original understanding, whether they intended to do so or not.

[3] The error as to the effect to be given to the statement of the London County & Westminster Bank that the sight draft had been returned to New York was expressly raised by the defendant's exception as follows:

"I also except to your honor's charge to the effect that the plaintiffs were only chargeable with what they actually knew, and not with what their agent, the London County & Westminster Bank, over in London, knew or did, unless it had actually been communicated to them."

This appears not to have been assigned as error, but we have a right under our rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii) to "notice a plain error not assigned," and we have less hesitation in doing so because the question was fully presented to and considered by the trial judge.

[4] In view of the new trial that is to be ordered, it is proper for us to say that Zimmermann & Forshay's receipt in settlement of their claim to Uhlfelder, Thompson & Co. for their notes is no defense to the Swiss Bank. The relation of principal and surety did not exist between Uhlfelder, Thompson & Co. and the bank, and Zimmermann & Forshay's claims against them, respectively, were different, viz., against the Swiss Bank for conversion, and against Uhlfelder, Thompson & Co. on their sight draft.

The judgment is reversed.

## UNITED STATES NAT. BANK OF CENTRALIA et al. v. CITY OF CENTRALIA.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1917. Rehearing Denied March 19, 1917.)

No. 2821.

1. DEPOSITARIES ⊂=10—BONDS—AMOUNT—INSUFFICIENCY—EFFECT.

Pierce's Code Wash. 1912, tit. 77, §§ 681, 683, require municipalities to designate one or more banks in the county where the city is located as a depositary or depositaries of funds required to be kept by the city treasurer, but provide that, before any such designation shall entitle the treasurer to make deposits in such bank, the bank so designated shall file with the comptroller or town clerk a surety bond in the maximum amount of the deposits, or shall deposit bonds with which to secure the same. A city having negotiated a sale of bonds to raise funds to be expended upon its water system, the treasurer delivered the bonds to the bank designated as the city depositary, and which had given a bond in the amount of $10,000, with instructions to forward and collect the draft. The bank, though the proceeds from the bonds greatly exceeded $10,000, permitted the same to be placed to its credit by its correspondent, giving the treasurer credit on its books for the amount. *Held* that, as the bank knew of the purpose for which the bonds were to be sold, and was not an authorized depositary, it was guilty of a violation of the law, rendering it liable as a trustee for such funds.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. §§ 23–26.]

2. BANKS AND BANKING ⊂=80(7)—INSOLVENCY—TRUST FUNDS—LIABILITY.

Where a bank, having become liable as a trustee for moneys wrongfully commingled with its own funds, became insolvent and a receiver was appointed, the trust may be impressed upon funds so misappropriated to the extent that they can be traced, either in their original or substituted form, into funds which came into the possession of the receiver; the cestui to that extent being entitled to a preference over other creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 191.]

3. BANKS AND BANKING ⊂=82(7)—TRUST FUNDS—EVIDENCE—SUFFICIENCY.

In a suit against the receiver of an insolvent bank, which, without authority of law, permitted the proceeds of a draft for the purchase price of municipal bonds deposited for forwarding and collection to be credited to its account by its correspondent, evidence *held* insufficient to show that any such proceeds, either in the original or substituted form, were represented by funds which came into possession of the receiver, and hence no trust could be imposed upon such funds.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 209.]

4. BANKS AND BANKING ⊂=80(7)—TRUST FUNDS—RECEIVERS.

A bank, authorized only to collect a draft for the purchase price of city bonds, allowed its correspondent to deposit the funds to its credit, though such deposit was in violation of law; the bank not having given bond to secure a deposit for the same. The correspondent applied a portion of such proceeds on the bank's overdraft. *Held* that, there being no showing that any of such proceeds came into the hands of the receiver, such application by the correspondent furnishes no basis for giving the municipality priority in funds received by the receiver on the theory of a trust, for it must be assumed that the correspondent dealt with the proceeds of the bonds on the understanding that the bank had complied with the law.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 191.]

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Suit by the City of Centralia, a municipal corporation, against the United States National Bank of Centralia, a banking association, and A. R. Titlow, as receiver of said bank. From a decree for complainant, defendants appeal. Reversed and remanded, with directions to dismiss.

The city of Centralia brought a suit against the United States National Bank of Centralia and A. R. Titlow, receiver of said bank, the purpose of which was to impress a trust upon funds in the receiver's hands and to obtain a preference over the general creditors of the insolvent bank. The said bank will be designated herein the Centralia Bank. At the time when the transactions referred to in the suit occurred, the law of the state of Washington (title 77, §§ 681, 683, Pierce's Code of 1912) required that a city of the class of Centralia shall, upon a majority vote of its city council, designate one or more banks in the county where the city is located as depositary or depositaries of the moneys required to be kept by the city treasurer, but that before any such designation shall entitle the treasurer to make deposits in such bank, the bank so designated shall file with the comptroller or town clerk of the city, a surety bond to the city in the maximum amount of deposits designated by said treasurer to be carried in such bank, or in lieu of such bond shall deposit with the treasurer certain described school, county, or state bonds or warrants, or United States bonds, and shall also file with the comptroller or town clerk a contract binding the bank to pay not less than two per centum on the average daily balances, where such balances exceed $1,000, of all municipal funds kept by such treasurer in said bank while acting as such depositary. The Centralia Bank had been designated a depositary of the city's public moneys, and had given a bond in the sum of $10,000 to the city as required by statute.

Prior to July, 1914, the city had authorized the issuance of bonds to raise funds to be expended upon its water system, and to be applied to no other purpose. It had negotiated a sale of the bonds to Carstens & Earles, bond buyers, of Seattle, and on or about July 10th the city treasurer delivered the last of the bonds to the Centralia Bank, with a draft on Carstens & Earles, with instructions to forward and collect. The cashier of the Centralia bank knew the nature and purpose of the bonds, and caused an entry to be made indicating that the same were to be credited to the account of Mason, the city treasurer. The bonds and the draft were forwarded to the bank's regular correspondent and reserve bank in Seattle, the National Bank of Commerce, which will be designated herein the Seattle Bank. On or about July 13, 1914, the draft was paid to the Seattle Bank, and that bank gave the Centralia Bank credit for $50,911.88, the amount collected, and advised the Centralia Bank of the credit. On July 13th the Centralia Bank entered in its books a credit to the treasurer of Centralia for the amount so collected, and charged a like amount against the Seattle Bank. At that time the city treasurer was absent from Centralia, but when he returned, and learned that the bank had credited him with this amount, he notified the president and manager of the Centralia Bank that it must give an additional bond on account thereof, as required by law; but the bond was not given.

On July 13th the total deposits of the Centralia Bank with the Seattle Bank amounted to $55,069.77. Before that time, and from July 11th, the account of the Centralia Bank with the Seattle Bank had been overdrawn $11,071.64. By the deposits of July 13th the overdraft was wiped out, and a balance was left of $44,998.13. In the ordinary course of business the balance in the Seattle Bank was reduced by withdrawals on drafts from the Centralia Bank, and by payment of checks on the Centralia Bank drawn by depositors of that bank, and by drafts drawn by the Centralia Bank in favor of other correspondent banks and reserve agents, so that on July 22, 1914, as shown by the books of the Seattle Bank, the account was again overdrawn.

When the Centralia Bank closed its doors on September 19, 1914, it had in its vaults $32,439.44, which came into the hands of the receiver. Between July 13th and September 19th it had at all times with its reserve agents and in its vaults more than $50,911.88. After the bank passed into the control of the receiver, the city received $10,000 on the bond which had been given by the Centralia Bank, and credited sufficient thereof to extinguish a certain other claim of the city on account of a special deposit of $2,641.21, and credited the remainder of the $10,000 upon the account for $51,911.88. The city treasurer received from the Centralia Bank no passbook or other evidence of the bank's indebtedness on account of the money received on the sale of the bonds.

The court below found that the officers of the Centralia Bank knew the purpose for which the bonds had been issued, and that the moneys collected thereupon were trust funds, which the city treasurer could hold only as a public officer, and that the same could not be lawfully used for any purpose other than the purchase and improvement of the city's system of waterworks; that $44,938.13 of the proceeds of the sale of the bonds had been traced into the hands of the Centralia Bank, and its receiver; and that the appellee is a preferred creditor to that amount. And thereupon a decree was entered for the payment of said sum to the appellee.

R. P. Oldham and R. C. Goodale, both of Seattle, Wash., for appellants.

William R. Lee, City Atty., of Centralia, Wash., and Samuel H. Piles and James B. Howe, both of Seattle, Wash., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] The Centralia Bank, in permitting the proceeds of the bonds to be placed to its credit in the Seattle Bank, violated the plain provisions of the law. It had no right to use the money, or to commingle it with its own funds, or to place it to its credit in another bank. Nat. Bank v. School District No. 8, 94 Fed. 705, 36 C. C. A. 432; Board of Com'rs v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100. The law impresses a trust upon funds so misapplied, and to the extent that the said money, or any portion thereof, either in its original or a substituted form, can be traced into the funds which came into the possession of the receiver, the appellee is entitled to a preference over the general creditors. Titlow v. McCormick, 236 Fed. 209, — C. C. A. —; Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806; Brennan v. Tillinghast, 201 Fed. 609, 120 C. C. A. 37; Board of Com'rs v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; In re Brown, 193 Fed. 24, 113 C. C. A. 348; Spokane County v. First Nat. Bank, 68 Fed. 979, 16 C. C. A. 81; In re See, 209 Fed. 172, 126 C. C. A. 120.

[3] But it does not appear from the evidence that any of the appellee's money, or any property into which it was transmuted, ever came into the possession of the Centralia Bank, or was in the possession of any of its reserve banks, or other banks, at the time when the Centralia Bank closed its doors. It is shown that $35,000 of the amount so placed to the credit of the Centralia Bank in the Seattle Bank was transferred from the Seattle Bank to the Centralia Bank's credit in the Bank of California of Tacoma, a reserve agent of the

Centralia Bank; but it also appears that thereafter, on July 22d, the account of the Centralia Bank with the Tacoma Bank was overdrawn by $11,423.69, and it is not shown that any of said money came back to the Centralia Bank. Between July 13th and July 28th the total of the deposits of the Centralia Bank with the Seattle Bank, including the appellee's money, was $184,102.01. The credit so established was exhausted by the transfer of money to the Bank of California of Tacoma, as above noted, by the transfer of about $20,000 to the Continental Bank of Chicago, a reserve agent of the Centralia Bank, by drafts drawn by the Centralia Bank in favor of its creditors on its account with the Seattle Bank, by the cashing of checks at the Seattle Bank drawn on the Centralia Bank by depositors of that bank, by the Seattle Bank charging back to the Centralia Bank certain discount notes, which were either charged to accounts of depositors of the Centralia Bank or were exchanged for renewal notes taken by the Centralia Bank and rediscounted by it with other banks. But none of the appellee's money so deposited in the Seattle Bank is shown to have gone from that bank back to the Centralia Bank, or to be traceable into any fund that came into the receiver's hands.

[4] The appellee contends, on the authority of Commercial National Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363, that the Seattle Bank could not lawfully apply on the Centralia Bank's overdraft as it stood on July 14, 1914, the sum of $11,071.64 out of the moneys received for the appellee's bonds, for the reason that the money so received on the sale of the bonds was a trust fund, and that in contemplation of law the Seattle Bank has at all times held that sum as the agent of the Centralia Bank. A similar contention is made as to the proceeds of three notes, aggregating $12,225, which had been guaranteed by the Centralia Bank to the Seattle Bank, and by the latter charged back to the former. But it does not follow from these facts that the appellee can, in the present suit, recover either of those sums; for, as we have already found, there is nothing to show that either thereof ever came into the possession of the Centralia Bank, or its receiver, from the Seattle Bank, or that the latter admits liability to pay the same. It should be assumed, in absence of evidence to the contrary, that the Seattle Bank dealt with the proceeds of the bonds on understanding that the Centralia Bank had complied with the law, and had given the statutory bond, which would legalize its possession and right of disposition of the moneys collected on the sale of the bonds.

The case is clearly distinguishable from Merchants' Nat. Bank v. School District No. 8, 94 Fed. 705, 36 C. C. A. 432, cited by the appellee, and relied upon by the court below. In that case the Helena Bank sent school bonds to its correspondent bank in Boston, with instructions to sell the same. They were sold, and the proceeds were placed to the credit of the Helena Bank, but were not at that time transferred to the Helena Bank. That bank, on learning that the bonds had been sold, opened an account with the school district, crediting it with the amount so received by its agent. Subsequently, and before the Helena Bank closed its doors, all the money so realized on the sale of the bonds in Boston was received by the Helena Bank "in due course of

business," so that the money had actually gone into the Helena Bank prior to the receivership.

The decree is reversed, and the cause is remanded to the court below, with instructions to dismiss the bill.

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## DAVIS v. HARRISON.

(Circuit Court of Appeals, Ninth Circuit. February 26, 1917.)

No. 2633.

1. TRUSTS ⟸131—STATUTE OF USES—"ACTIVE TRUST."
A deed conveying land to the grantee, to hold in trust to pay the rents and profits to the grantor during the continuance of the existing lease, and thereafter to pay the rents and profits to the grantor's nephew for life, and upon the nephew's death to convey the property to his bodily heirs, or to his wife or heirs at law, creates an "active trust," which is not executed by the statute of uses, not a mere passive trust.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 175, 175½.
For other definitions, see Words and Phrases, First and Second Series, Active Trusts.]

2. MORTGAGES ⟸139—ABSOLUTE DEED AS MORTGAGE—AGREEMENT TO RECONVEY.
An absolute deed to property, given to a grantee to secure a debt, the land to be reconveyed on payment of the debt, passes no title to the land.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 278.]

3. DEEDS ⟸129(1)—ESTATES CREATED—TRUST.
A deed conveying land to a trustee, to pay the rents and profits to a grantor's nephew for life, gives only a life estate in the rents and profits, not any title to the land.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 362.]

4. TRUSTS ⟸205—POWERS OF TRUSTEE—LEASE.
A deed to trustees, to pay the rents and profits to the grantor during the existing lease and thereafter to pay the rents and profits to the grantor's nephew, not only gives the trustee the right, but makes it his duty, to lease the land after the expiration of the first lease.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 280-282.]

5. TRUSTS ⟸230—POWERS OF TRUSTEE—LEASE—ESTOPPEL OF BENEFICIARY.
Where the beneficiary, under a trust deed requiring the trustee to pay rents and profits to him for life, expressly consented in writing to a lease of the property by the trustee, he is estopped from questioning the validity of that lease.

6. TRUSTS ⟸147(1)—INTEREST OF BENEFICIARY—ASSIGNMENT.
Where a deed to trustees, to pay the rents and profits to certain beneficiaries, provided that one beneficiary should have the right to live thereon and to use it for grazing and pasturage, that right was a personal one, which he could not assign.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 192.]

In Error to the Supreme Court of the Territory of Hawaii.

Suit to quiet title by Fred Harrison against Robert Wyllie Davis. Judgment for plaintiff was affirmed by the Supreme Court of the ter-

ritory of Hawaii, and defendant brings error. Remanded, with directions to modify the judgment, and, as modified, to stand affirmed.

E. C. Peters and R. J. O'Brien, both of Honolulu, T. H., for plaintiff in error.

W. L. Stanley and William B. Lymer, both of Honolulu, T. H., and E. B. McClanahan and S. H. Derby, both of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The record shows that in 1892 one John K. Sumner was the owner of a certain tract of land, situated at Koolaupoko, Island of Oahu, Hawaii, known as the land of Mokapu, upon which there was an existing lease, which land Sumner then conveyed to one Cartwright, in trust—

"in the first place to pay the rents, issues, and profits arising therefrom or thereout, so long as the lease now in existence is in force, to me, the said party of the first part, and upon the expiration of the present lease or other sooner determination, to pay the rents, issues, and profits arising from or out of said land to my nephew, Robert Wyllie Davis, during the term of his natural life, or, in the discretion of said Robert Wyllie Davis, to permit him to reside upon said premises, and while so residing to use the same for grazing or agricultural purposes; and in the second place, from and after the death of the said Robert Wyllie Davis, to convey the said premises to the heirs of the body of said Robert W. Davis lawfully begotten, and failing such heirs of his body, then to the wife, if living, of the said Robert W. Davis, and, failing such wife, then to convey the said premises unto the heirs at law of the said Robert W. Davis, share and share alike."

Subsequently Cartwright resigned as trustee, and one Holt was duly appointed his successor, who on the 1st day of June, 1910, leased the land in question for 25 years to one A. V. Gear. On the 16th of the same month the latter assigned an undivided one-half of his interest in the lease to the said Robert Wyllie Davis, and thereafter assigned the other undivided one-half thereof to one Peterson, whose interest subsequently passed to the present defendant in error, based upon which ownership he commenced this suit to quiet his title thereto against the present plaintiff in error, the said Davis, alleging his ownership of the undivided one-half of the lease and the adverse claim thereto by the defendant to the suit.

The action was brought under and by virtue of that provision of the Revised Laws of Hawaii reading:

"Sec. 2085. *Object of Action.* Action may be brought in any of the circuit courts by any person, against another person, who claims adversely to the plaintiff an estate or interest in real property, for the purpose of determining such adverse claim."

The answer of the defendant consisted only of a denial of each of the allegations of the complaint, and the trial resulted in a judgment —affirmed by the Supreme Court of the territory—decreeing the plaintiff "the owner and entitled to the immediate possession of an undivided one-half for a term of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoku, city and county of Honolulu, territory of Hawaii, known as the land of

Mokapu, and described in that certain lease from John D. Holt, trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the registrar of conveyances, in said Honolulu, in Book 343, at pages 347–351," quieting plaintiff's title thereto, and awarding him costs.

[1] The main contention on behalf of the plaintiff in error is that the trust created by the deed from Sumner to Cartwright was a mere passive one, and that under the statute of uses, which it is said is in force in the territory of Hawaii, the trust as to Davis was thereby executed, and there remained in the trustee no power to create any leasehold interest in the property during the life of the plaintiff in error.

The law is well settled, not only in Hawaii, but elsewhere, that trusts which are active are not within the statute of uses, and such, in our opinion, is very clearly the case here, for the trust deed in question in express terms imposes upon the trustee the active duty of paying the rents, issues, and profits of the trust property to its grantor until the then existing lease of the property should expire, necessarily importing that he should first collect them, and thereafter should collect and turn over to the grantor's nephew, Davis, during his natural life, the rents, issues, and profits "arising from or growing out of said land," or, in the discretion of the said nephew, the trustee should "permit him to reside upon said premises, and while so residing to use the same for grazing or agricultural purposes." Upon the death of the nephew, Davis, the further duty was by the deed imposed upon the trustee to convey the lands to the heirs of the body of the deceased nephew, if any such heirs existed, and, if not, to the wife of the said deceased nephew, if living, and, in the event she was not living, then to the heirs at law of the deceased nephew, share and share alike.

These provisions are very plain, and admit of no doubt as to their meaning. By them active duties were imposed upon the trustee from the moment of the execution of the deed; there was nothing passive about it. And therefore the Supreme Court of the territory was quite right in holding, as it did, that the statute of uses had no application to the case, assuming that such statute was in force in the territory. Estate of Boardman, 5 Hawaii, 146, 147; Kidwell v. Godfrey, 14 Hawaii, 138, 140; Harrison v. Davis, 22 Hawaii, 51, 57. See also, Young v. Bradley, 101 U. S. 782, 787, 25 L. Ed. 1044; Perry on Trusts, p. 305; Lewis on Trusts, p. 210.

[2] The record further shows that in the course of the trial in the circuit court of the territory the defendant to the action introduced, over the objection of the plaintiff, a deed dated January 1, 1906, and executed by defendant, purporting to convey to John K. Sumner "all my one-half undivided share and interest" in the land in question, and also a mortgage, dated and executed the next day by the defendant to Sumner, of "all my undivided one-half share and interest" in Mokapu. That evidence was subsequently held by the court inadmissible, and was stricken out, to which ruling error was assigned. We think the Supreme Court of the territory rightly held the ruling correct.

In the first place, it appears from the record that the plaintiff in error, in his sworn answer to a suit brought against him in the trial court

of the territory by Cecil Brown, trustee, expressly alleged and averred, among other things, as follows:

"That heretofore, and on, to wit, the 1st day of January, A. D. 1907, this respondent, Robert W. Davis, for a good and valuable consideration, did grant, bargain, sell, and convey to the said John K. Sumner an undivided one-half share or interest in and to the land and premises known as 'Mokapu,' and ever since said last-named day said John K. Sumner has been and now is the owner and holder thereof, subject to a defeasance of the legal title in the said John K. Sumner, and the reconveyance thereof by him to this respondent at any time on or before January 2, A. D. 1916, upon the payment to the said John K. Sumner of the sum of $2,794.93, with interest from the 1st day of January, A. D. 1906, to the date of reconveyance, at the rate of 7 per cent. per annum, and thereafter, and on, to wit, the 2d day of January, A. D. 1906, this respondent conveyed by way of mortgage to the said John K. Sumner an undivided one-half share and interest in and to said land and premises known as 'Mokapu,' and said mortgage is in full force and effect, and not satisfied or discharged."

That sworn statement of the plaintiff in error finds corroboration in the testimony of the witness A. V. Gear, appearing in the record, to whom the trustee, Holt, made the lease of the land in question, and also in the written consent to that lease made by the plaintiff in error, which consent, as indorsed upon the lease, reads as follows:

"Know all men by these presents, that I, Robert Wyllie Davis, of Mokapu, Koolaupoko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms of the aforementioned deed of trust. Robert Wyllie Davis."

[3-5] Both the deed and the mortgage having been given to Sumner as security merely, it is obvious that neither passed any title to the land, even though any title thereto ever vested in the plaintiff in error under the deed of trust, which was not the case. What *did* vest in him by that instrument, and all that did, was, as has already been in effect stated, a life estate in the rents, issues, and profits of the land accruing after the expiration of the lease thereof existing at the time of the execution of the deed of trust, and the right at the option of the said beneficiary to reside upon the land, and while so residing to use the same for grazing or agricultural purposes. There was, therefore, not only the right, but the imperative duty, of the trustee, Holt, to lease the land upon the expiration of the prior lease in order to carry out the provisions of the trust. Not only so, but in performing in part that duty, and making the lease to Gear, the trustee did so, according to the record, with the express consent in writing of the plaintiff in error. Upon the most obvious principles of justice, the latter is therefore estopped from questioning the validity of that lease.

[6] Neither the instrument purporting on its face to be an absolute deed from plaintiff in error to Sumner of January 1, 1907, nor the mortgage of the 2d day of the same month and year, pretended to assign to Sumner the personal option vested by the trust deed in the plaintiff in error to reside upon the land, and while so residing to use the same for grazing and pasturage purposes. Had either or both of

those instruments undertaken to do so, the attempt would have been ineffectual, for we agree with the Supreme Court of the territory that:

"The right of Davis to occupy and use the land for certain purposes was personal to Davis, and did not extend to his assigns. This was the intention of the donor, as we gather it from the deed. The object was to provide and secure for the defendant, either a home and an opportunity to make a living out of the land, or an income, as he might elect to take. A right to assign the right of occupancy would be incompatible with that object, and we must give effect to the apparent intention of the donor in this respect, even though the right to assign the income was not restricted. The defendant having waived his right to occupy the premises, the lease to Gear was valid and operative, and its validity was not affected by the conveyances made by the defendant to Sumner."

It may be added that it appears from the evidence that Sumner never at any time established a residence on the land, nor did the plaintiff in error, so far as appears. There should have been added to the judgment entered by the trial court, and affirmed by the Supreme Court, to which the present writ of error was directed, immediately preceding the provision for costs, the words: Subject to all of the terms and conditions of the said lease.

The cause is remanded, with directions to the trial court to so modify the judgment, and, as so modified, it will stand affirmed.

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## INTERNATIONAL AGR. CORP. v. CARY et al.

### In re HULL'S ESTATE.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1917.)

No. 2901.

1. BANKRUPTCY ⊜467—APPEAL—REVIEW—RECORD.

Where, on appeal from an order denying a petition to set aside an order of the referee denying petitioner the right to participate as an individual creditor in the estate of a bankrupt, the record in the original proceeding showed that the referee, entering the order of denial, gave notice on his own motion that hearing would be had to determine the question, and that creditors appeared at the hearing, it must be assumed that the notice of the hearing was given by the referee, and that petitioner had actual notice.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929.]

2. BANKRUPTCY ⊜341—PROOF OF CLAIM—EFFECT OF.

Under Bankr. Act July 1, 1898, c. 541, § 57, 30 Stat. 560 (Comp. St. 1913, § 9641), declaring that claims which have been duly proved shall be allowed upon their receipt by or upon presentation to the court, unless objection to their allowance shall be made by the parties in interest, or their consideration be continued for cause by the court on its own motion, the sworn proof of claim against the estate of a bankrupt is prima facie evidence of the indebtedness claimed, and the allowance amounts to an adjudication to that effect.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 516, 528.]

3. BANKRUPTCY ⊜342—PROCEEDINGS—AUTHORITY OF REFEREE.

Under Bankr. Act, § 57k, declaring that claims which have been allowed may be reconsidered for cause, and reallowed or rejected in whole or in

part, according to the equities of the case, before, but not after, the estate has been closed, a referee has jurisdiction, after the allowance of a duly proven claim, to disallow such claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 529.]

4. BANKRUPTCY ⊜351—CLAIMS—ALLOWANCE.

An allowance of a claim against the individual estate of a partner is not, however, a determination of priorities as between firm and individual creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564.]

5. BANKRUPTCY ⊜11—COURT OF BANKRUPTCY—NATURE OF.

A court of bankruptcy is a court of equity, though the proceedings therein are more summary than ordinary suits.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11.]

6. BANKRUPTCY ⊜342—PROCEEDINGS—JURISDICTION OF REFEREE.

While General Order in Bankruptcy No. 21 (89 Fed. x, 32 C. C. A. xxiii), providing for the re-examination of claims on application to the referee by petition of trustee or a creditor, prescribes the usual practice and should in ordinary cases be followed, a referee may, a court of bankruptcy being one of equity, on his own motion, order a reconsideration of the question of the allowance of claims already allowed, and hence, in the interests of justice, a referee may, notwithstanding previous allowance of a claim against the estate of a bankrupt, disallow the same, save as to the assets of a firm of which the bankrupt was a member, even though, by reason of the absence of firm assets it amounted to a practical disallowance.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 529.]

7. BANKRUPTCY ⊜351—CLAIMS—PARTNERSHIP ASSETS.

Under Bankr. Act, § 5g (Comp. St. 1913, § 9589), providing for the marshaling of assets of a partnership estate and individual estates, so as to secure equitable distribution of the several estates, firm creditors are not entitled to receive dividends from the separate estates of the partners until the separate creditors have been paid in full.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564.]

8. BANKRUPTCY ⊜342—PROCEEDINGS—ORDER OF REFEREE.

A rule of the District Court provided that petitions for the review of orders made by the referee in bankruptcy should be filed within 10 days after the entry of the order, with authority to the referee, on written motion and upon good cause shown, to allow a longer time, not exceeding 5 days. General Order in Bankruptcy No. 27 (89 Feb. xi, 32 C. C. A. xxvii) provides that when a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of, and the referee shall forthwith certify to the judge the question presented. Petitioner took no steps to secure review of an order of the referee in bankruptcy which worked a practical disallowance of its claim until more than two years after its entry. *Held*, that the petition was filed too late to have review, and a subsequent referee was without jurisdiction to set aside the order and allow petitioner's claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 529.]

Appeal and Petition to Revise from the District Court of the United States for the Northern District of Ohio; John H. Clarke, Judge.

In the matter of the bankruptcy of the estate of Robert B. Hull. Petition by the International Agricultural Corporation to revise a decision of the referee denying petitioner participation as an individual creditor in the distribution of the bankrupt's estate, opposed by Charles

Cary, trustee in bankruptcy, and others. From an order denying the petition, petitioner appeals and petitions to revise. Order affirmed.

See, also, 224 Fed. 796.

J. M. Butler, of Columbus, Ohio, for appellant.

C. A. Fisher, of Canton, Ohio, for appellees.

Before WARRINGTON and KNAPPEN, Circuit Judges, and EVANS, District Judge.

KNAPPEN, Circuit Judge. In November, 1912, the Kyser-Hull Company, a copartnership, was dissolved by mutual consent; Hull retiring, and Kyser, the only other partner, continuing in the business as an individual, and (apparently) assuming the debts of the firm. Before and at the time of the dissolution appellant was a creditor of the copartnership in the sum of about $1,100. It had no knowledge of the dissolution at the time it occurred. On or about the following 31st of December Kyser and Hull, individually, gave appellant their joint and several promissory notes covering the amount of the indebtedness to appellant. January 11th following Kyser was adjudged bankrupt on his voluntary petition, and three days later similar action was taken in Hull's case. Both estates were referred to the referee in bankruptcy for the usual administration.

[1] Petitioner's claim was allowed against the Hull estate January 5, 1913 (and is said to have been similarly allowed against Kyser's estate), but no determination was then made regarding priorities or payment of dividends. No objection or exception to, or appeal from, the allowance of the claim as stated, was made or taken. On April 18, 1913, the referee, on his own motion, gave notice to creditors of the Hull estate that on a certain date a hearing would be had to determine individual and firm creditors, and especially to "consider certain notes of [appellant] and the Canton Buggy Company, the same being firm debts of Kyser, Hull & Co., and for which notes were given in December prior to the bankruptcy proceedings by both Kyser and Hull, as individual creditors, and to determine whether said claims are individual claims or not"; and on the 29th day of the same month, at a hearing at which certain creditors appeared "and on argument of counsel," the referee held that the two claims mentioned should not prorate with Hull's individual creditors.

Upon this record it must be taken as true that notice of the hearing mentioned was given appellant by the referee; also that appellant received notice of the order of April 29th, two days or so after it was made, although it was not represented at the hearing. No review of that order was ever asked for by appellant. The Buggy Company, however, obtained a review, and a reversal thereon, of the referee's order denying to the Buggy Company the right to participate in the distribution of the assets of the individual estate of Hull. In re Hull (D. C.) 224 Fed. 796.

On May 19, 1915, and thus more than two years after the order of April 29th, appellant applied to the successor referee to set aside his predecessor's order of April 29th on the grounds: (1) That the ref-

eree had no power to make the order; (2) that appellant's name was inserted in the order by inadvertence or mistake; and (3) that appellant had no notice or knowledge of the giving of the notice of April 18th and of the making of the order of April 29th.

As already said, both the notice and knowledge in question are established. It is also established that appellant's name was not inserted in the order by inadvertence or mistake, but that the order was purposely made to include appellant. The successor referee held, however, that the order of April 29th was made without jurisdiction, for the reasons that no application had been made to the referee to have the claim disallowed, and no pleadings were had on the new issue raised, and that the referee was without authority to act on his own motion. The order of April 29th was accordingly "vacated, set aside, and held for naught"; the referee's opinion (but not his order) stating that appellant would be given opportunity "for a hearing in the court, to present evidence as to whether or not it is entitled to a dividend."

Judge (now Mr. Justice) Clarke, on review of the successor referee's order of May 19, 1915, upheld the authority of the original referee to make the order of April 29, 1913, and reversed the successor referee's action of May 19, 1915. It is to review the order of the District Judge that the present proceedings are brought.

[2-4] We think the referee had jurisdiction to make the order of April 29, 1913. True, the sworn proof of claim against the bankrupt was prima facie evidence of the indebtedness claimed (Bankr. Act, § 57d; Whitney v. Dresser, 200 U. S. 532, 535, 26 Sup. Ct. 316, 50 L. Ed. 584); and the allowance of the claim amounts to an adjudication that Hull's estate was indebted to appellant, so long as such adjudication is not set aside or reversed. The allowance of the claim was not, however, in form a determination of priorities as between firm and individual creditors. But, assuming that there were substantially no partnership assets, and thus that the referee's action in denying appellant the right to share ratably with individual creditors in the assets of the Hull estate amounted, for practical purposes, to a disallowance of the claim, the action had was nevertheless within the jurisdiction of the referee; for section 57k of the Bankruptcy Act expressly provides that "claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed." This express statutory provision makes it unnecessary to consider what the authority of the referee would be in its absence.

[5-7] Appellant urges, however, that General Order in Bankruptcy No. 21 (89 Fed. x, 32 C. C. A. xxiii) which provides for re-examination of claims on application to the referee by petition of the trustee or of a creditor, furnishes the exclusive remedy, and that the referee is powerless to proceed of his own motion; and, as already suggested, the successor referee, in making the order of May, 1915, so held. We cannot agree with this contention. While it is probably the better practice generally for the referee to act upon petition of the trustee or of cred-

itors, and, in case the information comes in the first instance to the referee, to direct the trustee to institute proceedings for re-examination, yet we cannot think that the referee is without jurisdiction to act, as in the case in question, upon his own motion. There may or may not have been good reason for proceeding sua sponte, but the presence or absence of such reason is not fatal to jurisdiction. A court of bankruptcy is a court of equity (Bardes v. National Bank, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175); the proceedings therein are more summary than in ordinary suits (Whitney v. Dresser, supra); and it cannot be that an equity court, acting under such summary practice, is powerless, in the interests of justice, on its own motion to take steps to correct what it believes to have been an erroneous action had upon insufficient knowledge; and the general rule is that firm creditors are not entitled to receive dividends from the separate estates of the partners until separate creditors have been paid in full. Bankr. Act, § 5g; Loveland on Bankruptcy (4th Ed.) § 273. And see In re Telfer (C. C. A. 6) 184 Fed. 224, 106 C. C. A. 366; Ft. Pitt Coal & Coke Co. v. Diser, Trustee, 239 Fed. 443, — C. C. A. —, decided by this court February 6, 1917.

It is at least open to inference that the referee, before giving the notice of April 18th, had learned that the claim in question grew out of partnership dealings. We entirely agree with the conclusion of Judge Clarke that "it would seem to be to subordinate substance to form to hold that the referee, due notice being given to all concerned, could not do of his own motion in such a case as this that which the referee, impliedly at least, considers it would have been competent for him to have done if a petition or motion had been filed by a trustee or a creditor," and that the notice of the hearing of April 29th gave as effective notice of the proposed action as could any formal pleading. Jurisdiction over the subject-matter thus clearly existed; and appellant, having received due notice of the proposed action, as well as of the action had, is bound by the action taken.

[8] Appellant further urges that, if the referee had the right of his own motion to make the order of April 29th, a successor referee had like jurisdiction and authority, upon due application of a creditor and upon due hearing, to "open up the whole matter, to reallow the claim, and to make such other orders as are necessary to do substantial justice 'according to the equities of the case.'" But this proposition, as applied to a rehearing as to action within the jurisdiction of the predecessor referee, fails to give due effect to appellant's failure to take steps to review the action now complained of. General Order in Bankruptcy No. 27 (89 Fed. xi, 32 C. C. A. xxvii) provides that, when a person shall desire a review by the judge of any order made by the referee, "he shall file with the referee his petition therefor, setting out the error complained of," whereupon the proceedings shall be certified to the judge; and rule No. 17 of the District Court below expressly provides that petitions for the review of orders made by the referee shall be filed with that officer "within ten days from the entry of such order," with authority to the referee "on written motion and upon

good cause shown" to "allow a longer time, not exceeding, however, five days." Having failed to take such review, and the order in question having been within the referee's jurisdiction, appellant's right to complain of the order was effectually lost. In re Marks (D. C.) 171 Fed. 281 (opinion by present Circuit Judge McPherson); In re Wister & Co., Bankrupts (D. C.) 232 Fed. 898; s. c. (C. C. A. 3) 237 Fed. 793, —— C. C. A. ——.

Attention is called to the asserted injustice of denying appellant the right given to the Buggy Company to participate in the assets of the Hull estate. But the injustice of such result is more apparent than real. The Buggy Company has prevailed because it took a review of the order here complained of. Upon that review Judge Killits held that firm creditors were not entitled to share ratably with the insolvent partner's creditors, even though there were no partnership assets available for partnership creditors, and seems to have granted relief because of the finding by the referee that by the taking of the individual notes a novation was accomplished, whereby the Buggy Company became the individual creditor of Hull, and because the evidence failed, in the judge's view, to show that the Buggy Company, when it took the notes, had reason to believe that Hull was insolvent and unable to pay both his individual and partnership liabilities.

The record before us is not such as to enable us to determine, even were it open to us to do so, whether appellant's relation to Hull's estate was such as to entitle it to the relief granted the Buggy Company.

The order of the District Court is affirmed.

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## TWENTY-ONE MINING CO. v. ORIGINAL SIXTEEN TO ONE MINE, Inc.

(Circuit Court of Appeals, Ninth Circuit. March 5, 1917.)

No. 2909.

1. MINES AND MINERALS ⇐38(7)—PROTECTION PENDING LITIGATION—DISSOLUTION—DISCRETION OF COURT.

Ordinarily, when title to property is in dispute, and one of the parties has obtained an injunction against the use or waste thereof by the other, the injunction in effect binds both parties, and when the one obtaining the injunction proceeds to do acts of the nature of those which his adversary is prohibited to do, the court will in its discretion be justified in dissolving the injunction and refusing its aid.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 91.]

2. MINES AND MINERALS ⇐38(7)—DISSOLUTION—DISCRETION OF COURT.

Complainant, who owned and operated a mine, was mining on a vein within the vertical plane lines of defendant's claim, asserting the right to do so on the ground that it had its apex in the surface of its own claim, and in its dip passed beneath the surface of the defendant's claim. Complainant was granted a temporary injunction, restraining defendant from continuing operations, but complainant, after entry of the order, commenced operations itself. Complainant had an organization of miners, and to cease work would cause great loss, and it kept accurate account of the tonnage and value of all ores extracted from the vein. *Held* that, in such case, though the right to the vein was in dispute, it

was not an abuse of discretion for the trial court to deny defendant's motion to vacate the injunction on complainant's recommencing work; the court offering defendant a cross-injunction in event of its giving an indemnifying bond similar to that executed by complainant.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 91.]

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Bill by the Twenty-One Mining Company, a corporation, against the Original Sixteen to One Mine, Incorporated. Complainant was granted a temporary injunction, and defendant's motion to dismiss was denied, although a cross-injunction was granted on condition that defendant furnish an indemnifying bond, and defendant appeals. Order affirmed.

The appellant and the appellee own adjoining lode mining claims. The appellee was mining on a vein within the vertical plane lines of the appellant's claim, asserting the right to do so on the ground that the vein had its apex within the surface of its own claim and in its dip passed beneath the surface of the appellant's claim. The appellant was mining, as the appellee alleged, on the same vein beneath the surface of its own claim at a lower level and at a point remote from the appellee's place of working. The appellant denied that the vein on which it was working had its apex in the appellee's claim, and asserted that the vein had its apex in its own claim. The appellee brought an action against the appellant to recover damages for extracting the ores on the vein, and at the same time, as ancillary thereto, filed its bill in equity to enjoin the continuation of the alleged trespass. The court below issued a temporary restraining order, and after a hearing issued a preliminary injunction against the appellant, upon the filing by the appellee of a bond in the sum of $30,000. Thereupon, upon the advice of its counsel, the appellee ceased its work on the vein within the vertical boundaries of the appellant's claim. Two months later it gave notice of a motion to compel the appellant to furnish a bond to indemnify the appellee against damages by reason of such cessation of its work. The court denied the motion. Thereupon the appellee notified the appellant of its intention to resume work, stating that its purpose was to raise the question of its right to an indemnifying bond from the appellant. After the appellee resumed work the appellant served its notice of a motion to dissolve the preliminary injunction, on the ground that the appellee had resumed mining, and thereby violated the spirit of its own injunction. The motion was denied, but the appellant was granted, if it so desired, a cross-injunction against the appellee upon furnishing an indemnifying bond in the sum of $30,000. This the appellant declined to do, and it took its appeal from the order denying its motion.

W. H. Metson, Frank R. Wehe, and Bruce Glidden, all of San Francisco, Cal. (Metson, Drew & Mackenzie and E. H. Ryan, all of San Francisco, Cal., of counsel), for appellant.

William E. Colby and Grant H. Smith, both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appellant contends that the function of the injunction was to maintain the status quo pending the litigation, and that it bound the appellee who applied for it as much as it did the appellant against whom it was directed, citing, among other authorities and text-writers, 3 Lindley on Mines, p. 2193, where it is said:

"It is a gross abuse of the process of the court for the complainant to disregard his own injunction, having, by means thereof, tied the hands of his adversary. This is particularly true where the purpose of the injunction is to maintain the property in statu quo during the suit; but such an injunction is not binding on the complainant, so as to subject him to the summary criminal proceeding for contempt, if he violates it. The defendant can either move to have the complainant's injunction dissolved because of the complainant's abuse of the process of the court, or, better, petition the court to force the complainant to restore the property, if possible, and enjoin him from any further acts."

To that text are cited Vanzandt v. Argentine Min. Co. (C. C.) 48 Fed. 770; Silver Peak Mines v. Hanchett (C. C.) 93 Fed. 76; Mowrer v. State, 107 Ind. 539, 8 N. E. 561; Haight v. Lucia, 36 Wis. 355. In the Vanzandt Case the bill alleged that the plaintiff owned a certain mine then in the possession of the defendant. On the plaintiff's application the defendant was enjoined from mining on the claim pending the suit. Thereafter the plaintiff ejected the defendant and took possession of the mine. Upon the defendant's application an order was made requiring the plaintiff to restore possession. Thereupon the defendant moved for an order requiring the plaintiff to show cause why he should not be punished for contempt in violating his own injunction. The court, Judges McCrary and Hallett sitting, said:

"The injunction did not by its terms, or of its own force, forbid the complainant to interfere with the possession of the mine pending the suit, and therefore he cannot be held to answer in this proceeding. It does not follow, however, that a complainant, in such a case as the present, can with impunity do the acts which, at his instance, the defendant has been restrained from doing. Where, as in this case, the evident purpose of the writ is to preserve the existing status of property in litigation until a final adjudicating can be had, it is gross abuse of the process of the court for the complainant to disregard his own injunction, after having by means thereof tied the hands of his adversary, and no doubt the court has ample power to prevent or redress such abuse. In this case the court did redress it, by ordering the complainant to restore the property to defendant, and to abstain from any further interference with the possession thereof pending the suit. If defendant had desired and asked a dissolution of the injunction, the court might have granted it, on the ground that complainant was no longer entitled to the exercise of the discretionary power of the court for his protection."

In Haight v. Lucia each party claimed to own certain land and the timber thereon. The plaintiff, after having obtained an injunction against the defendants, restraining them from cutting timber on the premises, entered upon the premises and felled a large quantity of the timber. The court said:

"At that time neither party had established a right thereto. In that respect they were on equal ground. If there were valid reasons for restraining the defendants from cutting the timber, it was proper, for the same reasons, to restrain the plaintiff also from doing the same act. Evidently the spirit of the injunction was to preserve the property in controversy, so that the prevailing party might have it unimpaired. The plaintiff invoked the extraordinary powers of the court to accomplish that purpose, and then, in entire disregard of the spirit and object of the injunctional order which he had obtained, attempted to seize and appropriate to his own use the most valuable portion of the property in controversy, before his right thereto had been adjudicated. This was a gross abuse by the plaintiff of the process of the court, which, to say the least, should have been severely censured by the court. Had an application therefor been made, the court would have been justified, had it

dissolved the injunction, and refused further to exercise its discretionary powers for the protection of the plaintiff. Courts should see to it that their process be not used as instruments of wrong and oppression."

In Mowrer v. State, in a similar case, the court said:

"Strictly speaking, the writ of injunction does not restrain the plaintiff. By its terms the writ ordinarily enjoins only the defendant. It does not follow, however, that the plaintiff can with impunity do acts which, at his instance, the defendant has been restrained from doing; and, where the purpose of an injunction is to preserve the existing status of property in litigation until a final adjudication can be had, it is a gross abuse of the process of the court for the plaintiff to disregard his own injunction, and to disturb the existing status of such property. The court granting the injunction has doubtless ample power to redress such an abuse by ordering the plaintiff to restore the status which he has disturbed, and requiring him to abstain from further interfering improperly with such property; also by dissolving the injunction, upon the ground that the plaintiff had forfeited his claim to the equitable relief which the injunction afforded him, in the event that his misconduct has been so gross as to justify such a proceeding."

In Maloney v. King, 30 Mont. 414, 76 Pac. 939, the court said:

"They [the defendants], being enjoined from working the disputed ground, desired that the plaintiffs should also be enjoined, so that the premises should remain in statu quo pending the litigation. However desirable such result would seem to be, it could have been attained in the original suit by petition on part of defendants, setting forth the facts and the reasons for such relief. Upon a hearing, if the court concluded that a proper showing had been made, it would undoubtedly have granted the relief sought."

In Johnson v. Hall, 83 Ga. 281, 9 S. E. 783, an injunction had been granted. Thereafter the plaintiff entered upon the land and commenced to cut the trees. The defendants filed a cross-petition, alleging title to the land, and alleged that the plaintiff was doing the very acts which they had been restrained from doing on his application. The court thereupon enjoined the plaintiff, but did not require the defendants to give a bond, as had been required of the plaintiff in the first injunction. The court said:

"Where both parties in good faith claim title to the same tract of land, and one of them is enjoined from entering or trespassing thereon upon the application of the other, the object of the injunction is to preserve the land in statu quo until the title is settled by the proper proceedings. The plaintiff has no more right to disturb the status quo than the defendants had; and it follows, as a matter of course, that, when the plaintiff undertook to commit the same acts that the defendants had been enjoined from committing, the court should have restrained him also, it appearing that both parties bona fide claimed the land."

The court proceeded to say that both parties should have been placed upon equal terms, and that defendants should have been required to give a similar bond to that required of the plaintiff.

[1, 2] The principle deducible from these decisions is that when the title to property is in dispute, and one of the parties to the suit has obtained an injunction against the use or waste thereof by the other, the injunction in effect ordinarily binds both the parties, and that when one obtains an injunction, and subsequently proceeds to do acts of the nature of those which his adversary is prohibited to do, the court will be justified in dissolving the injunction and in refusing further to ex-

ercise its discretionary powers for his protection. In all the authorities so cited there is a clear recognition that the power of the court so to deal with the party who violates his own injunction is discretionary, that in such a case an order made dissolving the injunction, or an order withdrawing the protection of the court, will not be held an undue exercise of the discretion, that the peculiar facts of each case must be dealt with as controlling the court's action, and that the dissolution of the injunction does not follow, as a matter of course or of absolute right, from the fact that the party who obtained it has disobeyed its commands.

It will be seen, also, that the facts in the case at bar differ to a certain extent from the facts in the cases cited, and that they present ground not found in those cases for the exercise of the discretion of the trial court to deny the motion to dissolve. In the Vanzandt Case the defendant was in possession. The plaintiff after enjoining it from mining, forcibly ejected it and proceeded to mine the ores. In the other cases cited the acts of the plaintiffs changed the existing status of the property in controversy. In the present case the court below, upon the complaint, the answer and the affidavits, found that, prima facie, it was shown that the vein on which both parties had been working had its apex in the appellee's claim. It was shown also that the appellee was working at a place remote from the place where the appellant was working and that it had an organization of miners, that if required to cease work on the vein it would have been compelled either to keep the miners employed at a considerable financial disadvantage or to discharge them, and that its loss in either event would be as great as that which the appellant might suffer from the injunction during the period of the litigation. It was further shown that from the time when it resumed work the appellee had kept accurate account of the tonnage and value of all ores extracted by it. Under these circumstances we would not be justified in holding that the trial court abused its discretion. On appeal to this court from an order of the trial court denying a motion to dissolve an interlocutory injunction the question is not whether this court, upon the showing made, would have allowed the motion, but it is whether it has been clearly shown that the trial court has abused its discretion and has plainly disregarded the facts, or has departed from the settled principles of equity established for its guidance in cases of this character. Vogel v. Warsing, 146 Fed. 949, 77 C. C. A. 199; American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 120 C. C. A. 644; Kansas City v. Sanitary Street Flushing Mach. Co., 224 Fed. 964, 140 C. C. A. 456.

The order is affirmed.

# HARRIMAN NAT. BANK v. SELDOMRIDGE.

(Circuit Court of Appeals, Second Circuit. February 8, 1917.)

No. 159.

1. BANKS AND BANKING ⊂=133—LIABILITY TO DEPOSITOR—TRANSFER WITHOUT AUTHORITY.

The cashier of a bank, corresponding in the name of the president, who was his father, borrowed from a correspondent bank in another city a sum of money on the joint note of himself and his father secured by collateral, a portion of which was forged by the cashier. Thereafter the cashier made a deposit slip, showing a deposit in his bank by his father of the amount of the loan by check on the correspondent bank. On being informed that his bank's account with the correspondent bank had been overdrawn, he instructed the latter to place the proceeds on the note then standing to the credit of his father to the bank's credit, which was done, and the amount was carried to the bank's credit for a month. On being informed by the president of the resignation of the cashier, the correspondent bank, without instruction, charged the amount of the note against the bank and credited the president's personal account with it, and thereafter charged the note against that credit. The receiver of the depositor bank brought action against the correspondent bank to recover that amount. *Held*, that the receiver was entitled to recover, there being no mistake or misunderstanding shown as to the account, since a bank cannot discharge its liability to account with the depositor to the extent of the deposit, except by the payment to him, or to the holder of a written order from him.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 339–352.]

2. BANKS AND BANKING ⊂=116(6)—REPRESENTATION BY OFFICER—KNOWLEDGE OF OFFICER—INTEREST ADVERSE TO BANK.

The knowledge by a bank cashier of the forgery by him of collateral for a loan, the proceeds of which were credited to the bank, is not to be imputed to the bank, since it was to the cashier's interest to conceal the forgery.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 287.]

3. APPEAL AND ERROR ⊂=997(3)—REVIEW—DIRECTION OF VERDICT—MOTION BY BOTH PARTIES.

Where both parties moved for direction of a verdict, there was no substantial question of fact to be decided, and, if the law was correctly applied by the trial judge, the judgment must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4024.]

In Error to the District Court of the United States for the Southern District of New York.

Action by Harry H. Seldomridge, as receiver of the Mercantile Bank of Pueblo, Colo., against the Harriman National Bank. Judgment for the plaintiff on directed verdict, and defendant brings error. Affirmed.

A judgment for $32,100 damages was entered by direction of the court in favor of the defendant in error, who was the plaintiff below. The parties will be referred to hereafter as they appeared in the District Court, viz., as plaintiff and defendant.

Wesselman & Kraus, of New York City, for plaintiff in error.

Barber, Watson & Gibboney, of New York City (Stuart G. Gibboney and George M. Burditt, both of New York City, of counsel), for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

COXE, Circuit Judge. [1] On January 28, 1915, a letter purporting to be signed by W. B. Slaughter stating that he was the president of the Silverton National Bank, at Silverton, Colo., was sent to J. W. Harriman, president of the Harriman National Bank of New York stating that he (Slaughter) wished to buy the control of the only other bank at Silverton, viz., the First National. In order to make this purchase he stated that he "would require for about 60 days $25,000 or $30,000." This letter was signed W. B. Slaughter, with a rubber stamp. On February 1, 1915, the Harriman National Bank telegraphed Slaughter:

"Letter received. Will accommodate you to extent thirty thousand dollars for sixty days, upon security and joint note yourself and C. C. Slaughter when you need it. Letter follows."

On February 6, 1915, all the stock of the First National Bank of Silverton was purchased from M. D. Thatcher and a check for $35,000 on the Mercantile National Bank was given in part payment therefor. This check was signed "W. B. Slaughter by C. C. Slaughter." In order to meet this check, C. C. Slaughter handed in a deposit slip of which the following is a copy:

Deposited with Mercantile National Bank of Pueblo by W. B. Slaughter
2-8-16.

Enter all checks separately with name of bank drawn on

| | Dollars | Cents |
|---|---|---|
| Currency | | |
| Gold | | |
| Silver | | |
| Checks | | |
| Harriman | 30,000 | |
| Total $ | 30,000 | |

C. C. Slaughter is the son of W. B. Slaughter and was cashier of the bank. W. B. Slaughter was engaged in the cattle business. On February 7th, C. C. Slaughter wrote to Joseph W. Harriman, president of the Harriman National Bank, a letter signed W. B. Slaughter, in which he says:

"I am herewith handing you the note, dated February 10, properly signed by myself and C. C. Slaughter and also inclose five hundred shares of the capital stock of the Mercantile National Bank and also four hundred shares of the First National Bank of Silverton, Colorado. Will ask you to kindly place the proceeds of this note to my credit. If for any reason this note is not satisfactory, kindly wire as I am drawing on the funds on Monday. * * * In fact, it will take us in all probabilities at least thirty days before we can consolidate the two banks."

The note was discounted by the Harriman National Bank and the proceeds placed to the credit of W. B. Slaughter on February 10, 1915.

On February 17th, the Harriman Bank telegraphed to the Mercantile Bank of Pueblo, Colorado, as follows:

"Checks presented your account appears to be overdrawn $8,000. Have you remitted to cover overdraft? Slaughter's personal balance is $30,000. Did you intend to loan proceeds for credit bank, wire."

In reply a telegram was sent dictated by C. C. Slaughter as follows:

"Place thirty thousand personal account W. B. Slaughter our credit.
"Mercantile National Bank."

On receipt of this telegram the Harriman Bank transferred $30,000 from the account of W. B. Slaughter to the account of the Mercantile Bank and asked for confirmation of authority to do so. This was answered by a letter dated February 22d and was signed "C. C. Slaughter, Cashier." On March 23, 1915, a telegram was received by the Harriman Bank signed W. B. Slaughter as follows:

"Cancel authority C. C. Slaughter as an officer this bank as of date to-day resigned."

On March 25th the assistant cashier of the Mercantile Bank telegraphed to the Harriman Bank asking for a statement of account. On March 26th, the Harriman Bank telegraphed to W. B. Slaughter as follows:

"W. B. Slaughter, President, Mercantile National Bank, Pueblo, Colorado.

"We credited your personal account thirty thousand dollars February tenth proceeds of loan. Under instructions from C. C. Slaughter February eighteenth we charged your personal account and credited account Mercantile National Bank with this thirty thousand dollars. Inasmuch as we have not received confirmation and instructions from you personally as requested we have this day charged Mercantile National Bank thirty thousand dollars and hold the amount out of their account and in our sundry account subject to adjustment of which please take note. Balance of Mercantile National Bank after this deduction is twenty three thousand dollars off.

"Harriman National Bank,
"John A. Noble, Cashier."

On March 30th, the note of W. B. Slaughter and C. C. Slaughter was charged against the credit of $30,000 held in the sundry account by the Harriman Bank. It appears from the Harriman Bank statement that the transfer of $30,000 to the credit of the Mercantile Bank was in part withdrawn. It also appears that the Harriman Bank had been doing business with the Mercantile Bank for at least three years and that at the close of business on March 25, 1915, there was a balance to the credit of the Mercantile Bank on the books of the Harriman Bank of over $53,000. If that sum, or any part thereof, was removed or misapplied, without authority from the Mercantile Bank, the receiver of that bank is entitled to recover. The Mercantile Bank never gave any orders, oral or written, which authorized the withdrawal of this fund.

On March 29th, the bank examiner in charge of the Mercantile Bank telegraphed to the Harriman Bank announcing the suspension of the Mercantile Bank. On the next day the Slaughter note was charged against the credit of $30,000. This would seem to have been

done without authority or right and was an arbitrary unauthorized act.

"The bank cannot discharge its liability to account with the depositor to the extent of the deposit, except by payment to him, or to the holder of a written order from him, usually in the form of a check." Leather Bank v. Merchants' Bank, 128 U. S. 26, 34, 9 Sup. Ct. 3, 4, 32 L. Ed. 342.

There was no mistake, confusion or misunderstanding about this $30,000 balance. It was expressly acknowledged by the Harriman Bank in its February statement. When and by what process did the Mercantile Bank lose the benefit of this credit? We are unable to find that it did lose this benefit.

[2] It is further urged by defendant that there was fraud in the negotiation of the loan by defendant to the Slaughters. This is true, as C. C. Slaughter deliberately forged a portion of the collateral attached to the note discounted by the Harriman Bank. It is also true that when the proceeds of that loan were transferred from the credit of W. B. Slaughter to that of the Mercantile Bank, the order for transfer was given by C. C. Slaughter as cashier of the Mercantile Bank; the same man who in his private capacity had perpetrated the fraud upon the defendant. On these admitted facts defendant urges that even if the transfer of credit from W. B. Slaughter to the Mercantile Bank was upon good consideration, the knowledge of fraud possessed by C. C. Slaughter must be imputed to the Mercantile Bank.

As the Mercantile Bank innocently paid out $35,000 on the faith of the expected transfer on the books of the Harriman Bank, we think the consideration too obvious for discussion. As to the imputation to the Mercantile Bank of C. C. Slaughter's knowledge of his own fraud, it was evidently to the latter's interest to conceal that knowledge, if he expected, as he obviously did, to be able to carry out the Silverton Bank transaction. Therefore what C. C. Slaughter knew is not to be imputed to the Mercantile Bank. The subject was sufficiently treated in our recent opinion in the Matter of the United States Hair Co., 239 Fed. 703, — C. C. A. —.

[3] As both parties hereto moved for the direction of a verdict there was no substantial question of fact to be decided. The law was correctly stated and applied by the trial judge, and the judgment is affirmed with costs.

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## FREY & SON, Inc., v. WELCH GRAPE JUICE CO.

(Circuit Court of Appeals, Fourth Circuit. Feb. 26, 1917.)

No. 1483.

1. MONOPOLIES ⟸28—ACTION FOR DAMAGES—EVIDENCE—ADMISSIBILITY.
In an action by a wholesaler against a manufacturer, who had refused to sell his product to plaintiff at less than the price charged retailers, because plaintiff had been selling the product at less than the price fixed by the manufacturer, where the declaration contained two counts, one for unlawful combination to control the price of the product, and the

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

other for unlawful discrimination against plaintiff, it was error to admit evidence offered by defendant that the profit to dealers on the product at the list price was the average profit on other groceries, that defendant was not in any combination with manufacturers of other brands of the product to control the price, and that by the custom of the trade the price at which the jobber was expected to sell was fixed by the manufacturer, all of which was irrelevant and incompetent under the issues.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18.]

2. APPEAL AND ERROR ⊜1050(2)—PREJUDICIAL ERROR—ADMISSION OF EVIDENCE.

In view of the novelty and difficulty of questions presented in an action for unlawful combination and discrimination, the admission of such evidence, in connection with remarks by the trial judge as to the importance of the issues involved, was prejudicial to plaintiff, as obscuring the real issues in the case, though the court correctly charged the jury as to the issues, and told them to disregard the economic questions made by the objectionable testimony; the rule that such a charge will make the error harmless being subject to exception, where the testimony has made such a strong impression on the jury that its withdrawal will not remove the effect caused by its admission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154.]

3. MONOPOLIES ⊜28—DAMAGES—MEASURE—LOSS OF PROFITS.

The measure of a jobber's damages for unlawful discrimination against him by a manufacturer whose product the jobber had been selling for several years, the sales increasing each year, is not limited to profits lost on sales which he proved he could have made; but the jury could have inferred, from the average increase of sales, the probable increase during the time of the discrimination, and could allow for the loss of profits on such sales.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18.]

4. MONOPOLIES ⊜28—DAMAGES—LOSS OF OTHER SALES.

A jobber, to whom a manufacturer of a well-known product refused to sell his product at less than the regular price charged to retailers cannot recover as damages the loss of profits on sales of other articles to customers desiring that product, who dealt with competing jobbers in order to get all their goods at the same place, since such damages are too remote and uncertain, and could have been prevented by the jobber buying the product at the retailers' price and reselling it without profit.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18.]

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action by Frey & Son, Incorporated, against the Welch Grape Juice Company. Judgment for defendant, and plaintiff brings error. Reversed.

Horace T. Smith, of Baltimore, Md., and Daniel W. Baker, of Washington, D. C., for plaintiff in error.

Charles P. Spooner, of New York City (John Hinkley and Thomas Foley Hisky, both of Baltimore, Md., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. This action is for damages under the federal statutes forbidding combinations and discriminations in restraint

of trade. The verdict was for the defendant, and the plaintiff asks a new trial for errors assigned in the admission of testimony and in the charge on the subject of damages.

There was evidence tending to support these allegations of the declaration: The defendant, a manufacturer and seller in Baltimore of an established article of commerce known as "Welch's Grape Juice," had an understanding or agreement with the jobbers to whom it sold that they should sell at not less than a fixed price to retailers. The plaintiff, a wholesale grocer in Baltimore, with a considerable trade in defendant's goods, being contented to take a smaller profit than others, began to sell at a lower price than that the defendant required its customers to charge. For this violation of its requirements the defendant refused to sell to the plaintiff, except at the list price which it required jobbers to charge retailers. This discrimination resulted in the entire loss of the profits which the plaintiff would have made in the regular course of its sales of Welch's grape juice and loss of trade in other commodities, since customers who desired Welch's grape juice and could not purchase it from the plaintiff transferred their general accounts to other jobbers, who could supply the grape juice.

The declaration was divided into two counts—the damages declared in the first count being for the alleged unlawful combination to control the price; and in the other for the alleged unlawful discrimination in price against the plaintiff. The defendant denied both the unlawful combination and the unlawful discrimination.

In the effort to avoid any appearance of an expression of an opinion on the merits, we have made only such statement of the case as seems necessary to an understanding of the point here involved. The law applicable to the issues of violation of the federal statutes was not in serious dispute.

Evidence was admitted over the objection of the plaintiff: (1) That the profit to dealers on Welch's grape juice at the listed price prescribed by the defendant was the average profit on other groceries; (2) that the defendant was not in any combination with manufacturers of other kinds of grape juice to control the price; (3) that by the custom of trade the price at which the jobber is expected to sell is fixed by the manufacturer.

[1] All of this evidence was irrelevant and incompetent. The issues made by the pleadings were whether there was an unlawful combination to control the price of grape juice, or unlawful discrimination against the plaintiff in charging him a greater price than other jobbers. If there was such a combination to require all dealers to sell at the price fixed by the manufacturer upon the penalty of not being allowed to sell on an equality with other traders, and the plaintiff was the victim of it, it was no defense to show that the plaintiff was required to charge only an average profit, or that it was the custom of trade for manufacturers to violate the law. Dr. Miles Medical Company v. Park & Sons, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. Nor would it avail the defendant, against the charges made by the plaintiff, to show that it had not violated the law by making a combination with manufacturers of other brands of grape juice.

[2] We cannot help thinking that all this testimony tended strongly to divert the minds of the jury from the real issue. The statutes against trusts, combinations, and discriminations in trade brought such new and unfamiliar prohibitions into the laws of trade that they have been only partially assimilated after a great effort by experienced and learned judges. The admission of the testimony referred to, taken in connection with the remarks of the presiding judge, in admitting some of it, as to the importance of the issues to be decided by the jury, must have been prejudicial to the plaintiff in obscuring the real and comparatively simple issues involved in the trial. It is true the charge in clear language stated the real issues and instructed the jury to disregard the economic questions that were made by the objectionable testimony. The general rule is that such a charge will be held to make harmless the error of admitting incompetent testimony, but the rule is not unbending.

"But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error." Throckmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663.

This was a case for the application of the exception stated.

[3] In his charge, and in interruption of counsel for plaintiff in the course of his argument, the District Judge limited the measure of damages to the profit that plaintiff would have made on two particular orders proved to have been given to the plaintiff which it was unable to fill, and to the profit the plaintiff would have made but for the alleged discrimination on 200 cases which it bought from another dealer at a higher price than that charged other dealers by the defendant. This, we think, was error. The damages recoverable were those which arose from the unlawful interruption of the plaintiff's business in selling Welch's grape juice. This damage could not as a matter of law be confined to the loss of profit on specific sales which the plaintiff might be able to prove; for in such case, when a merchant's business is broken into, it would ordinarily be impossible for him to know and prove all specific sales he had lost. The plaintiff testified that in the year 1911, before the alleged discrimination began, it sold 190 cases of Welch's grape juice, and it also proved the average increase of its general business for the succeeding years. This average increase of general business was evidence from which the jury could have inferred the probable increase of the sale of this brand of grape juice, had the plaintiff been able to purchase it on the same terms as other jobbers. This evidence, together with that offered by the plaintiff of the per cent. of profit made by it on sales of the grape juice, should have been submitted to the jury as data from which in connection with any other relevant facts they could arrive at the damage which the alleged combination and discrimination caused the plaintiff. 1 Sedgwick on Damage (9th Ed.) § 182, and cases cited.

[4] We agree with the District Judge that the damages arising from the incidental loss of general business in other commodities were too

remote and uncertain. Indeed, that loss, if any, the plaintiff might have prevented altogether by purchasing and selling the grape juice without profit.

Reversed.

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## THE P. R. R. NO. 32.

## THE JOHN J. HAGUE.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 110.

COLLISION ⊜99(7)—TOWS MEETING—MUTUAL FAULTS.

A collision occurred in the Kill von Kull in the channel between Shooter's Island and Staten Island, which is about 400 feet wide, between the tows of two meeting tugs, one having a single boat in tow and the other nine, in three tiers. The tows were passing starboard to starboard. *Held*, on the evidence, that the tug with the large tow was in fault for not allowing more room, the other tow being as close to the bank of Shooter's Island as it could get; that the other tug was also in fault for not waiting until the large tow had passed through the narrow channel, for not giving the proper bend whistle when approaching the island, and for failure to keep to the starboard side of the channel, as required by article 25 of the Inland Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 101 [Comp. St. 1913, § 7899]).

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202.]

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty for collision by Anthony O'Boyle, owner of the coal boat O'Boyle Brothers against the steam tug P. R. R. No. 32, the Pennsylvania Railroad Company, claimant, with the steam tug John J. Hague, the Tice Towing Line, claimant, impleaded. Decree for libelant against the P. R. R. No. 32, and her claimant appeals. Modified and affirmed.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Benjamin W. Wells, both of New York City, of counsel), for appellant.

Park & Mattison, of New York City (Henry E. Mattison, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. This is a suit in admiralty brought by the libelant as the owner of the coal boat O'Boyle Brothers against the steam tug P. R. R. No. 32, owned by the Pennsylvania Railroad Company. The latter, under the fifty-ninth rule in admiralty (Comp. St. Ann. 1916, p. 2706), has impleaded the steam tug John J. Hague, owned by the Tice Towing Line. The suit grows out of a collision which occurred on June 30, 1913. About 4 o'clock in the afternoon of that day the tug John J. Hague took in tow at Carteret, N. J., the O'Boyle Brothers and started for Jersey City. The O'Boyle Brothers was towed astern on two hawsers, which ran from the bow of the boat to the

stern of the tug and were about 25 feet in length. On approaching Shooter's Island in the Kill von Kull, the steamtug P. R. R. No. 32 was encountered with a tow of nine boats arranged in tiers of three boats abreast. The P. R. R. No. 32 was on the starboard side, the Staten Island side, of the John J. Hague. The collision took place at the upper end of Shooter's Island.

The master of the Hague testified that he first saw the P. R. R. No. 32 when he got within 400 feet of Shooter's Island. The tug Kimpland was ahead of his tug and going in the same direction he was. He testified he first saw that tug as she was "entering Shooter's Island" with a loaded mud scow on her starboard side. The Kimpland passed No. 32 on the Shooter's Island side of the channel, passing starboard to starboard. When the Kimpland got clear of No. 32's tow the Hague was probably 50 or 75 feet astern. The captain of the Kimpland testified that in going through his tug (the Kimpland) rubbed "along all the way" from the beginning to the end of tow No. 32, and that he went ahead very slowly. His testimony was, "I wasn't going at all, hardly." The Kimpland was a powerful tug, 95 feet long, and was about twice as large as the Hague. The Hague followed, but without the same success. The last scow, the deck scow in No. 32's tow, came into collision with the O'Boyle Brothers, which the Hague had in tow. The deck scow was in the last tier of the tow, and was the starboard boat in the tow, and struck the O'Boyle Brothers with the starboard bow corner, causing considerable damage.

The pilot of the Kimpland, who saw the collision, testified that the last boat in No. 32's tow was out of line, and that she stood about 2 feet outside of the other boats. Asked how the boats came into collision, he answered, "Well, the Pennsylvania scow fouled this canal boat, or whatever it was, that the Hague had in tow." He was asked what happened to the tow of No. 32 after he cleared it, and replied, "It floated across my stern as I passed by it," and "towards Shooter's Island." He also testified that the Hague and her tow was "right up against Shooter's Island." He was asked whether the Hague could have gone any further over that way, and he replied, "She was hard up against it." The master of the Hague testified that when the collision occurred his engines were stopped and his tow was up against the shore. He cleared the first two tiers of No. 32's tow without touching, but the last boat in the tier, which projected out, struck, and if that boat had been in line with the other tiers there would have been no trouble. There was some testimony to the effect that the O'Boyle Brothers took a sheer, which caused the collision. It is most improbable that any such thing happened, for the O'Boyle Brothers was held by two short hawsers, which were made fast to the stern bits of the Hague. Moreover, the wind, which was southwest, would have blown her the other way. It would naturally take No. 32's tow towards the Hague's tow.

The court below found no fault attributable to the Hague, and that No. 32 was alone at fault. We concur in thinking that No. 32 was at fault. She presented from her bow to the tail of her tow an obstruction some 500 feet long, gradually taking up more and more of the whole channel. No 32 was clearly in fault for not pulling her tow over

toward the Staten Island side of the channel, out of the way of the Hague and her tow.

The question remains to be considered whether the Hague was free from fault. The court below thought she was. We are unable to coincide in that opinion. It seems to us that, as No. 32 was proceeding with the tide and burdened with a tow of some proportions, she should have waited until No. 32 and her tow were out of the way. Moreover, as the two tugs were approaching each other in a narrow channel, with the bend at Shooter's Island between them, it was the duty of both tugs to sound a long blast of the whistle on approaching the bend. No. 32 did so. The Hague did not, and because she did not she is not free from fault. Moreover, the Hague is to blame for undertaking to force her way through and in following the lead of the Kimpland. She was bound to know that under the circumstances plainly visible the stoppage of No. 32's way would aggravate the effect of the wind on 32's tow, and that it would be more difficult for her to skin through between the tow and Shooter's Island than it had been for the Kimpland. The Hague was not bound to keep on going ahead. The passage of Shooter's Island is at all times difficult. If the Hague was afraid of the light tug, Brinton, which was on the Staten Island side of the channel, all she had to do was to stop with the tide against her and let No. 32 go by. But the fact that the Brinton was there really proved nothing. Light tugs can get out of the way, and it is not clear to us that she was blocking up the channel, or interfering with navigation on that side.

The collision occurred in a narrow channel; the Kill von Kull being at the place of collision about 400 feet wide. The narrow channel rule was applicable. Article 25 of the Inland Rules provides that:

"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

As the tug No. 32 was about in the middle of the channel, there was sufficient space on the Staten Island side for the Hague and her tow to have passed and to have obeyed the statute. The captain of the Hague tries to excuse himself for his failure to comply with the rules because "the Brinton was around in there," and "it wasn't safe," and that in doing so he "might have been crossing his (No. 32's) bow." His excuse is a futile endeavor to justify his failure to obey the statute. The testimony is clearly against him. The Brinton was back in her slip. Although she had started to come out, she had gone back in responding to the signal blown to her for the purpose by No. 32, and the weight of the testimony shows that there was no other boat there that was obstructing the channel. His own tug was only 17½ feet beam, and the scow he had in tow only 28 feet beam, so that if he had a channel of 200 feet, or even 100 feet, of clear water between No. 32 in the middle of a 400-foot channel and the Staten Island shore, it would have been perfectly safe for him to have gone that way. There is no sufficient excuse for her being on the wrong side of the channel.

It is undoubtedly true that the narrow channel rule must be construed in the light of common sense, and that it is not an inflexible

rule to be followed in all cases, but only when it is safe and practicable. But the evidence satisfies us that in this case it would have been safe and practicable to have obeyed it. Both tugs being at fault, the amount of the stipulated damages must be divided between them.

The decree must be modified in accordance with this opinion, and, so modified, is affirmed.

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SHOOK v. LEVI.

In re FARMERS' DAIRY ASS'N.

(Circuit Court of Appeals, Ninth Circuit. March 5, 1917.)

No. 2868.

1. BANKRUPTCY ⟸140(1)—POSSESSION OF PROPERTY BY TRUSTEE—ACTIONS—EVIDENCE—SUFFICIENCY.

In a proceeding to compel a trustee to return property found in possession of a bankrupt, on ground that title had not passed and the sale was conditional, evidence *held*, in view of the minutes of the bankrupt corporation as to the purchase, to warrant a finding that the sale was only conditional, and that title did not pass.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199.]

2. CORPORATIONS ⟸426(10)—PRESIDENT—POWERS OF—RATIFICATION.

Where a corporation took possession of, and exercised rights of ownership over, horses purchased by its president, it thereby ratified the president's purchase, and estopped itself to deny his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1704, 1714.]

3. SALES ⟸479(7)—CONDITIONAL SALES—BURDEN OF PROOF.

One claiming that a sale is conditional has the burden of proving it by a preponderance of the evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1427.]

4. SALES ⟸460—CONDITIONAL SALES—STATUTES.

In the absence of statute, a conditional sale may be verbal.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1348.]

5. SALES ⟸479(7)—CONDITIONAL SALES—NOTE.

The acceptance of notes for the balance due on the purchase price of chattels is not conclusive evidence that the sale was absolute, and not conditional, although it is a fact to be considered in determining the question.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1427.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Ben. F. Bledsoe, Judge.

In the matter of the bankruptcy of the Farmers' Dairy Association. Proceeding by A. Levi against A. M. Shook, trustee in bankruptcy, to require the return of property. From an order and judgment of the District Court (234 Fed. 118), on petition for review of the order of the referee, directing the return of the same, the trustee appeals. Affirmed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The appellant is trustee of the Farmers' Dairy Association, a bankrupt. As such trustee he came into possession of nine head of horses, which he claims title to as an asset of the bankrupt's estate. On September 13, 1915, A. Levi, the appellee, filed in the court below a petition claiming the legal title to the horses, and praying that they be adjudged to be his property. The basis of his claim is that prior to the time that the Dairy Association came into the possession of the property he was the absolute owner, that he sold the same to the association by conditional sale, the title not to vest until the full purchase price was paid by the association, and that promissory notes were given appellee for such balance of the purchase price as remained unpaid. Issue being joined, trial was had before the referee in bankruptcy, resulting in an order and judgment in favor of the appellant that he was owner of the horses. From this judgment a review was taken to the District Court, which held that the transaction had between the parties respecting the horses did not constitute a conditional sale, but that, under the circumstances, the only fair and equitable thing to do was to hold that the petitioner was still the owner of the horses, and that the bankrupt corporation was entitled to a return of so much of the purchase price as had been paid thereon, less such sum, not to exceed the amount paid, as would reimburse the petitioner for the reasonable value of the use of the horses during the time that they were in possession of the bankrupt. Order and judgment having been entered accordingly, the trustee prosecutes review to this court.

A. L. Wissburg, of San Diego, Cal., for appellant.

James E. O'Keefe, of San Diego, Cal., for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. [1] The question presented is largely one of fact. A brief statement of the evidence is to be found in the record, and from this it must be determined whether the alleged sale was absolute or conditional only. Manifestly the horses were contracted to be sold to the dairy association by piecemeal; that is to say, two at one time, two at another, and the remaining five at still another. The principal negotiations seem to have been had between the appellee and N. J. Peavy, who was president of the association, and as the evidence indicates was at certain times during "said period" manager thereof. Peavy relates that he and the appellee negotiated for the sale and purchase of two of the horses, and that they were sold to the association; that Levi stated at the time, and witness "understood, that title to the horses was to remain in seller until the purchase price therefor had been paid"; and that promissory notes representing the purchase price were given by the association. Later a like understanding was had with respect to two other horses, and still later with respect to the remaining five.

The appellee confirms the testimony of Peavy, and other witnesses, among whom were two of the directors of the association, corroborate both in part. There is nothing in the record in disparagement of this testimony, except that the property was thereafter treated by the association as an asset thereof, and further the minutes of the board of directors of the association show that four of the horses were purchased by it, the terms stated therein being that they were purchased at a consideration named, one-half due in six months, one-fourth in nine months, and the balance in one year, without mentioning that the pur-

chase was conditional upon the payment of the purchase price. As to the remaining five the minutes appear to be silent. The minutes further show that certain payments had been made towards the purchase price of the horses. All negotiations touching the sale of the horses were by word of mouth, except the giving of the notes for the purchase price.

A careful survey of the testimony can lead to but one conclusion, and that is that there was a verbal conditional sale of the horses by the appellee to the Dairy Association, the legal title to remain in appellee until the property was paid for, and that no title passed to the association by reason of its not having paid the purchase price. If it be argued that it has not been shown that the president of the association was authorized to make the purchase in behalf of the association, it may be answered that as to part of the horses there was a ratification of the purchase by action of the board of directors. True, the statement of the terms of purchase in the minutes does not correspond wholly with the terms as claimed by the appellee. But the minutes should be read in the light of the entire evidence, and, when so read, they must, where seemingly contradictory, give way to the true intention of the parties, which we believe was truthfully indicated by the testimony of Peavy and the appellee.

Serrano and Kimball, two of the directors of the association, say that the matter—that is, the contract between Peavy and the appellee—was brought to the attention of the board of directors, and that they took action on it.

[2] As to the remaining horses, the association assumed the possession and used them, and treated them as if it were the owner, and thus it has ratified the purchase by its own acts, or perhaps, more correctly speaking, it has estopped itself to deny the authority of its president to contract for it.

[3] In coming to this conclusion, we apply the rule which places upon the party who affirms that the sale is conditional the burden of proving it by a preponderance of the evidence. In re Leeds Woolen Mills (D. C.) 12 Am. Bankr. R. 136, 148, 129 Fed. 922. We apply, also, the following principles supported by adjudications:

[4] A verbal contract for the sale of personal property, when the seller retains the legal title, conditional upon full payment of the purchase price, is valid, if not otherwise in contravention of the statute of frauds. Meier & Frank v. Sabin, 214 Fed. 231, 130 C. C. A. 605. The doctrine seems to be recognized in California. Wise v. Collins, 121 Cal. 147, 53 Pac. 640.

[5] Nor is the acceptance of notes for the balance remaining due of the purchase price conclusive evidence that the sale was absolute, and not conditional. The fact is but a circumstance in determining the nature of the contract. Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339; Perkins v. Mettler, 126 Cal. 101, 58 Pac. 384.

The order and judgment of the District Court is as favorable to appellant as he could expect.

Affirmed.

## COURTNEY v. OHL.

(Circuit Court of Appeals, Third Circuit. March 8, 1917.)

No. 2190.

CORPORATIONS ⊂=269(3)—ASSESSMENT AGAINST STOCKHOLDERS—EVIDENCE—FRAUD.

In an action by the trustee of a bankrupt corporation against a stockholder to recover an assessment made on his stock subsequent to bankruptcy, evidence *held* insufficient to support the charge that the stockholder, who was one of a committee, before he owned any stock in the corporation, to appraise the property turned over to the corporation in exchange for its stock, made a valuation in bad faith and with knowledge that it was grossly excessive.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 887, 888, 1154–1159, 2277.]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by Joseph S. Courtney, as trustee in bankruptcy of the estate of the Groveland Mining Company, against Edwin N. Ohl. Judgment for the defendant on directed verdict, and plaintiff brings error. Affirmed.

S. H. Holding and Thompson, Hine & Flory, all of Cleveland, Ohio, and John D. Evans, of Pittsburgh, Pa., for plaintiff in error.

H. B. McGraw, of Cleveland, Ohio, and J. N. Martin and Norman A. Martin, both of New Castle, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Joseph S. Courtney, a citizen of Michigan, trustee in bankruptcy of the Groveland Mining Company, a corporation of that state, brought suit against Edwin N. Ohl, a citizen of Pennsylvania, a stockholder in that company, to recover an assessment made subsequent to bankruptcy, on his stock. The cause was tried by a jury, and at the conclusion of the testimony of both sides the court gave binding instructions for defendant. Thereupon plaintiff sued out this writ and assigned for error such action of the court.

The question here involved is therefore: Did the pleadings and proofs establish any liability of Ohl to the Groveland Mining Company, for it is manifest that, unless such liability of Ohl to the company existed prior to bankruptcy, the company's bankruptcy did not create any liability. As it is conceded there was no subscription or other express contract by which Ohl obligated himself to pay money to the Groveland Mining Company, it follows that any liability on his part here sued upon must be an implied contract which the law creates. Turning to the pleadings, then, for a statement of the implied liability sued on, we find it set forth on these alleged facts, namely:

"That for a long time prior to and at the date of the adjudication of said corporation as a bankrupt, its outstanding capital stock was two hundred

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

thousand dollars ($200,000.00), divided into eight thousand (8,000) shares of twenty-five dollars ($25.00) each. That the original subscribers of the capital stock of said corporation, and the number of shares subscribed for by each, were as follows:

| | |
|---|---|
| George W. Youngs | 2026 shares |
| J. H. Bartow | 2026 shares |
| D. T. Croxton | 2665 shares |
| W. H. Becker | 1280 shares |
| Frank W. Youngs | 3 shares |

"That all of said capital stock was issued for and in consideration of the assignment to said corporation of a certain option. That *prior to the incorporation* and in anticipation thereof, the above-named subscribers and incorporators, together with Edwin N. Ohl and E. D. Carter, *entered into a pretended valuation* of the potential lease mentioned in the option hereinbefore referred to, and pretended to value such potential lease at one hundred ninety thousand five hundred and twenty-five dollars ($190,525.00). That said option transferred to said corporation in payment for said stock was worthless and without value, and that the valuation of one hundred ninety thousand five hundred and twenty-five dollars ($190,525.00) aforesaid, was not made by said incorporators and stockholders honestly and in good faith, but was made with knowledge on the part of said incorporators and stockholders that said valuation was grossly excessive."

Assuming for present purposes that the facts stated would, if proved, establish a liability on the part of Ohl, a study of the proofs shows that no such alleged acts were done or in any way participated in by Ohl.

Without discussing all the proofs, we restrict ourselves to such as are pertinent to the issue between him and the company. The Groveland Mining Company was a corporation formed under the laws of Michigan, with a capital stock of $200,000, divided into 8,000 shares, of $25 each. Its articles of incorporation, filed with the secretary of state on August 3, 1907, recited that no cash was actually paid in on the capital stock, but that contemporaneously with its organization certain property, consisting of an option on certain ore lands, was conveyed to it, and that the value of such option was $190,500. In addition thereto, some $9,500 were expended in putting the ore banks in workable shape. The property, thus acquired by lease, consisted of an iron ore mine which had theretofore been leased and developed by another company at an expense of about $150,000 and was subsequently surrendered by it to the owner. The mine contained a large amount of knocked-down or already mined ore, which could be marketed when the water was pumped from the mine. The mine was operated by the Groveland Company until it went into bankruptcy about six years thereafter. There was conflicting testimony as to the value of the lease, but there is no testimony whatever to show any purpose to defraud any one in making such valuation. The corporation had but a few stockholders. The only attempt to dispose of its stock seems to have been amongst those who were in some may interested in either the marketing or the consumption of its product, and who were fully advised as to what had been done. Thus J. H. Bartow, the promoter of the Groveland Mining Company, and one of the original subscribers of its stock, controlled the Lake Erie Ore Company, of Cleveland, Ohio, which was the exclusive selling agent for the

entire product of the mine during the whole time it was operated, and became also the owner of 2,339 shares of the Groveland stock. So also Ohl, who was a furnace manager, bought some of the ore for plants he was interested in and became the owner of 1,000 shares of the Groveland stock. There is no evidence whatever to connect Ohl in any way with the organization of the company, or the valuation of the lease. He had no dealings of any kind with the company itself concerning this stock. He was told by Bartow, the promoter, that he was forming such a company, and was offered by Bartow stock in it at the price it had cost Bartow. He agreed to buy 1,000 shares of it, and paid Bartow about $1,200 personally as full-paid stock for it. Toward making up this 1,000 shares, Bartow used some of his own and procured some from his associates. Some 760 shares were transferred to Ohl by Bartow from stock issued to the latter and the certificates for the balance of 240 shares were issued direct by the company to Ohl at Bartow's instance. In no way did Ohl have dealings with the company.

Such being the case, it is clear that the allegations of the plaintiff's claim, quoted above, were not sustained by the proofs, and, indeed, the contrary was proven to be the case. It is therefore manifest that no grounds of recovery against Ohl were shown, and the court below committed no error in so instructing the jury.

The view we have taken of the controlling issue of the case renders it needless for us to discuss other questions discussed in the opinion of the court below, and in the brief and arguments in this court.

The judgment below is affirmed.

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## AMERICAN WAREHOUSE & TRADING CO. v. DAVISON LUMBER CO. et al.

(Circuit Court of Appeals, Second Circuit. January 16, 1917.)

No. 134.

1. SHIPPING ⟸50—CHARTERS—LIABILITY FOR WHARFAGE.

A charterer, who contracts for wharfage for the vessel, without disclosing that he is acting for any one else, is liable therefor, although by the terms of the charter, as between him and the owners, the liability is primarily on the latter.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 150–155.]

2. SHIPPING ⟸207—LIMITATION OF LIABILITY.

Rev. St. §§ 4283, 4285 (Comp. St. 1913, §§ 8021, 8023), limiting the liability of vessel owners for torts committed without their privity or knowledge, and Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (Comp. St. 1913, § 8028), extending the limitation to other debts and liabilities, are in pari materia, and the latter exemption does not extend to contracts made personally by or with the consent of a part owner.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 555, 643, 644.]

Appeal from the District Court of the United States for the Southern District of New York.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit in admiralty by the American Warehouse & Trading Company against the Davison Lumber Company, with Winfield S. Pendleton impleaded. From the decree, libelant and respondent Pendleton appeal. Modified.

Haight, Sandford & Smith, and John W. Griffin, all of New York City, for appellant American Warehouse & Trading Co.

Avery F. Cushman, of New York City, for appellant Pendleton.

Kelly & Hewitt, of New York City, for appellee.

Before COXE, WARD, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The libel was filed against the Davison Lumber Company, the charterer of the schooner Mount Hope, to recover wharfage furnished to her at Hoboken, N. J., between December 24, 1915, and January 23, 1916. The Lumber Company brought in the respondent Winfield S. Pendleton a part owner of the schooner, under the fifty-ninth rule in admiralty (29 Sup. Ct. xlvi).

The charter party was between the master of the schooner and the Davison Company, and was signed in the master's name by Pendleton Bros., Incorporated, the agents of the schooner. It was for the carrying capacity only, and was not a demise. When signed by Pendleton Bros., Incorporated, it contained the clause, "vessel to be free of wharfage," which the Davison Company struck out before signing. As the parties proceeded to perform the charter so altered, it is in our opinion to be treated as if it had never contained the clause in question. The obligation of paying wharfage lay, as usual, upon the vessel and owners.

[1] The Davison Company, without disclosing that it was acting for any one else, applied to the libelant for the berth, agreed upon the charge for wharfage per day, and sent the vessel there. It was therefore clearly responsible to the libelant, even though the liability between it and the owners was primarily on the latter. In this particular we disagree with Judge Smith.

At the time the charter party was executed, the schooner and her master were both at St. Johns, New Brunswick, and the master was quite without authority to make a charter, or to authorize any one else to make a charter, of the vessel in her home port. Pendleton Bros., Incorporated, were, however, the vessel's agents at New York, and the respondent Winfield S. Pendleton, who was vice president and a director of the company, was also managing owner, so that the charter party made by authority of the master must be regarded as having been fully ratified by the agents and managing owner.

Winfield S. Pendleton, in his original answer to the petition under the fifty-ninth rule, claimed that any decree against him must be confined to his share of the vessel. But in the court below his liability, as affected both by the act of March 3, 1851 (Rev. Stat. U. S. §§ 4283–4285, Comp. St. 1913, §§ 8021, 8023), as well as by the act of June 26, 1884, was fully considered, and we denied his application to amend his answer in this court by specifically claiming the benefit of

the act of 1884, on the ground that the cause was fully before the court and no amendment was necessary.

[2] It is now perfectly well settled that the acts of 1851 and 1884, are to be construed in pari materia. The former conferred exemption as to torts occurring without the privity or knowledge of the owner, and the latter extended this privilege to debts and other liabilities of the owner. It is well established that this exemption does not apply to contracts made personally by or with the consent of a part owner. McPhail v. Williams (D. C.) 41 Fed. 61; Gokey Co. v. Fort (D. C.) 44 Fed. 364; Great Lakes Towing Co. v. Mills Transportation Co., 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769; Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110. It is not easy to lay down a hard and fast rule as to the latter contracts. Each case must depend upon its own facts. Liabilities which are imputed as matter of law, without any personal intervention of the owner, are certainly within the exemption. We have considered the subject in The Loyal, 204 Fed. 930, 123 C. C. A. 252, and Benner Line v. Pendleton, 217 Fed. 497, 133 C. C. A. 349. In the instant case Pendleton, as managing owner and vice president and director of Pendleton Bros., Incorporated, the vessel's agents, must be taken to have had knowledge of the charter party and to have ratified it. Otherwise it would have been invalid, because of the master's want of authority. Therefore Pendleton is as much personally bound as if he had signed the charter party, or directed it to be signed. In McPhail v. Williams, supra, Williams, a part owner, was held personally responsible for supplies ordered in the home port by another part owner with his knowledge and consent. In Gokey v. Fort, supra, Judge Brown said:

"But the respondents were individually liable for the contracts of their managing agent, made in the home port, in the ordinary repair of the vessel, these repairs being known and approved by some of the owners. The Two Marys (D. C.) 10 Fed. 923; Scull v. Raymond (D. C.) 18 Fed. 549. It has been held that the limitation provided by the act of 1884 upon the liabilities of the owners 'on account of the ship' does not extend to their personal contracts, but only to the debts and liabilities that arise out of the navigation or business of the ship, or from the contracts of the master, under his general powers in the course of the voyage. The Amos D. Carver [D. C.] supra [35 Fed. 669]; McPhail v. Williams [D. C.] 41 Fed. 61. Such has long been the construction of the broad provisions of the ordinance of Louis XIV, as well as of the similar provisions of section 216 of the Code of Commerce (1 Valin, Comm. 569); Emerigon Cont. a la Grosse, c. 4, Sec. 11; 2 Desjardin, Droit, Com. Mar. §§ 283–286; 2 Valroger, Com. du Code de Com. § 256. And, in general, repairs made in the home port by the owners, or by their authorized agent, are treated as the personal debts of the owners, and cannot be discharged by a surrender of the vessel. It is the same with the captain's foreign contracts from the time they are ratified by the owners. Several of the maritime codes thus expressly provide. See Italian Code Mar. § 491; 3 Revue Internat. du Droit Mar. 316, 318; 4 Revue Internat. du Droit Mar. 337–339; and Desjardin, ut supra. Valin says: 'There are cases, however, in which the owner cannot free himself by making this abandonment. * * * The reason is, because these debts are his own personal debts, as much as if he had contracted them himself.' 'It is universally recognized in modern law' says Desjardin (section 283), 'that the right of abandonment cannot be invoked by the owner in order to limit his own personal obligation. The right of abandonment ceases also if the obligation at first contracted by the captain is ratified by the owner; it is the same as if the owner had acted

himself. Section 284. All legislations that permit the owner to limit his obligation by abandonment disallow this right from the time he has transformed the captain's engagement into his own personal obligation.'"

The decree is modified, by making the award, with interest and costs, payable to the libelant primarily by Winfield S. Pendleton, and secondarily by the Davison Company.

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## MOUND COAL CO. v. JEFFREY MFG. CO.

(Circuit Court of Appeals, Fourth Circuit. December 22, 1916.)

No. 1369.

1. APPEAL AND ERROR ⟸515(1)—HARMLESS ERROR.
Plaintiff in error was not prejudiced by the lower court's refusal to incorporate in the record an epitomized statement of the testimony; the rule of court, requiring such evidence to be brought to the appellate court by bill of exceptions, precluding its consideration, and a complete transcript thereof being incorporated in the record.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2322; Dec. Dig. ⟸515(1).]

2. APPEAL AND ERROR ⟸544(1)—BILL OF EXCEPTIONS—NECESSITY.
There being in the record an agreed statement of facts, which the court used as a basis of its judgment, a bill of exceptions to support an assignment to the rendering of judgment for a certain amount is not required.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412–2415, 2418–2420, 2422–2426; Dec. Dig. ⟸544(1).]

In Error to the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

On petition for rehearing. Granted.

For former opinion, see 233 Fed. 913, 147 C. C. A. 587. See, also, 215 Fed. 222.

Hubbard & Hubbard, of Wheeling, W. Va., for plaintiff in error.

W. Wilson Carlile, of Columbus, Ohio (J. Coleman Simpson, of Moundsville, W. Va., and J. B. Sommerville, of Wheeling, W. Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This case was decided at the May term, 1916. A petition for rehearing was presented June 17, 1916, in which it appears that plaintiff in error grouped the evidence in narrative form, but opposing counsel objected to the same; that the matter was then presented to the trial judge, who refused the request of plaintiff in error to incorporate the same as a part of the record. This question was presented to us in the first instance in the nature of a motion that the cause be remanded to the court below, with instructions to transmit to this court the proposed statement. The motion was not accompanied by a copy of the proposed statement of evidence, so that we might determine as to whether it was material

to the issues involved in this controversy. The statement in question obviously contained only the oral testimony offered in the court below, for the reason that there was a stipulation as to most of the essential facts incorporated in the statement of facts by the court below, and an examination of the same shows that the rule invoked by plaintiff in error could have no application to a stipulation of this character, inasmuch as it is already in the briefest possible form.

[1] Counsel for plaintiff in error did not appear at the time the case was heard in this court. Therefore we have no means of knowing what the narrative statement contained. As we have stated, plaintiff in error offered oral testimony in the court below, and if it is now the purpose of counsel to have an epitomized statement of the same transmitted to this court, the rule of court which requires such evidence to be brought here by a bill of exceptions would preclude us from considering this particular evidence. It also appeared when this case was heard before that a complete transcript of the evidence was incorporated in the record. Under these circumstances we were of opinion that the plaintiff in error was not prejudiced by the ruling of the court below, and we still entertain the same views.

The petition for rehearing in this instance is based upon the motion at the former hearing to remand this cause, with instructions to the lower court to settle and determine the controversy between the parties as to the prepared statement to which we have referred. This motion, for the reasons stated, is denied. It is further based upon three assignments of error. We think that the second and third assignments of error are without merit. The fourth assignment is in the following language:

"The court erred in making its last-mentioned order sustaining the plaintiff's motion for judgment, and entering judgment against the defendant for the sum of $8,726.85, with interest from the said date and costs."

[2] A rehearing will be granted as respects the fourth assignment, inasmuch as we are of opinion upon further consideration that the plaintiff in error is entitled to be heard as to the merits of this assignment, for the reason that there appears in the record an agreed statement of facts which the court below used as a basis of its judgment, and therefore a bill of exceptions to support this assignment is not required.

Rehearing granted.

## SHRAUGER & JOHNSON v. PHILLIP BERNARD CO.

(District Court, N. D. Iowa, W. D. March 8, 1917.)

1. COURTS ⟹255—FEDERAL COURTS—JURISDICTION.
The jurisdiction of the federal courts, whether original or appellate, must be derived from the Constitution and acts of Congress.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 792, 794, 805.]

2. COURTS ⟹290—FEDERAL COURTS—JURISDICTION.
In a suit between citizens of the same state brought in the federal court on the ground that a patent was involved, the court cannot, on the theory that having taken jurisdiction it should dispose of all controversies between the parties, grant an injunction restraining unfair competition regardless of the infringement of the patent, where the two matters were wholly separate; for as the jurisdiction of the federal courts is limited by statute, the rule that a court of equity, having taken cognizance of a case upon any ground on which jurisdiction is given, will proceed to dispose of the whole controversy between the parties, does not apply.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 832.]

In Equity. Bill by Shrauger & Johnson against the Phillip Bernard Company. On application for temporary injunction. Application overruled.

Orwig & Bair, of Des Moines, Iowa, for plaintiff.
T. F. Griffin, of Sioux City, Iowa, for defendant.

WADE, District Judge. The application for temporary injunction in this case was heard upon request of Judge Reed. Proof was offered which satisfies me that in some respects the defendant was guilty of unfair competition.

There was no proof offered as to the validity of the patent, though numerous affidavits in opposition thereto were presented. At the close of the hearing, I submitted to counsel the question as to whether temporary injunction restraining unfair competition should be granted without any proof as to the patent, the controversy as to which alone gives the court jurisdiction.

[1] Briefs have been furnished, and I have made a careful investigation of the authorities, which I find to be apparently very much in conflict, though, upon a careful study, I think it will be found that the conflict is more apparent then real.

"It must be observed in the outset, and never forgotten, that the jurisdiction of the courts of the United States, depending on the subject-matter or character of the case, whether exercised directly as original jurisdiction, or indirectly in the form of appellate jurisdiction over final judgments of the state courts, extends to, and is limited by, the class of cases specified in the Constitution, in which the jurisdiction depends upon the character of the case." Nashville Ry. v. Taylor (C. C.) 86 Fed. 168.

"As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it." Mayor v. Cooper, 6 Wall. 252, 18 L. Ed. 851.

Upon the averments of the bill charging infringement of a patent, there is no question but that the court has jurisdiction of the case; at least in so far as the case seeks relief, based upon the patent, and of other things incidental thereto.

[2] Counsel for plaintiff insist that, the court having jurisdiction as to the controversy over the patent, it also has jurisdiction upon the matter of unfair trade, even though such matter has no connection whatsoever with the patent, and they rely for this claim upon the rule of equity that:

"Having taken cognizance of the case upon any ground upon which jurisdiction is given, the court will proceed to dispose of the whole controversy between the parties."

Broadly stated, I do not agree with this proposition. I do agree with the proposition, if the word "controversy" is limited to include only the questions arising directly or indirectly out of the subject-matter which gives the court jurisdiction. I cannot agree that a suit may be brought upon a patent in the United States court in a controversy as to which the court would have jurisdiction, and that plaintiff can join therewith a suit for specific performance of a contract to convey real estate in no manner connected with the patent controversy, or an action to enjoin the defendant from trespassing upon the plaintiff's homestead. I believe that the court would be compelled to strike out these two causes of action upon motion, or upon its own motion; but if this were not done, and the parties proceeded to trial, and the court held that the defendant was entitled to recover in the controversy over the patent, I do not believe that the court would have jurisdiction to retain the other two causes of action and decide them, the parties being residents of the same state, and the cases involving no questions arising under the laws of the United States.

So far as the question is before this court, the cause of action for unfair competition is entirely independent of the cause of action based upon the patent, and of such proceeding by itself it has been repeatedly held that, where the parties are residents of the same state, as in this case, the United States court has no jurisdiction.

In many cases the element of unfair competition has been included with the charge of infringement of a patent, or a trade-mark, and, where the court held that there was infringement, the court properly retained jurisdiction upon the question of unfair competition, because it was an element that entered into the damages caused by the wrong.

In certain cases where there was combined the charge of infringement, and also unfair competition, courts have held that, even though the claim of infringement was decided in favor of the defendant, the court still could retain jurisdiction upon the question of unfair competition; but the large majority of the cases are the other way.

I think the rule is properly stated in Ross v. Geer (C. C.) 188 Fed. 731, where it is said:

"If having jurisdiction for one purpose, the court may retain and exercise jurisdiction for every purpose, still that purpose, or those purposes, must be to enjoin or restrain some act or acts done in connection with the acts creating the cause of action which gave the court jurisdiction."

This principle is applied by Judge McPherson in People's Sav. Bank v. Layman (C. C.) 134 Fed. 635.

In Louisville Trust Co. v. Stone, 107 Fed. 305, 46 C. C. A. 299, it is said:

"When the jurisdiction has properly attached, it extends to the whole case, and to all the issues involved, whether of a federal or non-federal character, and the court has power to decide upon all questions involved."

This broad statement is somewhat doubtful in view of the attitude of the Supreme Court of the United States in Warner v. Searle, 191 U. S. 195, 24 Sup. Ct. 79, 48 L. Ed. 145, in which it is said:

"The courts of the United States cannot take cognizance of an action on the case or a suit in equity between citizens of the same state, 'unless the trade-mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe.'"

In A. Leschen Co. v. Bascom Co., 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710, in which a trade-mark was involved, but where the decision on this point was against the plaintiff, it is said:

"Nor can we assume jurisdiction of this case as one wherein the defendant has made use of plaintiff's device for the purpose of defrauding the plaintiff and palming off its goods upon the public as of the plaintiff's manufacture. Our jurisdiction depends solely upon the question of whether plaintiff has a registered trade-mark, valid under the act of Congress, and, for the reasons above given, we think it has not."

In Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536, the court says:

"The case at bar is within the letter of the statute. The opposite parties to the suit are citizens of different states, and while this diversity of citizenship was not necessary to give the Circuit Court jurisdiction of the case in so far as it involved the validity of the trade-mark, it was necessary to give the court jurisdiction of the issue of unfair competition."

Numerous decisions of the District Courts and the Circuit Courts of Appeal squarely hold that the issue upon a trade-mark and unfair competition cannot be joined.

Judge Chatfield, in Johnston v. Brass Goods Co. (D. C.) 201 Fed. 368, says:

"As well could infringement and an action for specific performance of a contract to sell real estate between the parties to the suit be united, on the ground that the court had jurisdiction of the parties."

Other authorities to the same effect are C. L. King & Co. v. Inlander (C. C.) 133 Fed. 416; National Casket Co. v. New York & Brooklyn Casket Co. (C. C.) 185 Fed. 533; Mecky v. Grabowski (C. C.) 177 Fed. 591; U. S. Co. v. Kroncke Co. (7th Cir.) 234 Fed. 868, — C. C. A. —; and numerous cases cited in the foregoing.

There are cases holding the other way, but careful examination of them destroys their value as supporting the claim of the plaintiff. For instance, in Jacoway v. Young, 228 Fed. 630, 143 C. C. A. 152 (8th Cir.), the trade-mark was found to be valid, and the court says:

"The trade-mark found to be valid, the District Court had jurisdiction of the parties and of the subject-matter for the purpose of enjoining, not only

the infringement of that trade-mark but also all wrongful acts done in connection with the infringement which augment and aggravate the wrong."

In Ludwigs v. Payson Co., 206 Fed. 60, 124 C. C. A. 194, the court says:

"Whether or not such damages are cognizable if two separate and distinct matters or transactions are offered for investigation, or if, one matter alone being in evidence, the patent fails, we need not consider; for here the patent is found to be valid and infringed."

The true rule, as I gather it from all the adjudications, is indicated from the language of Judge Archbald in Woods v. Valley Iron Works (C. C.) 166 Fed. 770, in which he says:

"But it is an established rule in equity that, having taken cognizance of a case upon any ground of which jurisdiction is given, the court will proceed to dispose of the whole controversy between the parties, even though there may be certain phases of it as to which, by themselves, it would not; and that rule is applicable here. The unfair competition of which complaint is made is not a distinct and independent act, leading to an inquiry into different and unrelated transactions, constituting a separate cause of action. It is rather an aggravation of the infringement, by which the defendants, according to the bill, have not only copied the principle of the patented device, but the very form of it, taking advantage of the trade which has been worked up for it, and palming off their own upon the public as that of the complainants. It is thus merely an added feature, going along with the rest to show the extent and aggravated character of the infringement which the bill seeks to enjoin."

But in this case, as presented to this court, the unfair competition is "a distinct and independent act." It has no relation whatsoever to the patent. The patent is not relied upon. Infringement is not relied upon. It is to all intents and purposes a cause of action separate and distinct from the cause of action upon the patent. I am not referring to the form of the bill; I am referring to the controversy submitted to me. There is a motion presented to dismiss this part of the bill, which I do not consider, because it is not before me. I can see where, upon the case involving the patent, at least some of the questions presented alleging unfair competition might be so related to the infringement, if infringement be found, as to be held to be an aggravation of the infringement, or the damages incident thereto; but upon this hearing the plaintiff does not rest its cause of action upon the patent, or anything flowing therefrom; but it is presented to me as an independent cause of action, and jurisdiction is claimed because there is also before the court a cause of action upon the patent.

As at present advised, if a bill presented two separate counts, stating two separate and independent causes of action, one for a patent infringement, and the other for unfair competition, entirely independent of the infringement, I should hold that the cause of action for unfair competition should be stricken out. The court has no such jurisdiction conferred by statute, and the rule contended for relates rather to the practice of a court of equity, than it does to the jurisdiction of the court.

With the foregoing views, the application for a temporary injunction must be denied, and the clerk will enter the following order:

And now, to wit on this 8th day of March, 1917, the application for a temporary injunction in the above-entitled case having heretofore been presented, and the court, being now fully advised, finds that said application should be, and the same is, hereby overruled.

The plaintiff excepts.

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PRESSED STEEL CAR CO. v. UNION PAC. R. CO.

(District Court, S. D. New York. February 20, 1917.)

1. DISCOVERY ⟸3—BILL OF—MAINTENANCE.

When disability of parties as witnesses was removed, the chief ground for bills of discovery disappeared; but courts of equity did not lose their jurisdiction to entertain such bills, where the legal remedies are insufficient, though in most cases the necessary relief can be obtained by subpœna, or subpœna duces tecum.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 3, 4.]

2. DISCOVERY ⟸19—BILL OF—SUFFICIENCY.

In determining whether a bill for discovery to aid in an action at law is sufficient to entitle complainant to relief, the complaint in the action at law, as well as the contract on which it is based, may be considered.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 20-26.]

3. PATENTS ⟸292—BILL OF DISCOVERY—SUFFICIENCY.

Complainant entered into a contract with defendant, providing that, when defendant or any of its subsidiaries should use a car made embodying any of complainant's patents, it should pay the sum of $10, and that it should give complainant the preference in car building so long as its bids were not more than $10 per car above those of the lowest bidders. Defendant and some of its alleged subsidiaries entered into agreements with other companies to build cars which complainant claimed embodied some of its patent devices, complainant being the holder of at least 11 patents. Complainant sued for loss of profits on cars which it claimed it should have been allowed to build under its contract and for payment of royalties on the patents. *Held* that, as defendant could be required at trial to produce the drawings, and the question whether the cars which numbered thousands embodied any such patent devices could be then determined, a bill of discovery to aid in the action at law is properly allowable to prevent the interminable taking of evidence on such matters in the jury case, although discovery should not be allowed as to whether the bids of the successful bidders less than $10 per car under the bids of complainant, for that question could readily be ascertained at trial.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446.]

In Equity. Bill by the Pressed Steel Car Company against the Union Pacific Railroad Company for discovery in aid of an action at law. Motion under Equity Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) to dismiss the bill. Motion denied.

Motion under Equity Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) to dismiss a bill for discovery in aid of an action at law. The allegations in the bill are substantially as follows: The plaintiff has sued the defendant in this court on the law side to recover certain payments due under a contract by which the defendant promised to pay $10 for each car used by it embodying any one of numerous patents owned by the plaintiff. In the course of taking testimony de bene esse, it transpired that the Pullman Company had entered into agreements with the defendant and its subsidiaries to make cars in accordance with written contract, specifications, and drawings which were there

produced. The bids upon which these contracts were let were, however, not produced. The bill alleges that the plaintiff cannot safely prosecute the action without a full discovery from the defendant as to whether the defendant "owned or controlled by the ownership of a majority of the capital stock or otherwise or leased or operated" certain subsidiaries mentioned, and any others which it does not and cannot mention. The clause quoted is taken from the contract between the parties and covers those roads for whose use of the patented devices the defendant bound itself to respond. The bill also alleges that the plaintiff cannot safely prosecute the action without full discovery in respect of all freight cars built for it or its subsidiaries during the period of the contract, of the drawings which show the construction of such cars, the specifications and contracts for their construction, the bids submitted by all bidders for such contracts. The contract provided that the plaintiff should have all contracts for such construction in which its bids were not more than $10 per car above the lowest bidder, and the plaintiff sues for its lost profits on such contracts. This claim is the basis for asking for such bids and contracts. Appropriate interrogatories are annexed to the bill to call forth this information.

George A. Ellis, of New York City, for the motion.
W. C. Margeson, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). [1] The jurisdiction of this court to entertain a bill in equity for discovery has certainly not disappeared for all purposes. It is true that its chief reason went when the disability of parties as witnesses was removed, but the jurisdiction once existing did not fail for that, Carpenter v. Winn, 221 U. S. 533, 539, 31 Sup. Ct. 683, 55 L. Ed. 842; Kelley v. Boettcher, 85 Fed. 55, 66, 29 C. C. A. 14; Indianapolis Gas Co. v. Indianapolis (C. C.) 90 Fed. 196, 197; General Film Co. v. Sampliner, 232 Fed. 95, 97, 146 C. C. A. 287. For example, the jurisdiction will be still exercised even in aid of an action at law, if the plaintiff cannot without it find out whom he should sue. Brown v. McDonald, 133 Fed. 897, 67 C. C. A. 59, 68 L. R. A. 462; Kurtz v. Brown, 152 Fed. 372, 81 C. C. A. 498, 11 Ann. Cas. 576. Yet the jurisdiction will not be exercised, if the legal remedies are sufficient; like any other equitable remedy, it is exceptional, and the plaintiff must bring himself within the exception. Rindskopf v. Platto (C. C.) 29 Fed. 130; Safford v. Ensign Mfg. Co., 120 Fed. 480, 56 C. C. A. 630; Heath v. Erie Railway, 9 Blatch. 316, 320, Fed. Cas. No. 6,307; Scotten v. Rosenblum (D. C.) 231 Fed. 357, affirmed January 16, 1917 (C. C. A.) 239 Fed. 1022. The dicta in Ex parte Boyd, 105 U. S. 647, 657, 26 L. Ed. 1200, and Brown v. Swann, 10 Pet. 497, 501, 9 L. Ed. 508, accord with these decisions, and United States v. Bitter Root Development Co., 200 U. S. 451, 475, 479, 26 Sup. Ct. 318, 50 L. Ed. 550, may be taken as a decision that the plaintiff in the bill must show that he needs more than what the modern statutory procedure gives him. Colgate v. Compagnie Francaise (C. C.) 23 Fed. 82, does, it is true, use some language seeming to indicate, not only that the jurisdiction of equity remains, but that it will be exercised without regard to any changes in legal procedure; yet I think that the actual decision must rest rather on the propriety of allowing the plaintiff to inspect the alleged infringement, or, since it was submerged, to have an adequate description of it. As such it rests rather upon the embarrassments

under which a plaintiff labors in preparing his case if he has no definite knowledge of the supposed infringement.

The law, therefore, while it has rendered the bill in most cases obsolete, has in fact left it as a useful instrument for just those fundamental purposes for which it was originally devised. In those cases in which subpœna and subpœna duces tecum against his adversary will give a party all that injustice he may need, obviously, the bill will not lie. The principle of judicial parsimony will remove the occasion for most bills. If, however, the cause is of such a character that the plaintiff cannot adequately present his case by subpœna and especially if he needs a preliminary inspection of documents (Carpenter v. Winn, supra, 221 U. S. 539, 31 Sup. Ct. 683, 55 L. Ed. 842), then there is every reason to assert so ancient a source of equitable jurisdiction.

[2] The bill at bar seems to me to present a case where equity should help the plaintiff. It is true that the allegations of the bill, regarded alone, do not justify any action; they amount to no more than the bare conclusion that the plaintiff cannot safely prosecute his action without the information desired. Nevertheless, I have the right to look at the complaint in the action at law and at the contract, and from these it follows that the relief is necessary.

[3] The plaintiff's situation is in fact this: It has a contract with the defendant under which, whenever the defendant or any of its subsidiaries had a car made for it embodying any of the plaintiff's patents, it must pay $10. Furthermore, it must give the plaintiff preference in car building so long as its bid was no more than $10 above that of the lowest bidder. The plaintiff has at least 11 patents—perhaps more—which it thinks embodied in the cars which the defendant or its subsidiaries have embodied, and it supposes, also, that the defendant has let contracts upon bids less than $10 lower than the plaintiff's bids. All this could be brought out upon the trial, but the patents are at the least 11 and the cars number over 14,000. The trial will be protracted beyond any reason and will result in the greatest confusion, if the whole labour of sifting out the evidence is to take place before the jury. Practically, this can be done only by requiring the defendant to produce drawings and specifications of all the cars which have been made for it or the subsidiaries during the period of the contract, and then by comparing these drawings with the patents and ascertaining which part, if any, of the patents they embody. Since to all this the plaintiff is in any event entitled at some time, it is no hardship to compel their production in advance and at a time when it is likely to be of actual service in the administration of justice and rather than at a time when it will cause the utmost confusion, i. e., under the pressure of a trial with the constantly welling irritation of judge, jury, counsel, and witnesses. All this can be avoided without the slightest added annoyance to the defendant by the production of such documents before a master for comparison with the patents. After such production, the plaintiff will be held to a strict bill of particulars alleging with detail just what features of every patent it claims to have been embodied in the different types of cars made for it and its subsidiaries.

As respects the bids which the defendant received from other bidders and the contracts which it let upon those bids, these considerations do not apply. If the plaintiff learns, as it will, what types of cars embody its patents, it will be possible to describe in a subpœna duces tecum what contracts it wishes to have produced upon the trial, also the bids of all other bidders than the plaintiff. The comparison of the bids is a matter of a few moments, and it is unnecessary to have it take place in advance.

The motion to dismiss the bill will therefore be denied, and the plaintiff may take an order requiring the defendant to answer the first, second, third, fourth, and fifth interrogatories attached to the bill. The seventh interrogatory need not be answered, except in this sense: Those specifications must be produced, to complement the drawings, of all cars actually manufactured and delivered to the defendant or its subsidiaries. The specifications annexed to contracts need not be produced except as they may be necessary fully to describe the cars actually delivered and used.

The answer to the interrogatories will be made within 20 days, and the production before a master to be agreed upon by the parties within thirty days thereafter. The plaintiff will be allowed to take tracings of the drawings and copies of the specifications if so advised.

The interrogatories will be disallowed except as above. Settle order on notice.

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**CALKINS et al. v. SMIETANKA, U. S. Internal Revenue Collector, et al.**

(District Court, N. D. Illinois, E. D. January 31, 1917.)

No. 802.

1. INTERNAL REVENUE ⟸19(1)—TAX ON GRAIN SALES—OFFER—BASIS OF TAX.
Under Act Oct. 22, 1914, c. 331, § 22, 38 Stat. 759, imposing on each sale, agreement of sale, or agreement to sell any products at any exchange or board of trade, either for present or future delivery, a tax, for each $100 in value, of one cent, and for each additional $100 or fractional part in excess of $100 one cent, offers to sell grain made subject to deferred acceptance, only a small percentage of which developed into sales and on which the brokers received only $10 for each 10,000 bushels sold, are taxable on the basis of the total price for which the seller agrees to sell, not merely on the basis of what the broker is to receive, since on the latter basis no tax would be due on the great majority of the offers and only a small amount on the largest of them, and, if that basis were to apply to offers, it should apply also to sales and agreements of sale which would lead to an absurdity.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 39, 40.]

2. INTERNAL REVENUE ⟸19(1)—TAX ON GRAIN SALES—SUCCESSIVE SALES.
Act Oct. 22, 1914, § 22, imposing a tax on each sale, agreement of sale, or agreement to sell products at any exchange or board of trade, and requiring every such sale or agreement to be accompanied by a bill, memorandum, agreement, or other evidence thereof, to which a stamp or stamps in value equal to the amount of the tax shall be affixed, imposes a tax on each sale or agreement to sell any grain, though during the day several separate sales are made of the same lot of grain or parts thereof

and at the close of the day the only memorandum made shows the transfer from the original seller to the last buyer or buyers, since to hold otherwise would be to permit the parties by their own action to relieve themselves from liability for the tax after it had accrued.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 39, 40.]

3. INTERNAL REVENUE ⟸25—POWERS OF COMMISSIONER—ASSESSMENT OF DELINQUENT STAMP TAX.

Rev. St. § 3176, as amended by Act Sept. 8, 1916 (Comp. St. Ann. 1916, § 5899), provides that the Commissioner of Internal Revenue shall assess all taxes other than stamp taxes as to which returns or lists are made by a collector or deputy collector as theretofore provided. Section 3182 (Comp. St. 1913, § 5904) authorizes the Commissioner of Internal Revenue to make inquiries, determinations, and assessments of all taxes imposed by that title or accruing under any former internal revenue act, where such taxes had not been duly paid by stamp at the time and in the manner provided by law, and that all provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall apply, so far as necessary, to those proceedings. Act Oct. 22, 1914, § 22, imposes a stamp tax on sales and agreements to sell products at boards of trade, and section 23 provides that all administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, should extend to that act, and that any one evading or attempting to evade the taxes thereby imposed should be subject to a penalty of double the amount of the taxes to be assessed and collected as other penalties incurred under internal revenue laws are assessed and collected. *Held*, that Rev. St. § 3176, as amended, did not take away from the commissioner the power given by the other statutes to assess the tax on sales of grain, on memoranda of which the stamps were not affixed, since, if Congress had intended to limit that power by the amending statute, it would have amended section 3182, not section 3176.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 72, 73.]

4. INTERNAL REVENUE ⟸25—POWERS OF COMMISSIONER—ASSESSMENT OF DELINQUENT STAMP TAX.

Rev. St. § 3182, authorizing the Commissioner of Internal Revenue to make assessments of all taxes and penalties imposed by that title, authorizes him to make assessment of all taxes that were imposed by Congress and which come under the heading of internal revenue.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 72, 73.]

5. INTERNAL REVENUE ⟸25—ASSESSMENT OF TAX—INJUNCTION—STATUTE.

Rev. St. § 3224 (Comp. St. 1913, § 5947), providing that no suit to restrain the assessment or collection of any tax shall be maintained in any court, forbids the issuance of an injunction to restrain the Commissioner of Internal Revenue from assessing the taxes on sales of grain to which no stamps were affixed; the only remedy of the taxpayer being by suit to recover the tax after payment under Rev. St. § 3226 (Comp. St. 1913, § 5949).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 72, 73.]

6. INTERNAL REVENUE ⟸25—ASSESSMENT OF TAX—PRODUCTION OF BOOKS.

Rev. St. § 3173 (Comp. St. 1913, § 5896), authorizing the Commissioner of Internal Revenue to require persons who fail or refuse to make proper returns to produce their books, authorizes the commissioner to compel the production of books of grain brokers who have failed to pay the stamp tax imposed on sales of grain by Act Oct. 22, 1914, § 22.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 72, 73.]

7. INTERNAL REVENUE ⟸25—ASSESSMENT OF TAX—STATUTES—VALIDITY—PRODUCTION OF BOOKS.

Rev. St. § 3173, authorizing the Commissioner of Internal Revenue to require persons who fail or refuse to make proper returns to produce their books, is not unconstitutional, since an order to produce books is

not violative of the rights of a witness, though such rights may be invaded after his appearance.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 72, 73.]

8. INTERNAL REVENUE ⟹25—ASSESSMENT OF TAX—INJUNCTION—"ASSESSMENT."

Rev. St. § 3224, providing that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court, applies to a suit to restrain proceedings to make the assessments, since assessment cannot fairly be limited to the mental act of the officer who determines the amount of the tax, but includes the preliminary investigation as well as the final determination.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 72, 73.

For other definitions, see Words and Phrases, First and Second Series, Assessment.]

In Equity. Suit for injunction by Lucius A. Calkins and others against Julius F. Smietanka, as United States Collector of Internal Revenue of Chicago, and another. Application for injunction denied.

Henry S. Robbins, of Chicago, Ill., for complainants.

Charles F. Clyne, U. S. Atty., and Joseph B. Fleming, Asst. U. S. Atty., both of Chicago, Ill., for defendant.

EVANS, Acting District Judge. The plaintiffs seek through this action to have the court decree:

(1) "That the defendants are not entitled to have, or to have access to, the books of the plaintiffs, or any member of the Board of Trade, for the purpose of assessing or collecting any tax upon any 'sale, agreement to sell, or agreement of sale,' made on the Chicago Board of Trade during the time the act to increase the internal revenue, enacted October 22, 1914 [c. 331, 38 Stat. 745], was in force."

(2) "That certain 'transfers' be declared not taxable under the said act."

(3) "That certain 'offers' be declared not taxable when the amount received by the broker therefrom does not exceed $100."

(4) "That a temporary injunction be issued, which upon final hearing be made permanent, enjoining defendants from further demanding to have produced the books of any member and enjoining defendants from taking proceedings to compel the inspection and production of such books, and enjoining defendants from proceeding to collect by distraint any tax upon the 'transfers' or 'offers' above described."

The bill was supported by affidavits and opposed by counter affidavits, which showed the manner in which business is conducted on the Chicago Board of Trade.

[1] It appeared that members of the Board of Trade considered what in their parlance is termed an "offer," was not subject to a stamp tax, unless the amount, which the member was to receive in case the said "offer" was accepted, exceeded $100. Members very frequently post "offers" which are in the following form:

Offer Made Subject to Deferred Acceptance

Chicago ..... 191..

.....

We will sell ..... bushels of contract grade of ..... at ..... per bushel for delivery during ..... 191.. same to be delivered in store in regular

warehouses under the rules of the Board of Trade of the City of Chicago. This offer is subject to acceptance by you until the closing hour for regular trading on ..... 191...

.....

Only a very small per cent. of these "offers" ever developed into sales.

All parties agree, that such an "offer" came within the provisions of section 22 of the act referred to, and in view of the decision in the case of Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853, was taxable under certain circumstances. The government took the position that such an "offer" was taxable whenever the price for which the commodity therein named was to be sold, exceeded $100. The plaintiffs contended that such "offers" were taxable only when the amount received by the broker for negotiating the deal exceeded $100. Ten dollars was paid for the execution of each offer of 10,000 bushels.

The portion of section 22 of the act under consideration reads as follows:

"Upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery, for each $100 in value of said sale or agreement of sale or agreement to sell, 1 cent, and for each additional $100 or fractional part * * * in excess of $100, 1 cent: Provided, that on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000, or be imprisoned not more than six months, or both, at the discretion of the court."

Plaintiffs' contention that the stamp tax is collectible on an "offer" only when the broker receives a sum in excess of $100 is, in the light of all the surrounding circumstances, not persuasive. It must be, and is, admitted that under existing circumstances, if plaintiffs' contention be adopted, practically all "offers" would go untaxed, for the transaction must be large indeed, before the broker would exceed $100. If plaintiffs' contentions were adopted, all such "offers" involving transactions of less than 100,000 bushels would go untaxed, while "offers" involving the sale of 200,000 bushels would be taxed one cent. "Offers" to sell quantities aggregating 1,000,000 bushels (of wheat, of the value of $1,750,000) would be subject to a tax of only nine cents.

Assuming Congress intended to impose a tax on "offers," then such a construction would lead to an absurdity.

Again, Congress placed the three kinds of agreements on an equal basis. The act imposed a tax upon (A) each sale; (B) each agreement of sale; (C) each agreement to sell. The basis for determining the amount of the tax is the same in each case. Could one successfully contend that the basis of the tax of one cent for each $100 in value should be in the case of a sale, or an agreement of sale, the amount the broker receives for negotiating the sale? Such a tax in the case of a sale would admittedly be based on the selling price stipulated in the sale, or agreement of sale.

It follows that the total price at which each seller agrees to sell must be the basis upon which the tax on "offers" is computed.

The argument of the counsel that such a conclusion works apparent hardship upon these plaintiffs and others similarly situated, however true, goes to the merits of the legislation, but not to the question of construction.

[2] Plaintiffs further seek the injunction because the revenue officers are attempting to assess a tax upon certain transfers that the plaintiffs say are not subject to tax. In their bill and accompanying affidavits, they illustrate the situation as follows:

"That one business condition giving rise to said transfers is when A., having an order to buy, say, 15,000 bushels of wheat, is unable to secure from any one at that moment bidding in the pit an offer to sell 15,000 bushels, but B. is then offering to sell 25,000 bushels thereof, and A., in order to buy said 15,000 bushels, accepts B.'s offer to sell 25,000 bushels, and immediately offers 10,000 bushels at the same price, and, that being accepted by another member in the said pit, A., before the close of the market hours, asks B. to put down upon his trading cards, and B. agrees to and does so put down, the sale of 10,000 bushels of his said 25,000 bushels as a sale to C., whereupon the proper changes are made in the entries on the trading cards of such parties to manifest such change or substitution, the original transaction between A. and B. being originally entered on the trading card of A. as a purchase of 25,000 bushels from B. and on the trading card of B. as a sale of 25,000 bushels to A., and such original entries being during said trading hours erased and changed so as to show a purchase by A. from B. of 15,000 bushels, and a purchase by C. from B. of 10,000 bushels."

In other words, it appears that A. may offer to sell a large quantity of wheat, which offer is accepted by B., and B. makes a resale to C., who in turn makes another resale to D., and so on, until at the close of the day the wheat belongs to Z. In the clearing house settlement that evening, the only transaction of interest to the members is the final transfer of grain to Z. The government contends that the stamp tax is imposed on each of these transactions. The plaintiffs and other members construed the law as imposing a tax on but one transaction.

Another situation may arise out of transfers like the following: A. offers 50,000 bushels of wheat at a certain price, which is accepted by B. for a customer. Later B., on behalf of another customer, offers A. 50,000 bushels, which offer is accepted by A. for an entirely different customer. The prices may be the same, and in the final settlements between A. and B. their books balance. Should there be two transfer taxes.

Again, plaintiffs describe another situation where, on account of the different orders from different customers, a sale by A. to B. is later canceled. In other words, A. consents to "call off the trade." Plaintiffs contend that no tax is required. The government insists that two transfer taxes are due.

The statute above quoted is clear and explicit. Congress, in its wisdom, saw fit to impose a special tax on transactions had on the Board of Trade. The Supreme Court declared an act almost identical to the one under consideration as constitutional. Nicol v. Ames, 173 U. S. 509, 19 Sup. Ct. 522, 43 L. Ed. 786. Both the intent of Congress and the obvious meaning of the words used, lead the court to but one conclusion. The tax becomes due and payable by virtue of certain agreements being made. Parties, after they have made the agreement and exposed themselves to the tax, cannot meet and agree to exempt themselves from the tax. Agreements, subject to a tax, cannot later be relieved of the burden by new agreements. It is perfectly plain to the court that no agreement that is once subject to a tax can later be relieved of that burden by any action of the parties.

The fact that the agreements made were not, in all cases, reduced to writing with the stamp attached, cannot relieve the agreements from the tax. Congress imposed upon all members transacting business the duty of reducing their agreement to writing. Plaintiffs might as well contend that they were relieved of their taxes because they failed to pay them promptly, and when due, as to say that they are relieved from the stamp tax because they did not reduce their agreements to writing. They cannot plead their own neglect to relieve themselves of this tax. Any other conclusion would place a premium on misconduct.

[3] Plaintiffs further contended that, even though they were subject to a tax in the amount claimed by the government, the defendants had no right under the statute to demand the production of their books or make assessments of this tax, due from any one of them, or to collect this tax by distraint.

A well-prepared argument was made in support of these contentions by plaintiffs' attorney. The turning point in the argument revolves about plaintiffs' claim that defendants are powerless to make an assessment of a stamp tax.

Plaintiffs do not deny defendants' authority to assess taxes in certain cases, but deny that stamp taxes can be so assessed, and refer to various sections of the statute, notably sections 3173 and 3176, R. S. (Comp. St. 1913, §§ 5896, 5899), for support. Particular reference is made to section 3176, as amended by the Act of September 8, 1916 (Comp. St. Ann. 1916, § 5899), as showing that the power to assess stamp taxes is not possessed by the commissioner. That act, as amended, reads in part as follows:

"The Commissioner of Internal Revenue shall assess all taxes, other than stamp taxes, as to which returns or lists are so made by a collector or deputy collector."

Standing alone, this quotation would seem to justify their position. Section 3176, however, while one of the general administrative acts pertaining to the assessment and collection of internal revenue, is not

the section that grants to the collector the power and authority to make assessments. This will be seen by reading section 3182, R. S. (Comp. St. 1913, § 5904), herewith quoted:

"The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue act, where such taxes had not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified. * * * And all provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, so far as may be necessary, to the proceedings herein authorized and directed."

Congress, by section 3176, imposed upon the collectors and deputy collectors the duty of making returns or lists from such knowledge or information as the collectors or deputy collectors possessed. Upon the returns or lists made by the collectors or deputy collectors, the Commissioner of Internal Revenue makes assessments of taxes "other than stamp taxes," and imposes the penalties therein authorized. Section 3176 is not a limitation of the power granted by section 3182.

[4] Section 3182 is most general, comprehensive, and inclusive, and was unquestionably intended to give, and did give, the Commissioner of Internal Revenue authority to make assessments "of any tax imposed by this title," being "Title XXXV—Internal Revenue." This is but one section of the chapter dealing with the assessment and collection of taxes. But Congress referred to the broader heading of "internal revenue," when it used the words "imposed by this title." In other words, Congress gave the Commissioner of Internal Revenue authority to make assessment of all taxes that were imposed by congressional enactment, and which came under the heading of "internal revenue." That the act, imposing the burden, here in dispute, came within this heading, there can be no doubt.

If Congress intended to limit this power by amendment through the act of September 8, 1916, it would have proceeded to amend section 3182, and not to amend section 3176.

A further indication of congressional intent, as well as an express grant of power to the commissioner, is found in section 23, which reads as follows:

"That all administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this act, and every person, firm, company, corporation, or association liable to any tax imposed by this act, or for the collection thereof, shall keep such records and render, under oath, such statements and returns, and shall comply with such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may from time to time prescribe, and every such person, firm, company, corporation, or association who evades or attempts to evade any of the taxes imposed by this act, or shall fail to truly account for and pay all taxes collected by them under this Act, or any regulations issued thereunder, shall be subject to a penalty of double the amount of the taxes evaded or attempted to be evaded or unlawfully withheld, to be assessed and collected as other penalties incurred under internal revenue laws are assessed and collected; and for the expense connected with the assessment and collection of the taxes provided by this act there is hereby appropriated $200,000," etc.

The court therefore concludes that the Commissioner of Internal Revenue is authorized and empowered to make assessments of stamp taxes.

[5] Having the power to make the assessment for unpaid stamp taxes, the query arises: Can the court, by injunction, restrain the officer from making an assessment?

The defendants stand in a peculiarly protected position, when under color of right they seek to assess a tax against a defaulting taxpayer. Congress has provided, by section 3224, R. S. (Comp. St. 1913, § 5947), that:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

This section has been applied in a great number of cases, one of the most recent being Dodge v. Osborn, 240 U. S. 120, 36 Sup. Ct. 275, 60 L. Ed. 557. There the court quotes, approving, the following language found in Snyder v. Marks, 109 U. S. 193, 194, 3 Sup. Ct. 157, 160 (27 L. Ed. 901):

"The inhibition of Rev. Stat. § 3224, applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back a tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. * * * Cheatham v. United States, 92 U. S. 85, 88 [23 L. Ed. 561]. And again in State Railroad Tax Cases, 92 U. S. 575, 613 [23 L. Ed. 663], it was said by this court that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted, was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by section 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assignment (assessment) and claim that it is valid."

The court further says:

"And this doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it. Shelton v. Platt, 139 U. S. 591 [11 Sup. Ct. 646, 35 L. Ed. 273]; Pittsburg, etc., Ry. v. Board of Public Works, 172 U. S. 32 [19 Sup. Ct. 90, 43 L. Ed. 354]; Pacific Whaling Co. v. United States, 187 U. S. 447, 451, 452 [23 Sup. Ct. 154, 47 L. Ed. 253]."

While the decision in Snyder v. Marks dealt with the tobacco tax, the court in the case of Dodge v. Osborn, dealt with the income tax feature of the identical act here under consideration.

Section 3224, R. S., was enacted to insure the prompt collection of the government's revenue. Section 3226, R. S. (Comp. St. 1913, § 5949) provides the only method for an aggrieved taxpayer to obtain redress. Snyder v. Marks, 109 U. S. 189, 3 Sup. Ct. 157, 27 L. Ed. 901. Supplementing these provisions of the statutes and decisions above quoted,

is the equity rule that denies the jurisdiction of a court of equity of any case wherein there is an adequate remedy at law. Congress unquestionably concluded that it had provided the taxpayer with an adequate remedy at law, when it gave him the right to sue and recover back the tax illegally assessed.

It follows therefore that the plaintiffs' request to restrain the collection of the tax by any particular manner must be denied.

[6, 7] Plaintiffs' final contention is that they are entitled to an injunction to restrain the government from taking steps to compel the production of their books, even though the Internal Revenue Commissioner is authorized to make and collect an assessment in a case like the present one; in other words, it is claimed that a court of equity would not violate section 3224 if it restrained the officers from compelling plaintiffs and others similarly situated to produce their books. An elaborate argument is presented to show: First, that section 3175, R. S., does not authorize the production of books in a case like the present; and, second, that if section 3173 should be so construed as to include taxpayers situated like plaintiffs (subject to a stamp tax past due) the act is unconstitutional.

I am unable to accept either contention. An order to produce books is not violative of any constitutional right. In re Chadwick, 5 Fed. Cas. No. 2,570, p. 401; In re Lippman, 15 Fed. Cas. 8,382, p. 572; United States v. Distillery No. 28, 25 Fed. Cas. 14,966, p. 868; Perry v. Newsome, 19 Fed. Cas. No. 11,009, p. 290.

The witness' constitutional rights may be invaded after his appearance, but even then is dependent upon his willingness to waive his rights to refuse to testify.

[8] If section 3224 is given the liberal construction that its purpose demands, then it applies to actions brought to prevent officers from proceeding to make the assessment as well as to making assessments.

The word "assessment," as used in this section, cannot fairly be limited to the mental act of the officer who determines the amount. It must include the preliminary investigation as well as the final determination, for one is as important as the other.

What the government accomplished by this section was the prevention of suits that delayed it in the determination and collection of its taxes.

It follows that the application for an injunction must be denied, and the temporary restraining order heretofore granted should be vacated.

## THE WILLIAM B. MURRAY et al.

(District Court, D. Rhode Island. January 29, 1917.)

No. 1359.

1. MARITIME LIENS ⊂⊃24, 25—SUPPLIES—CONSTRUCTION OF STATUTE.
Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (Comp. St. 1913, § 7783), which gives a maritime lien to "any person furnishing repairs, supplies or other necessaries * * * to a vessel * * * upon the order of the owner," gives no authority for the creation of a maritime lien, except upon the vessel to which the supplies, etc., are furnished, and an agreement by an owner that certain vessels should be charged with a lien for coal to be furnished to other vessels can have no effect to create a maritime lien which would take precedence of an existing mortgage.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 30–36.]

2. MARITIME LIENS ⊂⊃43—SUPPLIES—WAIVER OF LIEN.
Under such statute the right to a lien is not affected by the fact that bills for supplies were made out and charges made to the owner, or that notes were given, unless there is satisfactory proof of an intention to waive the lien.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 82.]

3. MARITIME LIENS ⊂⊃35—SUPPLIES—CONSTRUCTION OF STATUTE.
One who furnishes supplies for the use of a number of vessels of the same owner, for which he is entitled to a maritime lien under the statute, cannot select one or more from such number, and enforce the lien against them for the entire amount.

4. MARITIME LIENS ⊂⊃27—SUPPLIES—COAL FURNISHED FOR USE OF FLEET.
A contract for coal to be furnished by libelant to a corporation, which owned a fishing fleet and also fish-packing plants, made with the knowledge by libelant that the corporation was largely indebted, but with the understanding that the coal was to be used in large part by the vessels, and in view of libelant's statutory right to a lien therefor, was a contract to furnish coal to such vessels, within the meaning of the statute, and the lien became fixed and definite when any of the coal was appropriated to a vessel, although it was all delivered on a wharf, and distributed to the vessels by the owner as required.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 41–45.]

5. MARITIME LIENS ⊂⊃17—SUPPLIES—CONSTRUCTION OF STATUTE.
Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (Comp. St. 1913, § 7783), giving a maritime lien for supplies furnished to vessels, in view of the facts that in the ordinary course of business supplies for the general requirements of an entire fleet of vessels operated under a common management are contracted for at one time, and that supply men will thus be called upon to furnish supplies in advance of the arrival of the vessels, and there may be uncertainty as to which vessel will require them or use them, should be given a construction which will make it applicable to and consistent with such business conditions.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 22.]

6. PAYMENT ⊂⊃39(8)—APPLICATION—APPROPRIATION BY CREDITOR.
A payment, not applied at the time, cannot be subsequently applied to a note not then due, rather than to a matured account secured by a maritime lien, where such application would be to the prejudice of another lienholder.
[Ed. Note.—For other cases, see Payment, Cent. Dig. § 113.]

In Admiralty. Libels by the Piedmont & George's Creek Coal Company to enforce maritime liens against the fishing steamers William B. Murray, and others; the Atlantic Phosphate & Oil Corporation, claimant. Decree for libelant in part.

Kirlin, Woolsey & Hickox, of New York City, and Frank Healy, of Providence, R. I. (John M. Woolsey, Cletus Keating and H. Brua Campbell, all of New York City, of counsel), for libelant.

Gardner, Pirce & Thornley, of Providence, R. I., for claimant.

BROWN, District Judge. The Piedmont & George's Creek Coal Company seeks to establish maritime liens for coal supplied under contracts with the Atlantic Phosphate & Oil Corporation, which, in 1913 and 1914, was the owner of a fleet of 19 fishing vessels, and of lands and fish factories at Promised Land, Long Island, and at Tiverton, R. I. All this property was mortgaged to the Astor Trust Company of New York, as trustee to secure an issue of bonds.

The coal was sent in five shipments. The first, 911 tons, May 19, 1914; the second, 922 tons, May 23, 1914; the third, 1,187 tons, June 9, 1914; and the fifth, 1,439 tons, July 3, 1914—were all delivered at Promised Land. The fourth shipment, 861 tons, June 20, 1914, was delivered at Tiverton, R. I. The invoices and manifests were, in each instance, made out to the Oil Corporation, and the name of no vessel belonging to the Oil Corporation was mentioned.

At the time of the delivery of the first shipment at Promised Land there were already in bins on the pier 1,068 tons of coal which had been paid for, and the four cargoes were dumped on the same pile. Coal from these bins was used by the Oil Corporation, both for the operation of its fleet of 19 vessels and for running the boiler plant at Promised Land. The coal delivered at Tiverton, R. I., was unloaded on the pier, and subsequently was used in part by 10 of the Oil Corporation's vessels and in part by the boiler plant on shore.

All of these deliveries were charged on the books of the Coal Company against the Oil Corporation, and there were no entries charging any of the coal against specific vessels.

Act June 23, 1910, c. 373, 36 Stat. 604, provides:

"That any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

The principal question is whether the evidence shows that the Coal Company, libelant, was a "person furnishing supplies to a vessel," within the meaning of the statute.

The documentary evidence in the case—the books of the Coal Company, the original invoices, etc.—is in the ordinary form which would be used in supplying coal to a purchaser at his dock or pier, without regard to its subsequent use by the purchaser.

Defendants' Exhibits 8 and 9 are as follows:

Exhibit 8.

New York City, May 28, 1914.

Atlantic Phosphate & Oil Corporation, No. 165 Broadway, New York.

Attention of Mr. T. C. Meadows.

Gentlemen: This is to confirm agreement for the furnishing of your coal requirements at Promised Land and Tiverton, for the current season, coal to be invoiced as follows:

10,000 tons our best grade George's Creek Cumberland coal on basis of $3.10 gross ton, New York loading piers.

Balance of your requirements for this grade of fuel to be filled on basis of $3.05 gross ton, New York loading piers.

All the Piedmont, or our second grade of George's Creek, to be billed on basis of $2.75 gross ton, New York loading piers.

This is not a formal contract, but is as per the writer's understanding with you a few days ago.

Yours truly, Piedmont & George's Creek Coal Co.,
SJB/BB S. J. Bohannon, Manager Sales.

Exhibit 9.

New York, N. Y., May 28, 1914.

Piedmont & George's Creek Coal Company, 30 Church Street, City.

Attention Mr. S. J. Bohannon, Manager Sales.

Gentlemen: This will acknowledge your favor of the 28th, confirming our agreement relative to our requirements of coal at Promised Land and Tiverton for the coming season.

The prices mentioned by you in this letter are in accordance with our understanding of the agreement and are satisfactory.

If at any time you wish a more formal contract than this letter, we shall, of course, be glad to supply it.

Yours very truly, Atlantic Phosphate & Oil Corporation,
TCM/A By T. C. Meadows.

These letters, which were intended as an informal memorandum of the agreement, contain no reference to the furnishing of coal for any particular use, and no reference to a lien.

Long after the five shipments had been delivered, and after checks for the same had been protested, legal proceedings against the Oil Corporation were threatened by the Coal Company, to avoid which it was agreed that the entire amount of coal furnished should be charged against the Oil Corporation's best five boats, as a security for the claim. The headings of the original invoices, in possession of the Oil Corporation, in which the charges were against the Oil Corporation, were torn off, and new headings were pasted on, charging coal to each of the five selected vessels and owners. This appears by libelant's exhibits: Number 2, dated September 11, 1914, and No. 3, dated September 15, 1914.

The intention of this arrangement was to give security upon five selected vessels for the coal already delivered to the owners.

There is nothing in the documentary evidence relating to prior dealings which, in terms, shows a specific agreement for a maritime lien for these five shipments.

The Oil Corporation went into the hands of receivers in October, 1914, and the Coal Company filed petitions, which were based upon the subsequent arrangement of September, 1914, rather than upon the original agreement, which preceded the delivery of the coal.

When the present case was brought on for hearing, the libelant took the position that the parties, by agreement, might create a maritime lien on such of the vessels as they might select, irrespective of the amount of coal actually furnished to or used by these vessels. Upon expressions of doubt by the court as to the soundness of this contention in point of law, the libelant filed a libel against seven other vessels.

The case presented by the consolidated libels is much complicated by the artificial mode in which it is presented. Instead of giving a plain narration of fact, the five original libels are artificially framed, and are based rather upon the agreement made for the prevention of litigation than upon the original agreement made for the furnishing of the coal. Oral testimony was presented at the hearing to the effect that, as there was still a balance due for the previous year, and as the Oil Corporation was known to be largely indebted, an oral agreement was made that for coal furnished the Coal Company should have a maritime lien upon the entire fleet of the Oil Corporation.

I am of the opinion that the testimony shows that before the writing of the letters, Exhibits 8 and 9, the financial ability of the Oil Corporation to pay was discussed, and that it was understood by the contracting parties that the law would afford a lien upon the vessels for the coal, and that the Coal Company would thus have security. It was also understood by the parties that a large part of the coal furnished was to be used by vessels of the fleet.

[1] The statute of June 23, 1910, gives no authority for the creation of a maritime lien on vessels to which coal was not to be furnished. An agreement that certain vessels should be charged with a lien for coal furnished to other vessels could have no effect to create a maritime lien which should take precedence of an existing mortgage. Even if the Coal Company expected that it was to get security upon the entire fleet, irrespective of what use should be made of the coal, this was an erroneous conception of legal rights. However, it seems just to hold that the parties contracted in view of the fact that the statute afforded a right to a maritime lien, and that, even if they misconceived the extent of this right or the mode of its enforcement, the libelant may be entitled to such a maritime lien as may arise under the statute upon the facts of the case.

[2] That bills were made out and charges made to owners, or that notes were given, does not destroy the lien given by the act of June 23, 1910. The parties must be presumed to have contracted with so important a provision in mind; and though it might be a defense that the lien has been waived, we should require satisfactory and definite proof of such intention in order to deprive the libelant of such security as may be afforded by the statute.

As it appears from the testimony that the contract covering the coal in question was made at a time when it was known to the libelant that the Oil Corporation was still in arrears for coal for the preceding year, and was otherwise heavily indebted, and that receivership proceedings were contemplated, it is quite clear that the libelant had no intention to waive any of its legal rights to a maritime lien.

In The Patapsco, 13 Wall. 329, 20 L. Ed. 696, it was said concerning the condition of the company which owned a line of steamships, and which was hopelessly insolvent and was borrowing large sums on mortgage:

"It would be strange if the libelant did not know this condition of things, and, in the absence of proof on the subject, it is a reasonable inference that he did. If he had this knowledge, it would be a violent presumption to suppose

that he relied on the credit of the company at all for the supplies which he furnished."

In the present case there is proof of the libelant's knowledge.

It may be said, therefore, that the parties contracted, knowing that a large portion of the coal was to be used for a strictly maritime purpose, and in reference to such legal rights as existed under the United States statute.

[3] As has been said, the theory of the libelant in filing his five original libels was that a contract for a lien on the fleet would permit the libelant to select any vessel for the enforcement of the entire lien, irrespective of the amount of coal furnished to that particular vessel.

The libelant cites Freights of The Kate et al. (D. C.) 63 Fed. 707; The Erastina (D. C.) 50 Fed. 126; The Advance, 72 Fed. 793, 19 C. C. A. 192; The Patapsco, 13 Wall. 329, 20 L. Ed. 696; also the recent case of The John L. Lawrence (D. C.) 231 Fed. 507. In the latter case the learned judge remarked:

"I can perceive no valid reason why, unless for some other cause the libelants are deprived of a maritime lien, they may not have filed their libel upon each of the steamers for the entire amount and recovered the whole amount out of either of them."

Without considering this case in detail, it may be observed that this dictum of the learned judge is not in accord with the decisions in this circuit.

In The Kearsarge, 1 Ware, 546, Fed. Cas. No. 7,634, upon a consideration of a lien statute of Maine, it was held by Judge Ware:

"If the owner is building two vessels at the same time and materials are furnished generally for both, the materialman has a lien on both the vessels, and may enforce it against either of them."

This case, on appeal (The Kiersage, 2 Curt. 421, Fed. Cas. No. 7,762), was reversed in an opinion by Mr. Justice Curtis, who said:

"I am unable to concur in so much of this opinion as holds that the statute gave a lien on both vessels for all the materials furnished, without regard to their use on one or the other. The statute in terms, for materials furnished for or on account of any vessel, gives the creditor a lien on such vessel for his materials. These terms do not give a lien on one vessel for materials furnished for or on account of another vessel, nor for or on account of it and another. The natural meaning of the words is that, for the price of materials furnished for a particular vessel, the creditor shall have a lien on that vessel. I do not think myself at liberty to give what is called a liberal construction to these terms, so as to embrace in them a case they do not describe."

The language of the Maine statute (Rev. St. 1841, c. 125, § 35):

"* * * Or furnish materials, for or on account of any vessel, building or standing on the stocks, or under repairs," etc.

—so far as the question before us is concerned, seems quite similar to the act of June 23, 1910.

The learned justice also used the following language, which seems to be directly applicable to the case before us:

"At the same time, I think that, where materials are furnished for two specific vessels, though the original contract does not appropriate them specifically to either, yet when they are afterwards appropriated, they may

properly be considered as furnished for that vessel, in the construction of which they are used. The effect of such a contract is to enable the builder to elect to which of the two vessels he will appropriate them. When he has made that election, and actually appropriated them or some part of them to one vessel, I can see no sound reason why it may not be said with truth that they were furnished for and on account of that vessel, and so that the case is within the terms of the law."

This case was followed in Berwind-White Coal Mining Co. v. Metropolitan S. S. Co. (C. C.) 166 Fed. 784. Judge Putnam, considering a single contract for machinery for two steamers, the Harvard and the Yale, held that, where there is a joint sale of materials, a lien cannot be maintained on any one vessel for the entire materials furnished for both vessels, but said that this was not inconsistent with the allowing of a lien after ascertaining what benefit each steamer received under the contract:

"The underlying equity is that the lien is supported by the fact that the labor and materials have actually gone into the property on which the lien is claimed, and increased its value."

This case on appeal (American Trust Co. v. W. & A. Fletcher Co. [Berwind-White Coal Mining Co. v. Same] 173 Fed. 471, 97 C. C. A. 477) was affirmed. Although the case was thoroughly contested by eminent counsel experienced in the admiralty law, the ruling of the court below that the furnishing of the materials removed any uncertainty arising from the fact that the contract was joint, so far as an examination of the briefs in that case discloses, was not questioned on appeal. In the opinion on appeal (173 Fed. 479, 97 C. C. A. 477) it was said also:

"The contract of construction was made with reference to the statute, and a verbal incorporation of the statute into the terms of the contract, expressing in the language of the parties that which the Legislature has declared to be the law, must be an empty formality."

[4] I find, therefore, that in contracting for this coal it was understood by both parties that it was to be principally used for strictly maritime purposes, that a large part of it was used for such purposes, and that the parties contracted in view of statutory rights to a lien.

It may be argued that when coal is delivered to bins on the wharf of a purchaser, who may use it as he pleases, on such of his ships as he may select, or upon land, if he prefers, that the coal is furnished to the owner and not to a vessel. But such an argument upon the evidence in this case ignores the material fact that it was understood by both parties that the coal was procured and supplied largely for uses which were strictly maritime.

Doubtless a very substantial part of the inducement to the Coal Company to supply the coal was its knowledge of its intended use by vessels for maritime purposes, and its understanding that the law gave it a lien for coal supplied for such purposes. Upon the facts in this case it is most improbable that the coal would have been supplied to the owner and upon the owner's very doubtful credit.

I find that it was furnished because it was destined and intended to be used in large part by vessels, and that in the sense of the statute it was therefore furnished to vessels upon the faith of a lien thereon, and not to the owner.

The ultimate destination to vessels, and the use by vessels, being a material consideration, contemplated by both parties, it would be most unjust to the libelant to hold that it furnished the coal to the owner, and only on the owner's credit. The mere fact that the names of the particular vessels to receive particular shipments of coal were unknown I cannot regard as material. The Oil Corporation was known to be the owner of a fleet of vessels, and it was known that those vessels would call from time to time at the Oil Corporation's wharves for their coal. That is sufficiently certain which, in the due course of the contemplated supply of coal to the fleet, would be made certain.

The subsequent appropriation of the coal to particular vessels by the owner, being in pursuance of what was intended by both parties, logically relates to the question whether the coal was furnished by the libelant to a vessel. The course of the business of the owner's fishing fleet selected and made certain which of the vessels should receive the benefit of the libelant's coal and become subject to a maritime lien corresponding to the benefit received. A contract to provide coal for such vessel of a fleet as might first arrive in port, and the delivery of coal ready at the owner's wharf for such vessel, would become definite on the arrival of the first vessel of the fleet.

[5] As supplies for fleets of vessels under a common ownership and management in the ordinary course of business are contracted for in view of the general requirements of the entire fleet, as supply men will thus be called upon to furnish supplies in advance of the arrival of the vessels, as at the time supplies are ordered there may be uncertainty as to which vessel may require them and use them, the statute should receive a construction which will make it applicable to and consistent with modern business conditions. A supply man who furnished supplies ready for any vessel of a fleet that may call for it should not be deprived of the same right to a lien as a supply man who is told the name of the vessel which is to require the supplies.

The appropriation of the coal to a particular vessel, though made by the owner, yet if done in pursuance of the course of business contemplated by the parties, must be regarded as completing a "furnishing" by the libelant to "a vessel," which is identified by the act of the owner in placing the coal aboard.

Cases which hold that supplies may be furnished to a vessel, though not actually incorporated in or used by the vessel, have no bearing in this case. While use and appropriation may not, in all cases, be necessary to make out a case of furnishing to a vessel, it does not follow that they may not afford conclusive evidence of the identity of a vessel and of the completion of a maritime lien thereon.

But the question of the effect of an appropriation to a particular vessel I regard as settled by the decisions of Mr. Justice Curtis and Judge Putnam, heretofore cited. In these cases it was at the outset uncertain which of two vessels might receive the supplies. In the

present case it was uncertain which vessels of a fleet might receive them; but in this case, as in the cases cited, the uncertainty ended upon the owner's appropriation of the coal to special vessels.

Following the decisions of Justice Curtis in The Kiersage, 2 Curt. 421, Fed. Cas. No. 7,762, and of Judge Putnam in Berwind-White Coal Mining Co. v. Metropolitan S. S. Co. (C. C.) 166 Fed. 784, I am of the opinion that for such coal as actually went into any vessels of the fleet the libelant is entitled to a maritime lien upon such vessel, but that there can be no lien upon one vessel for coal supplied to another vessel. See, also, The Yankee, 233 Fed. 919, 927, 147 C. C. A. 593.

According to the evidence of Mr. Milligan, manager at Tiverton, out of the entire fourth shipment of 861 tons, 790 tons were thus received by vessels of the fleet, and a record was kept of the amounts received by the respective vessels. The agreed price was $3.75 per ton.

There were shipped to Promised Land 4,459 tons of coal, at an average price of $3.28 per ton. Vessels of the fleet received from bins at Promised Land 3,568 tons, and a record is presented of the amounts received by particular vessels. Some uncertainty arises, however, from the fact that the 3,568 tons were taken from bins at Promised Land which contained, not only the 4,459 tons of coal furnished under the contract, and for convenience called by counsel "lien coal," but also 1,068 tons of coal that had been paid for. The entire amount of coal on hand was,

4,459 tons lien coal, so called.
1,068 tons nonlien coal.

5,527 tons.

If we should deduct from the 3,568 tons received by the vessels the whole amount of 1,068 tons of nonlien coal, it would follow with mathematical certainty that 2,500 tons of lien coal were used by vessels of the fleet. Upon this view of the case, it would seem that there should be deducted from the amounts furnished each steamer at Promised Land a part of 1,068 tons proportionate to the whole amount received by a particular vessel. But it hardly is just to assume that all of the 1,068 tons of nonlien coal went to the vessels. The confusion of lien coal and nonlien coal cannot be treated in the same light as a confusion of goods by a tort-feasor, against whom every assumption will be made. The Idaho, 93 U. S. 575, 585, 23 L. Ed. 978.

The proportion of nonlien coal, 1,068, to the whole amount in the bins, 5,527, is less than one-fifth. For practical purposes a deduction of 20 per cent. from the amount received by each ship would seem to give a result that would be fair and as accurate as the nature of the case admits.

I am of the opinion that the libelant is entitled to liens upon the respective vessels, the amount thereof to be determined upon the principles above stated. Any objection to the mode of computation, or to the accuracy of the figures, may be heard upon the settlement of the terms of the decree.

[6] There remains a question as to the application of a payment to the Coal Company of the sum of $2,000, made on or about August 24, 1914.

At this time the Coal Company held notes of the Oil Corporation that were not yet due. The book account for the five shipments of coal for which a lien is now claimed was then due. After the receivership of October 19, 1914, this payment was credited upon one of the notes, which had been renewed after the receipt of the check for $2,000.

To so credit the amount after the receivership would result in prejudice to the mortgagee by subjecting the property to a maritime lien to the amount of about $2,000.

I am of the opinion that this payment should be applied to the open account, rather than to the notes not due at the time of payment, and that the claim for maritime liens must be reduced by the amount of the payment of August 24, 1914, either by a pro rata reduction or by the extinguishment of the claims upon certain vessels, as shall hereafter be determined.

Counsel for the libelant may present a draft decree, within 20 days, in accordance with the above opinion; and objections to and corrections thereof may be filed within 10 days thereafter.

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## In re STAFFORD.

(District Court, D. Connecticut. February 2, 1917.)

No. 3239.

1. BANKRUPTCY ⟸461—APPEAL—TIME—JUDGMENT NUNC PRO TUNC.

Though the court has authority to enter a judgment nunc pro tunc as of the time when the opinion was rendered, and such judgment for most purposes takes effect from the earlier date, the time for taking an appeal therefrom, under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (Comp. St. 1913, § 9609), requiring an appeal to be taken within 10 days after the judgment appealed from has been rendered, dates from the actual entry of the judgment, not from the earlier date.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–923; Dec. Dig. ⟸461.]

2. BANKRUPTCY ⟸461—APPEAL—NATURE OF RIGHT.

The right to appeal from a judgment discharging a bankrupt is not a right based on principles of natural justice, is not specifically granted by the Constitution, nor essential to due process of law, and, if the appeal was not taken within the time fixed by the statute, the right is lost.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–923; Dec. Dig. ⟸461.]

3. BANKRUPTCY ⟸461—APPEAL—TIME—EXTENSION.

A petition to open the judgment discharging the bankrupt, to give objecting creditors an opportunity to appeal therefrom, which was not filed until after the time allowed by statute for appeal had expired, does not extend the time for appeal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–923; Dec. Dig. ⟸461.]

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. BANKRUPTCY ⟸416—JUDGMENT—ENTRY—NOTICE—EQUITY RULE.

Equity rule 4 (198 Fed, xx, 115 C. C. A. xx) providing that, where an order is entered in the equity docket or order book without prior notice to or in the absence of a party, the clerk shall forthwith send notice thereof to the party's solicitor, does not apply to a judgment discharging a bankrupt, since the bankruptcy side of the court is as distinct from the equity side as the law or the admiralty side, and the dockets are separately kept, though in bankruptcy proceedings the court protects the equitable rights of the parties, and appeals in bankruptcy are regulated, except as otherwise provided in the Bankruptcy Act, like appeals in equity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 707; Dec. Dig. ⟸416.]

In Bankruptcy. In the matter of George A. Stafford. On petition by objecting creditors, asking that the order of discharge be opened, so that they may be permitted to appeal therefrom. Petition denied and dismissed.

Charles D. Lockwood, of Stamford, Conn., for bankrupt.

Galen A. Carter and Warren F. Cressy, both of Stamford, Conn., for objecting creditors.

THOMAS, District Judge. The special master recommended a discharge in bankruptcy. Certain creditors filed exceptions to his report. On September 1, 1915, the court filed an opinion (226 Fed. 127) overruling the exceptions and directing that the report be confirmed, but no final judgment or order of discharge was entered until some time in September, 1916, when a discharge was filed nunc pro tunc as of September 1, 1915, the date of the filing of the opinion. The exact date of the entry of this order of discharge does not appear, but there is no doubt but that it was more than 10 days prior to the filing of the preceding petition.

The petitioning creditors now ask that the order of discharge be opened, so that they may be permitted the opportunity to appeal therefrom within 10 days, required by section 25a of the Bankruptcy Act, providing that:

"Such appeal shall be taken within ten days after the judgment appealed from has been rendered."

[1] There can be no question as to the power of the court to make this entry as of the date when it was directed, as the power to give effect to judgments as of some time prior to their actual entry has been possessed and exercised by all courts of record from the earliest times, and is founded upon the principle that an act or delay of the court shall prejudice no one; and until the entry was made there was nothing to appeal from, as no final decree or judgment was recorded which was the subject of an appeal. Ragan, Malone & Co. v. Cotton & Preston, 195 Fed. 69, 115 C. C. A. 576.

Although for most purposes the effects of such judgment is not different from what it would be if it had not been entered nunc pro tunc, yet, for the purposes of a statute of limitations, the date of a judgment nunc pro tunc is the date of its entry, and not the date as of which the judgment is ordered to take effect, and until the entry of

the judgment the right is in abeyance. As was said by the Supreme Court in Borer v. Chapman, 119 U. S. 587, at page 602, 7 Sup. Ct 342, 350 (30 L. Ed. 532):

"It cannot be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced."

The petitioners, therefore, did not have the right to appeal from this order until its actual entry, and then the statute began to run.

"It is the record of the judicial decision or order of the court found in the record book of the court's proceedings which constitutes the evidence of the judgment, and from the date of its entry in that book the statute of limitations begins to run." Polleys v. Black River Improvement Co., 113 U. S. 81, 84, 5 Sup. Ct. 369, 370 (28 L. Ed. 938).

And the statute (section 25a of the Bankruptcy Act) must be taken to be declaratory of the rule thus stated.

[2] The petitioners were in court and had due and timely notice of the filing of the opinion sustaining the report of the special master. The preparation and record of the order of discharge was purely a matter of routine, by filling up a printed blank provided for that purpose, the form of which is universal, and prescribed by the Supreme Court of the United States, and which followed the opinion as a matter of course, and required no findings of fact or law, and, indeed, no settlement of any kind. Furthermore, the right of appeal is merely a statutory privilege granted to an aggrieved party upon certain conditions, which must be complied with. It is not a right based upon principles of natural justice, and is not specifically granted by the Constitution, nor is it essential to due process of law. Reetz v. Michigan. 188 U. S. 505, 507, 23 Sup. Ct. 390, 47 L. Ed. 563; Etchells v. Wainwright, 76 Conn. 534, 540, 541, 57 Atl. 121.

It therefore follows that, if the appeal was not taken within the time fixed by statute, the right to take it was lost. Conboy v. First National Bank of Jersey City, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128; Credit Co., Ltd., v. Arkansas Central Ry. Co., 128 U. S. 258, 261, 9 Sup. Ct. 107, 32 L. Ed. 448; Rode & Horn v. Phipps, 195 Fed. 414, 115 C. C. A. 316.

[3] And it also follows from the authorities just cited that, as the pending petition was filed after the period for the appeal had expired, it had no effect in extending the time for taking the appeal. "When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

Credit Co., Ltd., v. Arkansas Central Ry. Co., 128 U. S. 261, 9 Sup. Ct. 107, 32 L. Ed. 448, supra.

[4] The petitioners have strenuously urged that the case is controlled by equity rule 4 of the Supreme Court (198 Fed. xx, 115 C. C. A. xx), providing that, where an order is entered in the equity docket or equity order book without prior notice to, or in the absence of, a party, the clerk shall forthwith send by mail notice of such order to

the parties' solicitors. But the answer to this is that this case was never entered, and indeed was never the subject of entry, in the equity docket, and the equity order book was not an appropriate or proper place for the entry or record of the order of discharge. While bankruptcy proceedings are in the nature of proceedings in equity, in that a bankruptcy court seeks to administer the law according to the spirit, and not according to the letter, and while a bankruptcy court may exercise full equity powers in the ascertainment and enforcement of the equities of the parties, and while, too, appeals in bankruptcy matters are regulated, except as otherwise provided in the Bankruptcy Act, like appeals in equity, it does not follow that the rule in question goes to the extent contended for it. The bankruptcy side of the court is as distinct from the equity side as either of these is from the law or admiralty sides, and their dockets and records are separately kept.

The controlling fact to be taken into account in disposing of this petition is that the petitioner's solicitors, if they did not actually know, had the means of knowledge, of the entry and record of the order, which was entered and recorded as of course more than 10 days prior to the filing of this petition, and after the right to appeal had expired and been lost, and, having been lost, it cannot, as was said by the Supreme Court in Credit Co., Ltd., v. Arkansas Central Ry., supra, be arrested or called back by a single order of court, the granting or denying of which is in the court's discretion.

The petition should be denied and dismissed, and an order to that effect entered. So ordered.

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## In re LOCKWOOD.

(District Court, E. D. New York. February 28, 1917.)

1. BANKRUPTCY ⇐413(3)—DISCHARGE—SPECIFICATIONS.
Where none of the specifications of objection to discharge filed by the objecting creditor stated any act coming within the provisions of Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (Comp. St. 1913, § 9598), prescribing the grounds for denying a discharge, and no testimony in support of the specifications was offered, the objecting creditor seeking to withdraw his specifications as soon as the question of their sufficiency was brought in issue, the specifications were properly dismissed and the discharge granted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 714.]

2. BANKRUPTCY ⇐315(1)—CLAIMS—PROVABLE CLAIM.
Where a judgment based on the obtaining of property by false and fraudulent representations was secured, a claim based on the judgment may on the bankruptcy of the defendant be proven as a debt in case the creditor so desires.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 491.]

3. BANKRUPTCY ⇐407(1)—DISCHARGE—RIGHT TO DISCHARGE—DEBTS.
Where a bankrupt had not been guilty of any of the acts denounced by Bankr. Act, § 14, he may be granted a discharge notwithstanding some of the debts listed were not dischargeable.

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. BANKRUPTCY ⟸415½—DISCHARGE—QUESTIONS FOR DETERMINATION.
On specifications by an objecting creditor to the discharge of the bankrupt, the question whether the creditor's claim was a debt dischargeable in bankruptcy cannot be determined by the referee; the bankrupt's right to discharge being unaffected by the question whether the particular debt was discharged, and the specifications not setting forth any ground for the denial of the discharge, for the question of the extent of the discharge can only be determined by a court having jurisdiction to decide that matter.

In Bankruptcy. In the matter of the bankruptcy of Samuel G. Lockwood. Motion to confirm report dismissing specifications of objection to discharge. Motion sustained, and discharge granted.

See, also, 240 Fed. 161.

Maires, Maddox & Maires, of Brooklyn (Samuel Evans Maires, of Brooklyn, N. Y., of counsel), for bankrupt.

Philip S. Dean, of New York City, for objecting creditor.

CHATFIELD, District Judge. [1] The special commissioner to whom the specifications of objection were referred has reported that the specifications of objection are insufficient. He recommends their dismissal upon the ground that the objecting creditor has not specified any act which comes within the provisions of section 14 of the statute. With this conclusion the objecting creditor does not disagree. In fact, it appears from the record that the objecting creditor sought to withdraw his specifications as soon as this question was raised before the commissioner. No testimony in support of the specifications as such was offered. It is evident therefore that the report dismissing the specifications should be confirmed and the discharge granted.

The motion, however, seeks to confirm the commissioner's report as to other findings which involve further consideration.

[2] The objecting creditor alleged that its debt was not provable in bankruptcy, and also that it was not dischargeable, "because it is founded upon a judgment obtained in an action, the gist and gravamen of which is fraud, in that the action was based on fraud in fact, and the bankrupt, by false and fraudulent representations, obtained property, to wit, money from the objecting creditor herein." This is supplemented by a lengthy statement as to the nature and particulars of the cause of action and the evidence which, after trial, resulted in the judgment scheduled by the bankrupt as a debt owed to the objecting creditor.

The first proposition in the specification is that the debt is not provable. It is evident that this is a mistake, as the debt is clearly provable, if the creditor sees fit to file a claim.

[3] The next proposition is that the debt is one from which the bankrupt cannot be discharged. Whether or not this be so is not a matter with which we are concerned in considering the right of the bankrupt to be discharged from such debts as are dischargeable. The commissioner, with the objecting creditor's acquiescence, so ruled, and reported that the specifications present no valid ground of objection to discharge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[4] The third proposition in the specification is that the discharge should be denied because the action in which the judgment was obtained is alleged to have been based on fraud in fact, and because the bankrupt is alleged to have, by false and fraudulent representations, obtained property, to wit, money, from the objecting creditor herein.

This last sentence, if the objecting creditor had taken the position that his specification was intended to set forth acts within the provisions of the statute defining the grounds for denial of discharge, would have been sufficient, at least by amendment, to enable the creditor to present evidence to show that the bankrupt had obtained property on credit, upon a materially false written statement, made for the purpose of obtaining such credit, or such property on credit, under subdivision 3 of section 14b of the statute. But no such claim was made or amendment asked. The creditor merely acquiesced in the proposition that the bankrupt, even if he obtained a discharge, could not thereby avoid litigating the effect of that discharge, if a creditor should subsequently seek to prosecute his claim and to contend that it had not been discharged and was not dischargeable.

Instead of dismissing the specifications upon their face, the special commissioner proceeded to take testimony upon the question as to whether the particular debt came within subdivision 2 of section 17 of the statute (Comp. St. 1913, §§ 9601). In other words, upon a reference as to the sufficiency of specifications of objection to discharge, the parties, by an enforced consent, based upon a claimed estoppel, had a voluntary reference or moot court determination as to the nature of the creditor's debt. In re Blumberg (D. C.) 94 Fed. at page 481.

A number of cases such as In re McCarty (D. C.) 111 Fed. 151, In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, In re Mussey (D. C.) 99 Fed. 71, In re Blumberg, supra, and Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718, have been cited, from which it sufficiently appears that the scope of the discharge, with respect to the inclusion of particular debts, has nothing to do with general granting of the discharge. It is also apparent from such cases as Friend v. Talcott, supra, and In re Marshall Paper Co., supra, that the effect of this discharge can be raised only in a proceeding before a court having jurisdiction to determine that issue.

The bankrupt has, however, cited certain cases, such as In re Levitan (D. C.) 224 Fed. 241, from which it appears that if a bankruptcy court, or any court, is called upon to deal with or dispose of an alleged right, based upon the debt apparently released by discharge, the effect of that discharge may be litigated, citing Hallagan v. Dowell (Iowa) 31 Am. Bankr. R. 848, 139 N. W. 883.

But no such issue was raised here, and this court should not seek to follow out the effect of the discharge. The special commissioner has taken a great deal of testimony and considered seriously the effect of the discharge, if granted, upon the objecting creditor's claim. Since the special commissioner's decision, the Supreme Court of the United States, in the case of McIntyre v. Kavanaugh, 242 U. S. 138, 37 Sup. Ct. 38, 61 L. Ed. ——, decided December 4, 1916, following Tinker

v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, has established certain propositions with relation to the obtaining of property by false representations which might well be considered on the merits, and which, of course, were not before the special commissioner in making his report. But the court has nothing to do therewith on this motion.

There seems to be no reason for the attempt on the part of the special commissioner to apply an estoppel in order to avoid the admission by the objecting creditor that the specifications are insufficient. There is no basis, therefore, for the application to confirm the findings of the special commissioner upon matters which were not in litigation before him.

The discharge will be granted.

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## In re LOCKWOOD.

(District Court, E. D. New York. March 2, 1917.)

1. BANKRUPTCY ⟸392—PROCEEDINGS—PROTECTION OF BANKRUPT.
Under Bankr. Act July 1, 1898, c. 541, § 9, 30 Stat. 549 (Comp. St. 1913, § 9593), providing that a bankrupt shall be exempt from arrest upon civil process unless issued on a debt or claim from which his discharge would not be a release, and that in such case he shall be exempt from arrest when in attendance upon a court of bankruptcy, a court of bankruptcy having granted a discharge has jurisdiction to protect the bankrupt from arrest under a judgment rendered by another court after discharge, pending application to such court for relief, though the bankruptcy court cannot determine whether the discharge will apply to such judgment.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 619–622.]

2. BANKRUPTCY ⟸418(3)—DISCHARGE—PROTECTION OF BANKRUPT.
Under Bankr. Act, § 2, subd. 15 (Comp. St. 1913, § 9586), giving the courts of bankruptcy authority to make orders necessary to give effect to the act, and section 11 (section 9595), declaring that when a suit is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of petition against him, it shall be stayed until after an adjudication or dismissal of the petition, a court of bankruptcy, the question involved not being that of jurisdiction to enforce the bankruptcy act, cannot determine the effect a discharge will have upon an action pending or a judgment rendered by another court, prior to the bankruptcy, but such question must be determined by application to the court having jurisdiction.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 767.]

In Bankruptcy. In the matter of the bankruptcy of Samuel G. Lockwood. Application to restrain the sheriff from levying a body execution upon the bankrupt pending time within which the question of the discharge could be litigated, etc. Motion granted for a period in order to allow the bankrupt to apply to the state court for appropriate remedy to determine the effect of his discharge.

See, also, 240 Fed. 158.

Maires, Maddox & Maires, of Brooklyn (Samuel Evans Maires, of Brooklyn, N. Y., of counsel), for bankrupt.

Philip S. Dean, of New York City., for objecting creditor.

CHATFIELD, District Judge. An application has been made to restrain the sheriff from levying a body execution upon the judgment debtor, pending the time within which an application for discharge could be made, the question of the discharge litigated, and the proceedings in bankruptcy carried on to a point where the bankrupt would not be harassed and interfered with in his bankruptcy proceedings by the process in the hands of the sheriff. A temporary stay, pending the determination of the motion, was granted, and the motion has been submitted. Discharge has just been allowed to the bankrupt, and the bankruptcy hearings have in general been concluded.

[1] The protection afforded by section 9 (which provides that a bankrupt shall be exempt from arrest upon civil process unless issued upon a debt or claim from which his discharge in bankruptcy would not be a release, and even in such case exempting the bankrupt from arrest when in attendance upon the court of bankruptcy) should not be extended (after adjudication and the examinations or attendance of the bankrupt have been completed) beyond a reasonable time for the bankrupt to make application for discharge, and, if that is granted, to apply to such court as may have jurisdiction for relief or protection from the effect of the order of arrest, if process thereunder be still outstanding against him.

[2] This court cannot, upon this application, determine what the state court should decide with reference to the dischargeability of the bankrupt from this particular debt. On the contrary, even if the debt be not dischargeable, the protection granted by section 9 should be and has been given. Nor can a stay under section 11 of the bankruptcy statute delay the prosecution of a suit longer than the determination of his application for discharge. When discharge is granted, it may be pleaded as a defense to any proceeding upon the debt. The scope of the discharge will be in issue if the defense is contested, and cannot be established collaterally by a dictum of the court granting the discharge. In re Mussey (D. C.) 99 Fed. 71. If the question involved were that of jurisdiction to enforce the bankruptcy law (In re Hicks [D. C.] 133 Fed. 239), or to administer the estate and to protect the bankrupt free from claims vacated or made void by the adjudication (In re Obergfoll, 239 Fed. 850, —— C. C. A. ——, decided January 16, 1917, Second Circuit), the general provisions of the statute would apply (section 2, subd. 15, Bankruptcy Statute). But the court can retain control of the bankrupt only to carry out the law, and not to prevent litigation in courts which have jurisdiction to litigate.

Motion granted for a definite period to be stated in the order when settled, in order to allow the bankrupt to apply to the state court for the appropriate remedy to bring up the question of the effect of his discharge.

## THE GLEANER.

(District Court, N. D. California, First Division. February 1, 1917.)

No. 15017.

SHIPPING ⊂=37—VALIDITY OF CHARTER—MUTUALITY.

A charter party for space for the carriage of all logs offered by the charterer from certain named Mexican ports to San Francisco at a stated rate of freight required the vessel "to stay and receive at ports mentioned all cargo that may be ready for shipment to any amount of logs up to convenient carrying capacity." There was no provision requiring the charterer to furnish logs for shipment at any of the named ports. *Held*, that the charter was void for want of mutuality, and that the vessel was not liable for its breach for failing to stop at one of the ports, although she did stop and take cargo at others.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 127-135.]

In Admiralty. Suit by the Dieckmann Hardwood Company against the American barkentine Gleaner. On exceptions to amended libel. Exceptions sustained.

Andros & Hengstler and G. W. Bell, all of San Francisco, Cal., for libelant.

Denman & Arnold, of San Francisco, Cal., for claimant.

DOOLING, District Judge. The amended libel counts on a breach of a charter, in that the barkentine Gleaner failed to call at Tiopa, on the west coast of Mexico, to take on board 326 logs which libelant had there ready for loading thereon, to be carried to San Francisco. The material provisions of the charter party, which is made a part of the libel, are the following:

"That the managing owner agrees on the freighting and chartering of enough space of said vessel to carry all cargo offered by charterers, for a voyage from Tiopa and/or Perula and/or Tenacatita to San Francisco. Charterers engage to furnish logs at loading place herein provided, of such lengths and size as she can conveniently handle with her usual equipment. Vessel agrees to stay and receive at ports mentioned all cargo that may be ready for shipment to any amount of logs up to convenient carrying capacity of the vessel." "Charterer agrees to pay * * * for the use of the vessel during the voyage aforesaid, payable on the right and true delivery of cargo at the port of discharge, for each one thousand feet, gross board measure, delivered at San Francisco, six dollars."

The libel alleges that the Gleaner did enter upon and partially, but imperfectly, perform the conditions of the charter party, by calling at some, but not all, of said places and there receiving and accepting logs tendered by libelant for carriage to San Francisco, and then proceeding on said voyage thereto, but that in breach of said charter party she did not call at Tiopa, despite the fact that libelant had there at the loading place 326 logs ready for loading.

While the charter provides that the vessel will carry all cargo offered by the charterers, the charterers are not bound by it to offer any cargo at all. The contract in this respect is absolutely without mutuality. In American Cotton Oil Co. v. Kirk et al., 68 Fed. 791, 15 C. C.

A. 540, a contract to sell and deliver 10,000 barrels of oil, at a stipulated price, in such quantities per week as the buyer might desire, to be paid for as delivered, but which contained no agreement on the part of the buyer to purchase and receive any particular quantity of oil, was held to be not binding, for want of mutuality, by the Circuit Court of Appeals for the Seventh Circuit; the court saying:

"There is no mutuality of promises for the sale of a definite or ascertainable quantity of oil. Suppose the plaintiffs had decided upon ordering 6 barrels of oil per week, or 1 barrel for every working day. That would require 32 years for the fulfillment of the contract. And we can discover no way, by the terms of the contract, whereby the defendant could put the plaintiffs in default, * * * because the amount and times of ordering are left wholly to the plaintiffs."

In Walker Mfg. Co. v. Swift & Co., 200 Fed. 529, 119 C. C. A. 27, 43 L. R. A. (N. S.) 730, the Circuit Court of Appeals for the Fifth Circuit uses the following language:

"If a seller agrees to deliver such quantities of any commodity as a buyer may choose to order, but the buyer does not agree to order any quantity of such commodity, the contract would be wanting in mutuality and void. The buyer not being bound, the seller would be free to disregard the agreement. To hold otherwise would enable the buyer to give orders and take the commodity if prices fall, and to give no orders and refuse to take it if prices should rise. It is axiomatic that such a contract would be wanting in mutuality and void."

By the charter party under consideration the charterers are under no obligation to furnish any cargo whatsoever. If the contract be valid they are in a position to secure other carriage for their cargo if freights should decline, but to insist upon the terms of the charter if freights should advance. The vessel might make a voyage to the west coast of Mexico for the purpose of receiving cargo from the charterers, there to be told that the charterers had no cargo to offer, and the owners would be without remedy, for the charterers are obligated to nothing save to pay $6 per 1,000 feet for the carriage of such logs as they may choose to offer. The contract, therefore, being without mutuality, is void.

It is claimed, however, that the charter constitutes a continuing offer on the part of the vessel, which became binding when the logs were provided for carriage at the loading place at Tiopa. But this is only saying that a contract void for lack of mutuality becomes valid upon the demand of the party not bound that the party bound should comply with its terms. But such demand created no obligation on the part of the charterers, as they were just as free to withhold the logs from shipment on the Gleaner after they were brought to Tiopa as they were before. It is also claimed that, as the vessel performed part of the contract by taking on logs at the other ports, she was bound to complete it and take on the logs at Tiopa. That might be true, if the charterers, by furnishing logs at the other ports, had obligated themselves to furnish logs, also, at Tiopa. But they had not. They were still as free from any further obligation to the vessel, as they had been theretofore.

In the American Cotton Oil Co. Case cited above, the contract had been carried out to the extent of the delivery of 9,490 barrels of oil

out of the 10,000 barrels provided for, but the court held the contract to be unenforceable as to the remaining 510 barrels.

As the amended libel is based upon a void contract, the exceptions thereto must be sustained; and it is so ordered.

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## In re ROWE.

(District Court, E. D. New York. February 27, 1917.)

1. BANKRUPTCY ⟸415(2)—OPPOSITION TO DISCHARGE—SPECIAL COMMISSIONER—REPORT—FORM.

A report by the special commissioner on specifications opposing a discharge in bankruptcy, which was in the form of an opinion, need not be returned for particular findings of fact and conclusions of law, since a report in that form is generally of more value than in the other form.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 702, 705, 706 708, 719.]

2. BANKRUPTCY ⟸415(3)—OPPOSITION TO DISCHARGE—REPORT OF SPECIAL COMMISSIONER—ACTION BY COURT.

The court will not overrule the findings of the special commissioner on specifications opposing a discharge in bankruptcy, if there is any evidence upon which they are based, unless the conclusions are contrary to law, or the entire issue leads to a different construction of some of the acts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698–701, 704, 707.]

3. BANKRUPTCY ⟸408(2) — DISCHARGE — FALSE STATEMENT — DECREASING CLAIM.

Where a bankrupt, in making his schedules, stated the claim of one creditor, who was supposed to have some security, as much smaller than it was, and the creditor was not estopped to claim the full amount, the false statement of financial condition was sufficient ground to deny the discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 733, 734.]

In Bankruptcy. In the matter of Perry B. Rowe, bankrupt. On objections to the discharge of the bankrupt. Discharge denied.

James L. Robinson, of New York City, for trustee.
Hooley & Wilson, of Rockville Center, N. Y., for bankrupt.

CHATFIELD, District Judge. Specifications of objection have been passed upon by a special commissioner, who has overruled or dismissed some of the objections, and found some of them sustained. It is generally objected to the report that the commissioner has not made separate findings of fact and of law, but has, instead, stated his general findings in the nature of an opinion.

[1, 2] Experience has proven that a report in the form of an opinion, such as has been used in admiralty and equity and is customary in bankruptcy, is generally of more value than enumerated statements of fact and conclusions of law, which require extensive exceptions in the nature of a pleading, if confirmation is opposed. A simple motion to

confirm a report, in the form of an opinion, allows argument of any question involved. Further, the District Court will not overrule the findings of the commissioner, if there is any evidence upon which those findings are based, unless the conclusions are contrary to law, or unless consideration of the entire issue leads to different construction of some of the acts involved. It will be held, therefore, that there is no necessity for returning the report, or for more particular findings.

As to the objections, much testimony has been taken, and the report of the commissioner constitutes a document of 24 pages. One main objection is that the bankrupt kept no sufficient books of account. While it appears that the bankrupt was exceedingly careless, and had no proper business training, there is evidence to support the finding of the commissioner that an utter failure to keep (other than by check stubs) any record of extensive business dealings, and complete lack of care with respect to the returned vouchers and check books themselves, when viewed from the general methods of business of this bankrupt, show his entire disregard for his creditors' rights, and indicate an intent to preserve no record of his transactions, rather than a purely haphazard method of business.

The various charges of false oath have each to do with a matter which shows disregard by the bankrupt of the rights of his creditors, as well as indifference to the responsibility placed upon him when called as a witness. The court could overlook the failure of the witness to understand the necessity of being accurate and careful when testifying, if he did not show disregard for the truth so far as his creditors were concerned. It is unnecessary to examine in detail and to enumerate each specification which the commissioner has sustained. They are, in general, sufficiently supported by the testimony, to make it unnecessary to see if some particular one might not be cleared up by the bankrupt.

[3] In making up his schedules, the bankrupt attempted to decrease certain claims to one Dr. Vliet, who has been made receiver in bankruptcy. It appears, however, that his claim was much larger, that Dr. Vliet was supposed to have some security, and the bankrupt later filed an amended schedule showing the true amount of the indebtedness. Unless the creditor (Vliet) could have been successfully estopped, and his claim held down to the lower amount, it would seem that the attempt by the bankrupt to falsely state his financial condition would be sufficient ground for denial of discharge. Josephs v. Powell & Campbell, 213 Fed. 627, 130 C. C. A. 291.

Upon the whole case, it is evident that the report recommending a denial of the discharge is in accord with the situation, and the specifications held sustained by the commissioner are found to have been substantiated.

The discharge will be denied.

In re SWEETSER.

(District Court, D. Massachusetts. June 19, 1907.)

No. 7811.

1. BANKRUPTCY ⟸131 — ASSIGNEE — DISQUALIFICATION — ACQUISITION OF CLAIM.

Mere ownership by an assignee in bankruptcy of a claim against the bankrupt estate, although acquired after the bankruptcy, does not disqualify him under Bankr. Act March 2, 1867, c. 176, 14 Stat. 517, where prior to its acquisition the claim had been allowed without opposition, and the transaction was fair and in good faith, and the claim was not brought for speculative purposes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 192; Dec. Dig. ⟸131.]

2. BANKRUPTCY ⟸132—ASSIGNEES—REMOVAL.

Facts *held* not to require, nor to render expedient, the removal of assignees in bankruptcy, under Bankr. Act March 2, 1867.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 190; Dec. Dig. ⟸132.]

3. BANKRUPTCY ⟸337—TRANSFER OF CLAIM—EFFECT OF ALLOWANCE BY REGISTER.

The allowance by the register of the transfer of a claim against a bankrupt estate under Bankr. Act March 2, 1867, is binding upon other creditors, who might have opposed it, whether they did so or not.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸337.]

In Bankruptcy. In the matter of Elbridge L. Sweetser, bankrupt. On petition for removal of assignees, and objections to petition of F. Joy to be subrogated to claim proved by Dolliver and others against the bankrupt estate. Petition for removal denied, and objections to petition of F. Joy sustained.

See, also, Kyle v. Hammond, 192 Fed. 559, 113 C. C. A. 31.

Hollis R. Bailey, of Boston, Mass., for petitioner.

Fred Joy, of Boston, Mass., for Wm. B. H. Dowse.

Warren O. Kyle, of Boston, Mass., pro se.

DODGE, District Judge. The proceedings in this case were instituted in 1878, prior to the repeal of the act of 1867. They are governed by that act, which as to them is continued in force by the repealing Act of June 7, 1878, c. 160, 20 Stat. 99.

[1] This petition to remove the assignees was filed September 27, 1901. September 30, 1901, the court referred it to the register, to ascertain facts and report. The assignees' answer was filed before the register May 20, 1902. The register's report, dated March 17, 1903, was filed in court December 8, 1903. He was of opinion that the charges made in the petition were not so sustained as to require removal of the assignees. No further steps were taken toward obtaining either the granting or dismissal of the petition, until March of the present year, when, upon the filing (March 6, 1907) of another petition by Hammond, the petitioner first named in the present petition, reiterating many of its

allegations in support of an application to the court to cancel the assignment of the Dolliver claim to which those allegations refer, made by Dowse to Joy April 24, 1901, and further considered below, I directed that the present petition be disposed of before proceeding under said petition of March 6, 1907. A hearing was had accordingly, March 30 and April 1, 1907, on the register's report of December 8, 1903, and the evidence taken before him.

The adjudication in the case was made on the bankrupt's own petition filed February 23, 1878. One of the present assignees, Mr. Dowse, was appointed March 23, 1878. The other assignee, Mr. Kyle was appointed December 16, 1882, upon the resignation of Mr. Dibble, originally appointed on the same day with Mr. Dowse.

The principal charge made in the petition to remove is:

"That said Dowse, acting simply for his own profit against the interest of the creditors, sought to buy up and take an assignment of the second largest claim against the bankrupt estate, to wit, the claim of Dolliver Bros., and is still asserting a title to and is seeking to have the benefits to be derived from the ownership of this claim; that said Kyle is acting in conjunction with said Dowse, and aiding and abetting him in the matter of his asserted ownership of said Dolliver claim."

The Dolliver claim here mentioned is a claim which William C. and John S. Dolliver proved against the bankrupt's estate on March 16, 1878. According to their proof of claim filed and allowed by the register on that day, the claim amounts to $2,478.31, and consists of balances remaining due on two notes signed by the bankrupt and one Friend. Copies of the notes and of the indorsements thereon are annexed to the proof. That Mr. Dowse has asserted the ownership of this claim to have been at one time in himself is undisputed, and appears from his own testimony given in the proceedings under a petition filed before the register by Frank K. Linscott on May 29, 1901, wherein Linscott, alleging that the claim had been assigned to him, asked for an order subrogating him to the Dollivers' rights. Fred Joy, alleging a prior transfer of the claim to Dowse and from Dowse to him, opposed Linscott's petition. The register, as he states in his report now under consideration, after a hearing on the issues thus raised between Linscott and Joy, at which hearing Dowse was a witness, found the evidence insufficient to prove a transfer of the claim to Dowse and granted Linscott's petition. This was on June 22, 1901, and thus matters stood when the present petition to remove the assignees was filed, on September 27, 1901. Had the referee's decision in Linscott's favor remained unreversed, the utmost that could be said would be that Dowse had sought at one time to buy the claim; it could not be said that he had ever bought it. But a recommittal to take further evidence was ordered, and although upon the further evidence the referee adhered to his first decision (June 18, 1904), the court on July 23, 1904, reversed the register. In Judge Lowell's opinion, dated July 18, 1904 (In re Sweetser, 131 Fed. 567), he held that a sufficient assignment to Dowse was established, and refused to subrogate Linscott. Linscott claimed an appeal on August 2, 1904, but the appeal was never perfected. This decision of the court, made, as above appears, a

year or more after the report of the register in the matter now before me, and now standing as a final determination of the issues raised upon Linscott's petition, is to be regarded as establishing for the purposes of this hearing, notwithstanding the register's report, the fact that Dowse did become owner of the Dolliver claim by a valid assignment from the Dollivers, after they had proved it against the estate. Further consideration is given below to the effect of this decision in connection with a still later report from the register, which deals with the assignment of the claim by Dowse to Joy, April, 24, 1901, and presents a question also raised at this hearing.

The petitioners contend that Dowse's acceptance of the transfer of the Dolliver claim, while acting as one of the assignees of the bankrupt estate, disqualifies him as assignee and requires his removal. It is said that "it is a fraud for an assignee in bankruptcy to purchase a claim for his own profit." Mere ownership by an assignee of a claim against the estate is of course no disqualification. A creditor might be, and often was, assignee under the act of 1867, provided only (Rev. St. § 5035) that he had received no preference contrary to the act. See In re Clairmont, 1 Lowell, 230, Fed. Cas. No. 2,781. In the present act no proviso barring preferred creditors is found. Under it a creditor may be and often is trustee. See In re Lewensohn, 98 Fed. 576. And so far as mere ownership of a claim against the estate is concerned, it would be difficult to say that ownership acquired after the bankruptcy must disqualify when original ownership is no disqualification at all.

The Dolliver claim was transferred to Dowse, as is found in Judge Lowell's opinion on July 18, 1904, in 1883. This was five years after the adjudication had been made, the assignees chosen, and the claim proved and allowed. So far as appears, the allowance of the claim was never opposed, there has been no attempt to re-examine it under Rev. St. § 5081, nor any reason to suppose that there has been or will be objection to its allowance, regarding it simply as a creditor's claim. While the act of 1867 did not bar claims not proved within a year, as does the present act, it might well be supposed in 1883 that all claims which would ever be offered had been proved. None have been proved since 1878. It is not suggested that Dowse acquired the claim in the interest of the bankrupt, or even that the bankrupt knew anything about its transfer. As to the creditor from whom Dowse obtained it, he has given testimony in corroboration of Dowse, in the contest upon the Linscott petition above referred to. No intimation is made by him that the transaction was not perfectly fair and honest, so far as he was concerned. There was an admitted balance, not determined, but less in any event than the face value of the claim, due from him to Mr. Dowse for professional services wholly unconnected with this bankrupt estate. Of his own accord, and with no suggestion from Dowse he proposed to make the transfer in question, in settlement. To this Dowse agreed. Dowse's position as assignee gave him no position of advantage over the creditor in the transaction. At the time there was extremely little reason to believe that the assignees would ever have any more assets of the estate to divide. All that they had previ-

ously collected had been accounted for and disposed of. The assignees were in no better position to judge of the probability that further assets would come to their hands than any one else. Not until the death on December 15, 1900, of the last surviving life tenant under the Richardson will, and not until after the termination, in the present year, of litigation begun in 1901, was their right to the bankrupt's interest under that will established. If the bankrupt had died before December 15, 1900, there would have been nothing to go to them under the will. See the agreed facts in Whittredge v. Sweetser, 189 Mass. 45, 75 N. E. 222, and Hammond v. Whittredge, 204 U. S. 538, 27 Sup. Ct. 396, 51 L. Ed. 606. Judge Lowell's conclusion in his opinion of July 18, 1904, that "the transfer to the assignee was in good faith, and was not procured by his misrepresentation or fraud" is without doubt the only possible conclusion on the evidence. The petitioners, indeed, have not attempted to show anything to the contrary.

None of the ordinary grounds, therefore, for regarding such a transfer of a creditor's claim as objectionable, exist in this case. The petitioners nevertheless contend that it is necessarily objectionable because of the mere fact that the transferee was an assignee of the estate. They contend that an assignee is a trustee for each and every creditor, and that the transfer was forbidden by the general principle, of course undeniable as a general rule of law, that a trustee may not occupy a position inconsistent with the interests of his trust, or which tends to interfere with his duty in discharging it.

The extent to which assignees in bankruptcy are trustees for each and every creditor is of course defined and limited by the duties which the act of 1867 imposes upon them. Those duties are to collect the bankrupt's property, turn it into money to the best advantage, and safeguard the fund realized until paid out by them in dividends as directed by the court. Of course they cannot buy the bankrupt's property; this would make them, whose duty it is to get as much as possible for what is sold, at once buyers and sellers. Of course they cannot acquire such claims upon or interests in the bankrupt's property as will, if established, reduce the fund which it is their duty to collect. Such claims and interests are adverse to their trust. Of course they may not make a private profit out of their administration of the trust fund, or the property from which it comes. But they are not charged with the duty of determining who are to be the beneficiaries of the fund, or in what proportions. As to the claims of creditors to share in the estate, the assignees have a standing to oppose their allowance, but the court decides whether they shall be allowed or not. The court, and not the assignees, fixes the dividends to be paid upon such creditors' claims as are allowed. Creditors' claims, once allowed, are adverse to each other, but not adverse to that interest of the creditors collectively whereof the assignees are trustees. On this point I agree with the register's opinion, who finds that, even if Dowse's purchase were to be sustained, "it does not appear that any interest in assets adverse to other creditors would be obtained thereby." Otherwise, no creditor could properly be assignee. If, therefore, the honest pur-

chase of a creditor's claim by an assignee is necessarily unlawful, it is not so by virtue of the general principle upon which the petitioners rely. If a profit to him is the result, it is not a profit made out of his doings as a trustee.

It is true that in certain English decisions relied on by the petitioners, such a purchase is declared unlawful and treated as ground for the assignee's removal. The two most in point are Ex parte Lacey, 6 Ves. 625 (1802), and Ex parte James, 8 Ves. 337 (1803). Other decisions of the same period are cited in Eden, Bankruptcy (2d Ed., 1826), p. 216, where their general effect is thus stated:

"Nothing is more firmly established than the general rule that an assignee, commissioner, or solicitor to the commission are incapable of purchasing property belonging to the bankrupt, or dividends under the commission."

The system of bankruptcy administration here in view is, of course, that in force in England in Lord Eldon's time, and this, it is evident, was a system differing widely from that with which we are here concerned. Much of what is said in these cases regarding the functions and powers of assignees could not be said of assignees under our act of 1867, to whom I am not satisfied that the decisions referred to, or the rule derived from them, can be fairly and justly applied. If there were ever reasons for treating the honest purchase of a proved and undisputed claim by an assignee as in the same category with a purchase by him of the bankrupt's property at an assignee's sale, I see no reason to believe that they exist here.

Pooley v. Quilter, 2 De Gex & J. 327 (1858), is also relied on; but, while that case repeats and relies on the doctrine of the earlier cases, it really turned, as it seems to me, on the fact that the purchasing assignee had important knowledge about the assets of the estate not imparted to the creditor whose claim he bought, and who, as complainant, was seeking to annul the transfer as a fraud upon him. It does not appear that in England at the present day an assignee is incapable of purchasing a creditor's interest in the estate, or will be removed because of the purchase, if, as here, he can prove that the purchase was bona fide, and a fair bargain as to the creditor who sells. Robson, Bankruptcy (7th Ed.) 613. The English authorities have been considered by Judge Lowell, as is manifest from his opinion. See 131 Fed. 567. It was with them in view that he found no sufficient reason to deny effect to the transfer to Dowse, a finding which I can hardly suppose possible, if acceptance of the transfer can be regarded as misconduct requiring Dowse's removal. No American authority is found for so regarding it, and in my opinion it is not to be so regarded, either on principle or on authority.

[2] If acceptance of the transfer is not ground for Dowse's removal, and if the transfer was valid as has been decided, reassignment of the claim to Joy is not ground for removal. Nor is there any ground for removing Mr. Kyle, so far as the transfer is concerned, against whom the only complaint in this connection is, that he "acted in conjunction with" Dowse, or "aided and abetted him in the matter of his asserted ownership of said Dolliver claim."

Coming to the other grounds for removal asserted in the petition, I cannot doubt that the register was right in holding the charge of re-

fusal to answer questions and the charge of refusal to furnish information not sustained by the evidence. There was nothing to show any attempt to conceal facts properly relating to the administration of the estate. In view of the circumstances under which the questions were put to him, I am unable to believe that Mr. Dowse deserves removal because he took the ruling of the court before answering them.

The register's refusal to find it proved that the assignees ever demanded $2,000 as a condition of their assent to a compromise of the various controversies wherein the estate was in one way or another involved, and his finding that the charge that they had objected to or opposed settlement from improper motives was not sustained were conclusions reached by him after hearing the conflicting evidence in support of and against those charges. I find no reason in the evidence reported for coming to any different conclusion. It cannot be supposed that, if all parties interested had ever really agreed upon a compromise, to which the assignees could not properly have objected for any reasons not relating to the question of their fees, the court, upon application to it, would have allowed that question to stand in the way. But it is not shown that there was ever any such agreement to any such compromise, and it is certain that there was never any attempt to represent any such situation of affairs to the court. In some of the controversies then pending a final result has been reached since the register reported on this petition. In one of them the result was against the assignees. In re Sweetser, 128 Fed. 165, affirmed on appeal in Dowse v. Hammond, 130 Fed. 103, 64 C. C. A. 437. But the Court of Appeals expressly declared in the latter case that it was reasonably incumbent upon the assignees to obtain the decision both of this court and the appellate court, and refused costs to the creditor because his method of proceeding had been such as to render judicial investigation necessary. In another of the controversies, that involving the assignees' right to the bankrupt's interest under the Richardson will, the assignees have now finally prevailed. Hammond v. Whittredge, cited above. It is because of the result thus secured by them that there will now be assets of the estate for division among creditors and of considerable amount. If they were opposed to compromise of this claim, their position now stands justified by the event, so far as both the above matters are concerned, yet one of the prayers of this petition for their removal is that they be ordered to desist from the prosecution of the very case last above mentioned. If I am right in the above conclusions, I see no other grounds upon which the general charge that the assignees "are acting for their own personal profit against the interest of creditors" can be held established.

The charge that the assignees have been guilty of contempt of court, except as it rests on matters already dealt with, rests only on the fact that notwithstanding the pendency of proceedings to supersede them by appointing trustees under Rev. St. § 5103, the assignees had a date set for hearing in the state court in Whittredge v. Sweetser, above cited. Upon a petition filed in this court September 27, 1901, an order was issued September 30, 1901, restraining further prosecution of that case by the assignees. On November 21, 1904, the court vacated this order. That the assignees' action amounted to contempt of court, or

was ever so regarded by the court, I am unable to believe. A contempt could not and would not have been thus lightly treated. And if the court was ever to be asked to deal with the assignees' action as a contempt, the application should have been made at the time.

It may be added, indeed, that if there was ever any ground for removing the assignees, the proceedings under this petition ought to have been continued before the court, and its decision obtained as soon as possible after the filing of the report now before me, on December 17, 1903. The question whether the assignees had been guilty of official misconduct or not ought to have been submitted to the court for settlement as soon as it was so presented that it could be so submitted. It is not a question which could properly be left in abeyance for more than three years, to be raised or not as might seem expedient. If it be said that Judge Lowell's decision on the Linscott petition in July, 1904, varied the facts as presented in the register's report, a delay of more than two years still seems to me a longer delay than should have been allowed to occur.

With all other conclusions reached by the register I agree, and none of them seem to me to require further remark. The result is that I find no cause which in my judgment renders removal necessary. The remaining question under Rev. St. § 5039, is whether there is any cause which renders removal expedient. On this question I have no doubt at all. The original petitioners for removal, if a majority in value, were by no means a majority in number of the creditors. Some of them (but without waiving the charges made in the petition) have now withdrawn from the request for removal. Some of them appear now to have no standing in the proceedings. Removal is now urged chiefly, if not solely, on behalf of Mr. Hammond, who, while he now owns the largest creditor's claim, was the person who claimed against the assignees the interest under the Richardson will, now held to belong to the estate, and indeed appears to have been their principal opponent in the various controversies with which they have had to deal. The present assignees have been acting for many years, are thoroughly familiar with the history of the proceedings in all its details, and whatever the charges against them, they are not charged with any failure in energy or diligence. It is due to them, not only that there is now to be a dividend on the creditors' claims, but also that certain of those claims which had no proper standing have been expunged. I cannot think that it would be either expedient or just to remove them under such circumstances.

The petition of Joy, also before me, was filed on November 22, 1905. It was thereupon allowed by the register. The allowance was afterward vacated, because notice under No. 34 of the old General Orders had not been given. Objections to the allowance of Joy's petition were thereupon filed by Hammond December 16, 1905. Joy denied Hammond's right to object or be heard in opposition May 4, 1906. A report of the register, certifying the question thus arising, was filed March 21, 1907.

[3] Hammond has succeeded to the rights of one creditor of the estate, and in virtue of them had a standing to oppose the allowance of

other creditors' claims or to apply for their re-examination. Joy's assignment of the Dolliver claim from Dowse was filed with the register June 18, 1901. So far as Hammond was concerned, or the prior owner of the claim he now owns, this filing was sufficient notice. The only notice expressly required by General Order 34 is notice to the creditor who originally proved. Of the rival assignment, also, of the same claim, relied on by Linscott, Hammond, or the original creditor he represents, has had notice from the time it was filed with the register, on or before May 29, 1901. If the owners of other claims ever had any standing to object to the subrogation of Joy or of Linscott to the Dolliver claim, that right has existed ever since the above dates whereon the assignments were filed upon which they respectively rely. The decision, therefore, which established the validity of Joy's assignment as against Linscott's, although they alone appeared as actual parties to the controversy in which the decision was made, binds all other creditors who had a standing to participate in it, because they might have intervened with objections to the allowance of either subrogation, had they chosen to do so. In similar proceedings, where different interests in a fund are brought into concourse, and each may claim to be heard as against every other, the determination of a controversy involving the standing of one interest concludes all the other claimants, who have had an opportunity to intervene and be heard upon the question, whether they have actually done so or not. Such a controversy is not to be reheard as many times as there are claimants. The objections now presented by Hammond deny Dowse's capacity to acquire the Dolliver claim and deal with it as its owner in these proceedings. If they had been presented upon the filing of the assignment from Dowse to Joy, in June, 1901, the questions raised could have been heard and determined in the proceedings since had between Joy and Linscott regarding the same claim, which equally involved Dowse's right to own and assign it. Evidence taken in those proceedings has been relied upon before the register in support of Hammond's petition to remove the assignees, so that his actual knowledge as to what was being litigated between Linscott and Joy is hardly open to question. Not having presented these objections for more than five years after Joy filed his assignment from Dowse, and the assignment to Dowse having meanwhile been held valid, Hammond has now, in my opinion, no standing to prosecute them.

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## In re SWEETSER.

(District Court, D. Massachusetts. October 30, 1914.)

No. 7811.

1. BANKRUPTCY ⊜368—ASSIGNEES—DUTY.

Where the assignees of a bankrupt under Bankr. Act March 2, 1867, c. 176, 14 Stat. 517, who had continued the estate for the purpose of acquiring the bankrupt's interest in a trust fund subject to preceding life estates, refused, after the death of the last of the life tenants, to consent to their being superseded by trustees, so that the power of administration would be almost completely under the control of the majority of the creditors, and, by contesting a petition for removal, protected the rights of

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

other creditors, who were not parties to the petition, they were not guilty of any dereliction of duty, warranting denial of compensation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂⊃368.]

2. BANKRUPTCY ⊂⊃272—PROCEEDINGS—DUTY OF ASSIGNEES.

Under Rev. St. § 5100 (Bankr. Act 1867), declaring that, if at any time there is not in the assignee's hands a sufficient amount of money to defray the expenses required for the further execution of his trust, he shall not be obliged to proceed unless the necessary funds are advanced or satisfactorily secured to him, an assignee in bankruptcy need not, for the protection of the estate, advance money to defend a suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. ⊂⊃272.]

3. BANKRUPTCY ⊂⊃368—ASSIGNEES—DERELICTION IN DUTY.

Under Act June 22, 1874, c. 390, § 4, 18 Stat. 178, declaring that if any assignee in bankruptcy fails or neglects to well and faithfully discharge his duty to the estate he forfeits all fees and emoluments, and if he in any way wrongfully disposes of the property committed to his care he forfeits all fees or compensation for other services, an assignee in bankruptcy who had, for the protection of the estate, advanced considerable to defend a suit when not required to under the statute, and who had acted as his own legal adviser, is not, in making a payment to himself for the purpose of discharging costs and satisfying his claim for legal services, guilty of such a dereliction in duty, where on order of the court he returned the same, as to preclude any right to compensation, for, had he engaged counsel to perform such services, they would have had a lien on the estate, and the assignee acted in good faith.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂⊃368.]

4. BANKRUPTCY ⊂⊃368—ASSIGNEES—RIGHT TO COMPENSATION.

Though an assignee in bankruptcy asserted a claim against the estate which, after approval by the District Court, was denied on appeal, the assignee cannot, having acted in good faith, be denied all compensation under Act June 22, 1874, § 4, on the ground that he had not faithfully executed his trust.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂⊃368.]

5. BANKRUPTCY ⊂⊃368—ASSIGNEES—RIGHT TO COMPENSATION.

The assignees will not be denied compensation because they assisted a stenographer, who performed services for the estate in litigation, in presenting a claim, though the claim was reduced by the register; it not appearing that the action of the assignees was in any way fraudulent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂⊃368.]

6. BANKRUPTCY ⊂⊃368—ASSIGNEES—COMPENSATION.

In such case, compensation will not be denied because, one of the assignees, having made a payment to himself, the assignees appealed from the order for return; the conduct of the assignees not being litigious or amounting to a breach of trust.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂⊃368.]

7. BANKRUPTCY ⊂⊃368—ASSIGNEES—COMPENSATION.

Under Bankr. Act 1867 (Rev. St. §§ 5092, 5093), requiring the assignees to file an account every three months, the assignees of an estate which had been fully administered, save a claim against a fund held in trust for the lives of others, need not file any elaborate account, nor will their failure to file an elaborate account after receiving the fund preclude an

award of compensation; it appearing that the accounts were rendered in good faith, and, though not perfect, the estate was in no wise injured.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂=368.]

8. BANKRUPTCY ⊂=368—ASSIGNEES—FEES OF—ADDITIONAL COMPENSATION.
Under Bankr. Act 1867, and General Orders thereunder, assignees in bankruptcy, who performed unusual services and beneficially continued the estate for a long time, are entitled to additional compensation; the act contemplating the summary conversion of the estate into money and distribution.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂=368.]

9. BANKRUPTCY ⊂=368—ASSIGNEES—COMPENSATION.
Where the assignees of a bankrupt's estate, for the purpose of realizing on his vested interest in a trust fund, subject to life estates, continued the proceedings for 20 years, during which time they performed considerable services in protecting the claim and at last realized upon it, they are, under amendment to General Order 30 under Bankr. Act 1867, entitled to additional compensation beyond that fixed; this being particularly true, as the course of the assignees was most advantageous to the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂=368.]

10. BANKRUPTCY ⊂=368—ASSIGNEES—COMPENSATION.
In such case, where the assignees, having received the trust fund, successfully resisted an attempt by the majority creditors to remove them and secure the appointment of trustees, the services of the assignees in such particular, being for the protection of the estate generally, were great and unusual, and they were entitled to additional compensation therefor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂=368.]

11. BANKRUPTCY ⊂=368—ASSIGNEES—COMPENSATION.
Where the assignees in good faith sought to secure the expunging of claims, repeated assignments during the long course of years having left the ownership of claims in doubt, they are entitled to additional compensation for services in the matter, though the claims were not expunged.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂=368.]

12. BANKRUPTCY ⊂=368—PROCEEDINGS—DISTRICT COURT.
In proceeding for the settlement of the accounts of assignees and disposition of their claim for additional compensation, the concurrence of the Circuit Judge in the allowance of extra compensation, provided for by amendment to General Order 30 under Bankr. Act 1867, may be waived by the parties, regardless of the abolition of that court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂=368.]

In Bankruptcy. In the matter of the bankruptcy of Elbridge L. Sweetser. Final accounting by Warren C. Kyle and another, assignees. Extra compensation allowed.

Warren O. Kyle and Fred Joy, both of Boston, Mass., for assignees.
Hollis R. Bailey, of Boston, Mass., for objecting creditors.

MORTON, District Judge. This matter relates to the final account of the assignees in bankruptcy of Elbridge L. Sweetser, who was duly adjudicated bankrupt on his own petition in this court on July 23, 1878, under the law of 1867, and to the petition of the assignees for an

allowance of extra compensation. John C. Hammond and others, creditors, have appeared in opposition to the account and to the allowance of the petition for extra compensation; and they, and the assignees, and other parties interested have been heard at length.

Certain items relating to the early expenses of the assignees and dividends paid to creditors were objected to because not itemized as required, and were passed at the hearing with the understanding that itemized accounts relating thereto would be submitted by the assignees to the inspection and examination of the objecting creditors. No further objections have been made to those items, and I assume that they are correct and should be allowed.

The remaining items, so far as objected to, involve matters relating to the conduct of the assignees, and may be properly considered in connection with their petition for an allowance for extra compensation, which presents the principal question at issue.

The assignees were appointed March 19, 1878, and consisted at that time of Mr. Dowse, who has continued to act as one ever since, and Mr. Dibble. Dowse, at the time of his appointment, was counsel for a firm by the name of Dolliver Bros., who had the second largest claim against the bankrupt estate, and Dibble was counsel for the Florence Machine Company, which had the largest claim against the estate, and with which Sweetser had been doing business several years. The assets of the bankrupt's estate, so far as then known, consisted of about $1,200. Dowse and Dibble administered these assets and filed an account in May, 1887. Objections to it were filed soon after. So far as appears, they were never pressed. No evidence in support of them was introduced before me. I find that that account is correct, and should be allowed.

Mr. Kyle was admitted to the bar in 1880 and opened an office in Boston. At that time his brother was treasurer of the Florence Machine Company. In the summer of 1881 Mr. Kyle was employed as counsel for the Florence Machine Company, and learned of what turned out to be a valuable vested interest in Sweetser under the will of one S. O. Richardson, which was subject to three intervening life estates. In the fall of that same year, the Florence Machine Company brought a bill in equity in the Supreme Judicial Court in Suffolk county, to reach and apply that interest in its favor, on the ground that it had not passed to Sweetser's assignees in bankruptcy. Mr. Kyle acted as counsel for the Machine Company until its dissolution in 1893, and he acted as counsel for its successor, the Central Oil & Gas Stove Company. In 1882 Dibble resigned as assignee; Mr. Kyle was appointed in his place. He informed his coassignee of the bankrupt's interest in the trust fund, and assisted Dowse in preparing a bill in equity to enforce the rights of the assignee thereto, which was duly filed in this court in September, 1882. The bankrupt's interest in the trust fund might have been at once sold out by the assignees. It was, however, of very doubtful character, was expectant on three life estates, and was claimed by another party. In view of these facts, it would at that time have brought very little, if put up for sale. The assignees therefore determined that, instead of selling out this inter-

est, they would hold it and would keep the estate open. Of the wisdom of this decision there can be no doubt.

From 1882 to the death of the last life tenant, matters, according to Mr. Kyle's statement, remained dormant. The assignees were responsible for the estate, and did whatever was necessary to hold the interest in the trust fund. They were admitted as parties to the suit pending in the Supreme Judicial Court which had been brought by the Florence Machine Company; they filed an answer therein, and from time to time they examined the records in that court and in this court, and in the probate court in Middlesex county, where the Richardson estate was in the process of settlement; and they attended to such incidental matters as came up. All parties seemed to have acquiesced in the policy of watching and waiting suggested by Mr. Kyle until the life estates fell in. Other suits were brought by Mr. Kyle for the Florence Machine Company against Sweetser, and he was busy in reference to those matters; but manifestly what he did as counsel for the Florence Machine Company can furnish no ground for extra compensation as assignee, and no such claim is here made.

The last of the life tenants died in December, 1900. The interest of the bankrupt in one-half of the trust fund, which had originally been $35,000, thereupon became complete, and he became entitled to immediate possession thereof. Up to this point all parties were in friendly relations. The legal situation at that time was, as to its important elements, as follows:

Mr. Hammond had become the owner of the claims and interests of the Florence Machine Company, the Monitor Oil Stove Company, and the Central Oil & Gas Stove Company. There was pending in the Supreme Judicial Court the bill in equity brought by the Florence Machine Company in 1882 to reach and apply Sweetser's interest under the trust fund to its claim against him, in which Mr. Hammond had become the plaintiff and the assignees had appeared as adverse parties. Certain assignments of his interest in the trust fund, made by Sweetser while this suit was pending, had also become vested in Mr. Hammond. Subsequent to the first bankruptcy, Sweetser had given new notes to the Florence Machine Company for the same debt which it had proved against him in that bankruptcy. These notes had passed to Mr. Hammond with the rest of that company's claim against Sweetser. Mr. Hammond therefore had at this time and was asserting, first, the equitable attachment in the suit to reach and apply the fund to the Florence Machine Company debt; second, the assignment from Sweetser of all his interest in the trust fund; third, the claim in bankruptcy which had been proved against the Sweetser estate; and, fourth, the claim upon the new notes made by Sweetser after the first bankruptcy. There was no property whatever in the estate, and, if the Hammond claim to the trust fund should be established, nothing to pay the expenses of the litigation by the estate in resisting said claim. The bill in equity brought by the assignees in the United States District Court in 1882, asserting their right to the Sweetser interest in the trust fund, in opposition to the rights asserted by the parties through whom Mr. Hammond was claiming, was also pending. Just before the death of

the last life tenant, Sweetser had gone again into bankruptcy under the act of 1898 (30 Stat. 544, c. 541), and was endeavoring to defeat the right of his first assignee in bankruptcy to the trust fund. His trustee under the second bankruptcy was also claiming the fund. Almost 23 years had elapsed since the bankruptcy, and most of the claims proved in bankruptcy against Sweetser were in the hands of other persons than the original creditors, a substantial part of them having been purchased upon speculation for a very small proportion of their face value, and some of them had been paid by Sweetser or otherwise extinguished.

[1] Upon the death of the life tenants, Mr. Hammond was desirous of an immediate settlement, and suggested to the assignees that they should be superseded by trustees, in accordance with the provisions of the law of 1867. This would give greater flexibility and more discretionary power in the settlement of the estate than were possessed by the assignees; it put the administration thereof almost completely under the control of a majority of the creditors, and Mr. Hammond and his associates had such a majority. This suggestion was made in furtherance of a plan for a distribution of the estate which involved paying a substantial part of it to other persons than those entitled under the first bankruptcy. (See findings of register on petition to remove.) The assignees objected to the arrangement. Why they did so is in controversy. Mr. Hammond claims that it was because he would not agree to an allowance of $2,000 for their fees. They claim —and they are supported in their view by Mr. Hayes, whose opinion is, I think, entitled to much weight—that the course proposed was not fair to the creditors, other than Mr. Hammond. The situation was plainly one in which the interests of Mr. Hammond and of the estate were seriously in conflict. The objecting creditors made this same contention upon their petition to remove the assignees; and it was decided in favor of the assignees by the register, by the District Judge, and by the Circuit Judge. See opinion of Dodge, J., June 19, 1907, 240 Fed. 167. The only question about the matter which now needs to be passed upon is whether the assignees were derelict in their duty in opposing the appointment of trustees. It is not established, and I do not find, that they were.

This refusal of the assignees to agree to the appointment of trustees brought upon them litigation of an amount, persistence, and virulence fortunately rare in the history of the law. The case in different phases appears nine times in the Federal Reporter, twice in the United States Supreme Court Reports, and once in the Massachusetts Reports, and there are several long opinions of this court which were not published.[1]

[1] The reported decisions are as follows: Hammond v. Whittredge, 204 U. S. 538, 27 Sup. Ct. 396, 51 L. Ed. 606 (1907); Kyle v. Hammond, 225 U. S. 692, 32 Sup. Ct. 406, 56 L. Ed. 1260 (1912); In re Sweetser (D. C.) 128 Fed. 165 (1904); Dowse v. Hammond, 130 Fed. 103, 64 C. C. A. 437 (1904); In re Sweetser (D. C.) 131 Fed. 567 (1904); In re Sweetser (C. C.) 157 Fed. 567 (1907); In re Sweetser (C. C.) 168 Fed. 1018 (1909); In re Kyle et al., In re Sweetser (C. C.) 181 Fed. 617 (1910); In re Kyle et al., In re Sweetser (C. C.) 185 Fed. 219 (1910); In re Sweetser, Kyle et al. v. Hammond, 186 Fed. 989, 108 C. C. A. 659 (1911); Kyle et al. v. Hammond et al., 192 Fed. 559, 113 C. C. A. 31 (1911); Whittredge v. Sweetser, 189 Mass. 45, 75 N. E. 222 (1905).

In considering the complaints of Mr. Hammond and the creditors acting with him over the delay and expense caused by litigation in the settlement of this estate, it is to be borne in mind that they themselves began unfounded litigation and were the first to exhibit personal animosity.

The unnecessary and unprofitable litigation began in March, 1909, with a petition by Mr. Hammond and other creditors for the supersession of the assignees and the appointment of a trustee. It was filed shortly after the assignees had refused to consent to such a course. A necessary step in securing such action was a vote of three-fourths of the creditors. A meeting of the creditors was accordingly called. It developed, as was to be expected, great uncertainty as to the ownership and validity of many claims, and as to who, if anybody, was entitled to vote thereon. Many hearings were necessary to determine those questions. The effort to supersede the assignees failed, because of the lack of the necessary vote by creditors, and because of the decision by the District Court declining to supersede them without it. Two petitions to remove them for misconduct were also filed by Mr. Hammond and other creditors, and were heard and denied by the District Court. The conduct of the assignees up to the filing of the latter of these, viz., March 6, 1907, was criticized and attacked in those proceedings on substantially the same ground as here, and the decision was in their favor. The creditors carried the matter to the Circuit Court, and the proceedings occupied a considerable time; the second petition to remove not being finally disposed of till November, 1907. No matters of any importance relating to the conduct of the assignees prior to March 6, 1907, have been alleged in these proceedings which were not heard and determined in favor of the assignees upon the petitions to remove.

The trustee of the Sweetser fund filed in the Supreme Judicial Court, early in 1901, a petition for instructions. The assignees were made parties to it. This made three proceedings pending at the same time for the purpose of ascertaining the ownership of the fund. The assignees, while the proceedings looking to their supersession or removal, and to the expunging of the Florence Machine Company claim hereafter referred to, were still pending, endeavored to have the petition for instructions, which was regarded as the best way in which to settle the ownership of the fund, set down for hearing. Mr. Hammond objected, and secured an order from this court forbidding them to do so, which remained in force for several years. Being a party to the equity proceedings, Mr. Hammond could himself have had the suit set down for hearing; but he did not do so, and he has nothing to complain of in that delay. After the proceedings to remove or supersede the assignees had failed, and it became settled that they were to close the estate up, the order forbidding them to have the petition for instructions marked for hearing was discharged, and the petition was heard. It was reserved for the full court, by which it was decided in favor of the assignees in bankruptcy and against Mr. Hammond. He then took a writ of error to Washington, and the matter was not decided there against him until 1907. After this the trustee under the will, who was also speculating in claims against the Sweetser estate, raised further ques-

tions, and it was not until February 2, 1908, that the final payment on the principal was made. Even then there was litigation between him and the assignees over certain items in his account, and it was almost a year later, January 22, 1909, before the final payment from him was received.

[2] In the meantime, in April, 1901, the assignees had instituted proceedings to have the Florence Machine Company claims expunged. That matter went to the Court of Appeals, which refused to expunge the claims, but held that it was reasonably incumbent upon the assignees to raise the question.

Mr. Hammond, the owner of that claim, was thus left free to continue on the outside his efforts to secure the trust fund for himself, and on the inside, as a creditor, his attacks on the assignees who were opposing his efforts. There was not a dollar in the Sweetser estate, and no certainty that there ever would be; and the assignees not only devoted a large amount of time to its protection, but also spent substantial amounts of their own money which were necessary for the litigation, with no certainty that they would ever be paid either for the time or their money. Plainly their duties as assignees required them to go to no such lengths. The statute explicitly provided that:

"If, at any time, there is not in his (the assignee's) hands a sufficient amount of money to defray the expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him." Rev. St. § 5100, cited Bump on Bankruptcy (10th Ed.) p. 673.

That anything has been obtained for the creditors is, it seems to me, due to the extraordinary service and risks undertaken by the assignees, and to their persistence in the face of great difficulties. In the opinion of the District Court on the petition to remove the assignees, it is said:

"It is due to them, not only that there is now to be a dividend on the creditors' claims, but also that certain of those claims which have no proper standing have been expunged." Opinion of Dodge, J., June 19, 1907.

Various other matters which it is not necessary to state in detail required a great deal of time on the part of the assignees. There appear to have been more than 150 meetings and adjourned meetings of creditors between March, 1901, and April, 1911.

[3-6] After having collected from the trustee under the will, Mr. Kyle, on October 26, 1907, and February 1, 1908, paid himself, from the funds of the estate, without any order of court, on account of his services and disbursements as attorney for the assignees, sums aggregating $4,252.76. In June, 1909, Mr. Hammond filed a petition asking that the assignees be ordered to return all this money, pending a final settlement of their account and the determination of the amount due them. The attack upon the assignees in this petition was inexcusably virulent. If the creditors had aimed only at a prompt settlement of the estate, they would have proceeded very differently. They were led to take the course they did in the hope of embarrassing and injuring the assignees, if they should be ordered to return the money and should be unable to do so. The facts in relation to this matter are so fully stated in the opinion of Judge Dodge thereon (dated February 11, 1910)

that it is not necessary to restate them. Judge Dodge ordered the money returned. He says, however:

"I find no reason in what appears for charging Mr. Kyle with any bad faith in what he has done, or with any design to obtain an advantage to which he did not believe himself entitled. He has stated at the hearing that he was ready to comply with any order which might be made upon the petition. During the litigation referred to, which, upon more than one previous occasion, has been brought under the notice of the court in connection with questions from time to time raised in this case, it may well be supposed that he has been obliged to make advances at the cost of considerable inconvenience to himself, and to expend a considerable amount of time and labor. In a case involving no controversy between himself and any creditor of the estate, the course pursued regarding the money here in question, though irregular, might perhaps have been acquiesced in as depriving no one of any substantial right. There has been such acquiescence, as stated above, in his payment of $874.81 out of this money to the register and for sundry expenses. Against objection such as is here made, it is impossible for the court to approve any disposition of the money other than that prescribed by law."

Lowell, Circuit Judge, said in relation to this same matter:

"The point of law involved in the decision of the District Court and of this court [the United States Circuit Court] concerning the assignees' liability to the bankrupt estate is important and doubtful." In re Kyle et al., 185 Fed. 219.

I agree with these conclusions. There was no intentional misconduct on Mr. Kyle's part. From the order directing the return of the money, the assignees endeavored to appeal to the Court of Appeals, and later to the United States Supreme Court, by both of which courts the matter was dismissed for lack of jurisdiction. Until about March, 1910, other litigation which made it impossible to close the estate was pending. After that, until November, 1912, the principal, if not the sole, cause of delay was the proceedings to compel the return of this money. The assignees were wrong in taking these appeals, and no additional compensation is claimed in respect to those proceedings.

Act June 22, 1874, § 4 (quoted in Bump on Bankruptcy [10th Ed.] p. 254), on which, so far as the statutes are concerned, the objecting creditors rely, provides as follows:

"If any assignee fails or neglects to well and faithfully discharge his duties in the sale or disposition of property he forfeits all fees and emoluments to which he might be entitled in connection with such sale. If he in any manner in violation of his duty unfairly or wrongfully sells or disposes of, or in any manner fraudulently or corruptly combines, conspires or agrees with any person or persons with intent to unfairly or wrongfully sell or dispose of the property committed to his charge, upon proof thereof he forfeits all fees or other compensation for any and all services in connection with the estate."

The objecting creditors contend that:

"The assignees in the present case violated the above-cited statutory provisions by agreeing together and with their attorney, Fred Joy, Esq., that he should hold the Dolliver claim for his own personal benefit; also by assisting the stenographer, Wilson, to present a claim of $1,635 for services, which was largely unfounded, as was found by the register; also by allowing Mr. Kyle to take over $4,200 for his own use in violation of Rev. St. U. S. § 5059 (Bump [10th Ed.] p. 562), and in violation of General Order XXVIII (Bump [10th Ed.] p. 885)."

The matter relating to the Dolliver claim above specified was brought before the court on the petition by these creditors to remove the assignees, filed March 6, 1907, which was heard and denied by Judge Dodge in an elaborate opinion dated June 19, 1907. I fully agree with his statements and findings of fact therein contained. Mr. Kyle never had any interest in the Dolliver claim. Mr. Dowse acquired it on absolute good faith. (See opinion of Lowell, J., July 18, 1904, 131 Fed. 567.) Judge Dodge thought he had a right to do so; the Circuit Court held differently, but ordered the claim paid from the estate in the amount, with interest, which Mr. Dowse had paid for it—a result which could hardly have been reached if the claim was tainted with fraud. It does not seem to me that Mr. Dowse's mistake as to the law was misconduct disentitling him and his coassignee to compensation, nor that, as contended by the objecting creditors, he was litigious in insisting on his supposed rights, and in not recognizing as plainly untenable a view of the law which was declared sound by the District Court, even though its decision was reversed on appeal. The assignees were not guilty of misconduct disentitling them to compensation in respect to the Dolliver claim.

The objection based upon the conduct of the assignees in reference to the Wilson bill arose from a difference of opinion between them and the objecting creditors as to the proper compensation of the stenographer, Wilson. The bill was allowed by the register for a smaller sum than the assignees thought justly due; but so far as appears there was nothing corrupt or fraudulent in their action in relation to it.

At the time when Mr. Kyle paid himself the $4,252.76 above referred to, he and Mr. Dowse had been defending the estate and themselves against Mr. Hammond and the creditors acting with him for about seven years, during which they had devoted much time and advanced substantial amounts of money in its interest. If they had hired somebody else as counsel, he would have had a lien on the proceeds of the judgment for his fees and disbursements. There was nothing per se fraudulent or plainly wrong on Mr. Kyle's part in supposing that he had the same right. The register evidently saw nothing heinous in it, for he took part of the money in payment of his fees under circumstances which notified him that the statutory requirements were not being observed. This payment to him is not now objected to. The whole matter was one as to which there could be, as Judge Lowell plainly intimated, an honest difference of opinion. The assignees were not bound to lie down under the false charges made upon their integrity. They were entitled to submit the question whether they should refund the money to the District Judge; and they acted strictly within their legal rights in the appeals which they endeavored to take from his decision. It would be going a good way to hold that a party defendant is litigious for appealing from decisions against him. It seems to me that the objecting creditors, having gone about the matter in the roughest possible fashion, have no just ground for complaint because the assignees fought back to the last ditch. The money was eventually restored, with interest at 2 per cent., as ordered by the court on November 21, 1912. The rate at which interest should be paid was the

subject of a hearing before Judge Dodge, and is fixed by his opinion dated October 11, 1912. The creditors suffered no injury, except the delay in settling the estate. It does not seem to me that what the assignees did was so wholly inexcusable as to amount to misconduct involving a forfeiture of all compensation, or as to bring them within the terms of Act June 22, 1874, § 4, above quoted.

[7] The objecting creditors also urge that the assignees failed to keep proper books of account and to file accounts as ordered by the Register. The law required an account to be filed every three months, and books of account to be kept by assignees. Rev. St. U. S. §§ 5092, 5093 (cited Bump on Bankruptcy [10th Ed.] p. 568). The assignees kept sufficient book entries to show with substantial accuracy the condition of the estate. The details of certain items of expense paid by the assignees out of their own pockets before there was any money in the estate from the trust fund were not shown with exactness. The estate, consisting at first merely of a claim against the Richardson trustee, and later of a sum of money on deposit, required no elaborate or special books of account. The failure of the assignees to make more detailed entries was in no sense fraudulent, or done with a view to conceal facts. Undoubtedly assignees ought to keep accounts showing to a cent their expenses; but an innocent and inadvertent failure in a matter of detail, out of which no harm has come, ought not to be penalized.

On May 14, 1908, the assignees filed a report saying that they had received $20,127.57, and that they had a further claim against Whittridge, trustee, for $500, and that they intended to claim $15,000 for their own services and expenses. This was not in the form of an account, and was objected to by Mr. Hammond and others. On June 4, 1908, a dividend of 37 per cent. was ordered on the strength of the assignees' report then on file, and was duly paid. On July 1st the assignees filed a report, stating the gross receipts and the gross payments made to Mr. Kyle for services and expenses, and on October 2, 1908, a further report of the same general character. Mr. Hammond made objections, based on the lack of dates and items as to certain payments. The conduct of the assignees certainly did no injury to the estate. If the reports were substantially deficient, it devolved upon the creditors to raise the question and try the matter out promptly. The language of Judge Dodge in his opinion of June 19, 1907, upon an analogous matter in this same case is applicable here:

"The question whether the assignees had been guilty of official misconduct, or not, ought to have been submitted to the court for settlement as soon as it was so presented that it could be so submitted. It is not a question which could properly be left in abeyance for more than three years, to be raised, or not, as might seem expedient." Dodge, J., June 19, 1907.

I do not find that the assignees have been guilty of misconduct disentitling them to compensation on account of their alleged failure to keep proper books of account and to file proper reports and accounts.

I have considered the various objections (57 in number) to the allowance of compensation contained in the answer of the objecting creditors, and also the objections to the disputed items in the account. It is impracticable to discuss each of them in detail. Except as to the effect upon the assignees' right to compensation of Mr. Kyle's

act in taking the $4,252.76, the objections, so far as they are substantial and serious, present questions which have already been fully heard by this court and have been decided against the objecting creditors. It is sufficient to say that I do not find that the assignees have been guilty in any particular of such misconduct as would, either under the statute or the general law, suffice to deprive them of compensation or would require their account to be surcharged, or payments therein scheduled to be disallowed. The account of the assignees is allowed as filed, including the statutory compensation stated therein

[8, 9] As to additional compensation:

Both assignees have filed petitions for additional compensation. That of Mr. Kyle is in the main, except as herein otherwise indicated, a correct account of their administration of the estate, as I view it, He requests an allowance of $9,000 for himself, $1,500 for Mr. Joy for legal services rendered to the assignees, and $500 for Mr. Dowse. According to the itemized schedule submitted by Mr. Kyle of his work on their estate between December, 1900, and June, 1909, he attended 198 hearings before courts, judges, and the register, and had besides about 375 consultations of sufficient importance to be entered upon his books. He apparently advanced to the estate, before there was any certainty of his being repaid, about $375. The petition of Mr. Dowse requests an allowance to himself of $2,460.50 as additional compensation, $3,000 to Mr. Joy for legal services to the assignees, and $350 to Mr. Jackson for similar services.

Mr. Dowse's bill contains only three items, viz., 34 years' services as assignee at $50 per year, $1,700; services in the litigation over the trust fund, $750; cash paid United States marshal, $10.50. According to the itemized schedule submitted by Mr. Joy of his services as counsel for the assignees between April, 1901, and June, 1909, he attended about 113 hearings and had about 276 consultations.

Mr. Jackson's bill covers various conferences, preparing papers, attending and arguing at two hearings before the court and one before the register in July, August, and September, 1909, while Mr. Joy was absent. His bill does not state on what matters he was employed. Apparently they related in part to Mr. Dowse's assertion of interest in the Dolliver claim, to Mr. Hammond's objections to the reports or accounts of the assignees, and to his petition for the return of the money taken by Mr. Kyle. A substantial part of the services would seem to have been more properly chargeable to Mr. Dowse personally than to the estate.

The amount of claims on which dividends are to be paid are about $11,000; the balance on hand, as shown by the assignees' final account, is $12,656.04. The statutory fees of the assignees amount to about $850. As before stated, a dividend of 37 per cent. was paid to creditors in 1908.

The act of 1867 contemplates a speedy liquidation of the bankrupt's property. His assets are to be converted into cash in a summary manner and distributed among his creditors, and the estate closed up. The statutory compensation is based on that idea. The fees allowed by the act, and the General Orders in force under it, are not intended to

cover any such extraordinary amount of work and time as this case has required. The assignees are entitled to additional compensation in excess of the statutory fees.

Mr. Kyle devoted far more work and time to the estate than did Mr. Dowse, and seems to have been the active one of the assignees. It is not clear on the evidence what part Mr. Dowse took in the various matters before referred to; I infer that it was comparatively slight, and that Mr. Dowse left the care of the estate largely to Mr. Kyle, sharing the responsibility, and perhaps assisting to some extent on the most important matters.

The principal matters as to which the assignees are entitled to compensation may be summarized and restated as follows:

1. Their services in holding fast to, and obtaining, the bankrupt's interest in the trust fund: This includes the plan adopted of waiting until the life estates fell in, instead of selling out the doubtful claim of the bankrupt for what it would bring; keeping hold of the claim for almost 20 years, during which time they were responsible to the creditors for safeguarding the estate, and seeing that the rights of the assignees were not lost (that this responsibility was real is shown by the contention which Mr. Hammond made in the state court that the rights of the estate had been lost by laches); the litigation in the state and federal courts by which the right of the assignees to the trust fund was finally established; and the proceedings, supplementary in character, upon the trustees' account in the probate court and in the Supreme Judicial Court. This part of the assignees' work is marked by sagacity, courage, persistence, and devotion to their trust of an unusual character. It involved great and unusual care and exertion on their part, for which, under the amendment to General Order 30 under the act of 1867, they are entitled to additional compensation beyond that fixed by the statute.

[10] 2. Their services in resisting the petitions to supersede them by trustees and to remove them: The petition for the appointment of trustees to administer the estate involved taking a vote of the creditors. As before stated, great difficulty was experienced in taking such a vote, by reason of the uncertainty as to who owned and was entitled to vote upon many of the claims proved. Some claims had been paid by the bankrupt subsequent to the first bankruptcy, or had been otherwise extinguished. The estate benefited by the expunging of about $1,000 of such claims. Other claims had been more than once assigned. A great deal of time was required, and many hearings, to determine the ownership of and voting rights on various claims. This work on the part of the assignees was necessary, but it did not add value to the estate commensurate with the expense. A certain amount of such work is required in many bankrupt estates, and to that extent, at least, is not "unusual." It seems to me that exertion may be "great and unusual" in amount as well as in character, although there may be some doubt upon this point in view of In re Many et al., 17 N. B. R. 429, Fed. Cas. No. 9,053. For the work required of the assignees in settling the ownership and validity of claims beyond what was "usual," I think that they are entitled to

additional compensation, but at a lower rate than for work more beneficial to the estate.

The petitions filed by Mr. Hammond and his associates to remove the assignees charged misconduct of a serious character, and the assignees were fully warranted in resisting both. The Circuit Court, which affirmed the judgment of the District Court dismissing them, said:

"The circumstances of the present case show no ground for doubting the present assignees."

The assignees did not institute the proceedings which made it necessary to take a vote of the creditors, and therefore to undertake the long investigation as to the voting rights on claims; nor did they institute the proceedings looking to their removal. The expense of both these sets of proceedings, useless and unfounded as they turned out to be, is attributable to the creditors, who now object to the allowance of additional compensation on account of the labor to which they themselves have put the assignees. The work of the assignees in resisting these petitions to remove them was "great and unusual exertion," for which they are entitled to additional compensation.

[11] 3. The services of the assignees in endeavoring to expunge the Florence Machine Company claim: This matter was sharply contested at every point and reached the Circuit Court of Appeals. The assignees failed in their efforts to have the claim expunged. It is strongly urged by the objecting creditors that the assignees are not, therefore, entitled to compensation for the work done on this matter, and I am asked to disregard the expression in the opinion of the Court of Appeals (Dowse v. Hammond, 130 Fed. 103, 64 C. C. A. 437) that:

"Under the circumstances it was reasonably incumbent on the assignees, who are now the appellants, to bring the facts to the attention of the court—both to the District Court and to the appellate tribunal."

But it seems to me that I ought not to disregard this statement of the Court of Appeals, with which, if not bound by it, I entirely agree, and that the assignees are entitled to compensation for their services in respect to the effort to expunge this claim. The situation created by it, as hereinbefore stated, was decidedly "unusual." It seems to me that the work of the assignees upon this matter may fairly be called "great and unusual exertion" in an effort to protect the estate.

Considering all the facts and evidence, I find and rule that the assignees are entitled to additional compensation beyond that allowed by statute in the amount of $6,750, to be apportioned, $6,250 to Mr. Kyle, and $500 to Mr. Dowse, and that they be allowed the further sum of $2,000 for counsel fees, of which $1,750 is for the services of Mr. Joy, and $250 for those of Mr. Jackson. In making these allowances, I have assumed that the statutory compensation would be equally divided between the assignees, and I have taken into account the sums received by Mr. Dowse under the first account. I have reduced the amount which would then have been allowed to Mr. Kyle on account of the delay in the settlement of the estate caused directly and indirectly by his taking the $4,256.

[12] Before the hearings began, it was agreed by all parties that the District Judge alone should hear and determine the matters in controversy, subject to all rights of appeal from his decision. In view of this agreement, the concurrence of "the Circuit Judge" in the allowance of additional compensation, as provided in amendment to General Order XXX, is unnecessary, even if otherwise required, now that the Circuit Court has been abolished and its powers transferred to the District Court.

The objecting creditors have requested 23 findings of fact. I have so fully indicated in the foregoing opinion my findings of fact and rulings of law that it seems unnecessary to pass upon each of these requests in detail. I give such of them as are contained in or are consistent with the foregoing opinion; the others I refuse. I am indebted to counsel for the objecting creditors for his thorough and painstaking brief and chronological statement of facts.

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## GRIGSBY v. MILLER et al.

(District Court, D. Oregon. January 29, 1917.)

No. 6741.

1. TRUSTS ⟸91—"CONSTRUCTIVE TRUSTS"—NATURE—"TRUSTS EX MALEFICIO."

A constructive trust in real estate arises where the purchase is made and title acquired contrary to trust relations existing between trustee and cesuti que trust, or ex maleficio through deceit and fraud, whereby the party whose title has been taken away from him has been misled and overreached, to his injury and detriment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 139.

For other definitions, see Words and Phrases, First and Second Series. Constructive Trusts; Trusts ex Maleficio.]

2. TRUSTS ⟸103(2)—CONSTRUCTIVE TRUST—CONVEYANCE BY DAUGHTER TO MOTHER.

A daughter, 32 years old, married and living with her husband, who joined with her, conveyed certain land to her mother for a nominal consideration. The land was in a lake and could not be used until drained at large expense. The mother had already expended some $8,000 or more on the land, a part of which belonged to the daughter, but leaving her indebted to her mother to the amount of about $6,000, and further large expenditures were necessary. At that time the daughter's husband was largely indebted. The land had been deeded to the daughter by her father and mother, before her father's death and before her marriage. She was the only child and sole heir of her mother. There was no evidence to justify a finding that the conveyance was induced by fraud or undue influence. *Held*, on the evidence, the daughter having died, that no constructive trust arose in favor of the daughter, but that it was the intention of the parties that the conveyance should vest the mother with title in fee simple.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 154.]

In Equity. Suit by Fenton E. Grigsby, administrator of the estate of Wana Miller Alexander Stuart, deceased, against Sarah E. Miller and J. O. Hayes. Decree for defendants.

See, also, 231 Fed. 521.

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The complainant, as administrator of the estate of Wana Stuart, brings this suit against Sarah E. Miller and J. O. Hayes, to have the respondents declared trustees of certain lands situated in Marion county, Or., known as the "Lake Labish lands," and certain personalty in the way of moneys arising from the sale by respondent Miller of certain other lands alleged to be the property of Wana Stuart in her lifetime, holding under a constructive trust arising from alleged confidential and fiduciary relationship between Miller and Stuart as parent and child, and between Miller and Stuart and Hayes as friend and adviser of the family. Grigsby was appointed administrator of the estate of Wana Stuart by the county court of Marion county, Or., on January 28, 1915, and has qualified as such.

The respondent Sarah E. Miller is the widow of Wm. P. Miller, who died intestate September 25, 1895, and Wana Stuart was their daughter. Wana died intestate October 14, 1914; her husband, John Edward Stuart, surviving her as her only heir at law. On May 17, 1895, Miller and his wife, one of the respondents herein, conveyed to Wana 522.86 acres of the Lake Labish lands. On September 5, 1900, Wana acquired by deed from A. A. Lee and F. W. Waters and their wives another tract, containing 97.08 acres, and the title to still another tract, containing 55.22 acres, was confirmed in her by virtue of a judgment of the Supreme Court of the state of Oregon, all in the Lake Labish district. On June 1, 1895, Miller and wife conveyed to Wana an undivided one-half interest in certain lands lying and being in Klamath county, Or., and it is alleged that, at the death of Miller, Wana was entitled to a one-half interest in personalty consisting of several hundred head of stock, cattle, and horses. Wana was formerly married to one J. E. Alexander, from whom she was divorced. Subsequently, and prior to August 1, 1910, she married John Edward Stuart.

Now it is alleged, briefly stated, that Sarah E. Miller was on peculiarly intimate relations with her daughter Wana, and, by reason of her superior mind and dominating personality, she was able to direct and control the disposition and actions of Wana with regard to her property holdings; that Mrs. Miller and J. O. Hayes, her co-respondent, conspired between them to induce Wana and her husband to deed the Lake Labish lands to Mrs. Miller for a nominal consideration, and that, in pursuance of said conspiracy, the respondent Miller did, through unwarranted persuasion and undue influence, induce Wana and her said husband to convey to Mrs. Miller, for the nominal consideration of $10, all of said Lake Labish lands except a small tract omitted by mistake, by deed bearing date August 1, 1910; that subsequently, to wit, on January 15, 1912, Mrs. Miller conveyed to Hayes; that about that time the omission from the deed to Mrs. Miller was discovered, and to correct such omission, and induced through the same unwarrantable influence, Wana and her husband conveyed to Hayes, by another deed of date February 7, 1912, the tract omitted, and that the legal title to all of said Lake Labish lands now stands in the name of Hayes. It is further alleged, by supplemental bill, that Mrs. Miller, through like undue influence, induced Wana to part with her property in Klamath county, the proceeds of which, amounting to a large sum of money, were taken over by Mrs. Miller and converted to her own use, for which an accounting is prayed.

The respondents, for answer, deny any conspiracy between themselves to procure the conveyances from Wana of the Lake Labish lands, or that Mrs. Miller exerted over Wana and her husband any undue or unfair influence by which they, or either of them, were induced to make or execute the deeds in question, and protest that the execution of such deeds was the free and voluntary act of Wana and her husband, uninfluenced by any one save themselves, and was in consideration of large sums of money that Mrs. Miller had paid to Wana and her husband Alexander, and Wana and her husband Stuart, in her lifetime, and for taxes, and large expenses paid for numerous pieces of litigation which were instituted and pending from time to time in relation to the lands. Respondents further allege that Mrs. Miller conveyed the premises to Hayes in consideration and in pursuance of a contract and agreement, made and entered into between them, whereby Hayes agreed to reclaim the lands through proper drainage, and to clear the same and render them fit for cultivation, at his own trouble, cost, and expense, and, when fully reclaim-

ed, to dispose of the same, and divide the net proceeds with Mrs. Miller, and that said lands are held by Hayes in fee simple, subject to the agreement on his part to make division with Mrs. Miller of the profits after sale.

The respondent Miller, further answering the supplemental bill of complaint, denies that Wana Stuart ever had or owned any interest whatever in the range stock, consisting of cattle and horses, which W. P. Miller left at the time of his death, but admits that Wana owned an undivided one-half interest in the lands, which it is alleged were all disposed of prior to the close of the year 1906, and for which there was realized in one sum $12,500 and in another $22,927.92, and that Mrs. Miller paid over and accounted to Wana, during her lifetime, for all her interest in the proceeds of such sales. Further answering to the bill of complaint, it is alleged in effect that, on the 17th day of March, 1913, Mrs. Miller and Wana had an agreement and settlement touching their financial affairs, and that, by such agreement and settlement, Mrs. Miller undertook to pay Wana $10,000 in money or property, as best suited Mrs. Miller, in consideration for which Wana released Mrs. Miller from all claims or demands whatsoever against her. Having thus answered, the respondents pray a dismissal of the bill.

William C. Bristol, of Portland, Or., for complainant.
Almon E. Roth, of San Francisco, Cal., for respondent Hayes.
Harry L. Raffety, of Portland, Or., for respondent Miller.

WOLVERTON, District Judge (after stating the facts as above). A question has been presented respecting the regularity of Grigsby's appointment as administrator of the estate of Wana Stuart, and the power of the county court of Marion county, Or., so to appoint him; but I waive this aside, and proceed to a determination of the cause upon its merits.

The deed by Wana Stuart and her husband, John E. Stuart, to Mrs. Miller, of August 1, 1910, is the storm center of this entire controversy, and it will be well to get a reckoning of the currents that tended to converge about this point of time and event, that we may appreciate the situation of the parties interested, and thus be the better enabled to determine more certainly the motives and considerations that induced the making of the deed, and its real and ultimate purpose.

The purpose of W. P. Miller and his wife, the respondent Sarah E. Miller, in deeding to Mrs. Stuart the Lake Labish land and an undivided one-half interest in the Klamath county lands, was to expedite the division and settlement of Miller's estate. Miller knew at the time that he could not long survive, and he, with Mrs. Miller's concurrence, of course, conveyed to the daughter these lands. Miller, at or about the same time, conveyed to Mrs. Miller an undivided one-half interest in the Klamath county lands, and gave her a bill of sale of all his personal property, consisting of range stock and such other personalty as he had. The estate was practically settled at the date of Miller's death. He owed considerable money prior thereto, and, in order to repay the same, sold cattle and used money and property that belonged to Mrs. Miller individually—to what extent the record does not make clear. She had a note of her own, amounting to $5,000. Then she had a house in The Dalles, Or., for which she obtained between $4,000 and $5,000. She claims, also, to have put something like $7,000 of her own money into the Klamath county lands when they were purchased by Miller. So that her own individual means were more or less inter-

mingled with Miller's in securing these lands in the first instance. When these settlements were being made by the use of Mrs. Miller's means, Miller told her that she could reimburse herself by taking the money out of the estate.

Thus stood the property relations in 1895, at the time of Miller's death. Mrs. Miller testifies that she had at that time separate property of her own amounting to about $17,000, and she subsequently sold cattle which came to her by bill of sale from her husband amounting to $4,000. Her previous testimony would seem to indicate, however, that she had expended a portion of this money in meeting the claims against Miller's estate, which were all paid as we have seen prior to his death.

Wana was married to John E. Alexander in 1897. Mrs. Miller must have had some ready money of her own at that time, because she gave to Wana in May, 1897, a few days after she was married, $1,300, and paid to her besides, as wedding and traveling expenses, $4,000. Both these sums of money must have come out of Mrs. Miller's individual property, for none of Wana's land had been sold at that time. Nor was any disposed of from which any money was derived until the sale of what was known as the "Upper Ranch," in Klamath county, to Fred and Gustave Melhase, August 14, 1903, for which was paid the sum of $12,500. Whether Mrs. Miller obtained rents and profits from the Klamath lands in the meantime does not appear. But it would seem that they were a source of expense rather than of profit, for it was necessary to sell stock from time to time to meet taxes and expenses. Three thousand dollars worth of stock was sold at one time, and $2,300 at another, for these purposes. It was not, therefore, until August 14, 1903, so far as the record shows, that any money which was the property of Wana came into the hands of Mrs. Miller. I say this, with this qualification:

On June 20, 1901, Mrs. Miller and Mr. and Mrs. Alexander made a conveyance to E. P. McCornack for a consideration of $559.65. On January 28, 1901, the same parties, for a stated consideration of $162.90, made another deed to one Frederick F. Cassidy. On November 1, 1900, the same parties, for a stated consideration of $400, made another deed to McCornack, and on October 27, 1904, the same parties gave a quitclaim deed to a piece of property to Charles E. Worden for a stated consideration of $2,300. Alexander testified concerning these deeds, and failed to state that any money was paid to Mrs. Miller on account of them. He was the son-in-law of Mrs. Miller, and acting attorney for her and his wife at the time, and was instrumental in negotiating the execution of the deeds, and in a position to know whether any money passed to Mrs. Miller as a consideration therefor, but remains silent about it. He does attempt to explain, however, that the deeds were given in exchange for other lands for the purpose of straightening out certain boundaries, and leaves the impression that no real money consideration passed. If any money was paid, it would naturally have been paid to Alexander, and then it would have been incumbent upon him to pay it over to Mrs. Miller or his wife. Mrs. Miller says she received no money on account of these deeds, indeed,

she has no recollection as to their execution. She does say that Alexander told her at one time that he had a check for $600 arising from this source, but that Alexander never accounted to her for, or paid her any part of, the money. I do not think the deeds themselves, in the light of all the other testimony attending the transactions, afford sufficient evidence by which to charge Mrs. Miller with the sum of the stated considerations named therein.

Wana was divorced from Alexander some time later than the date of the Melhase deed, which, as we have seen, was August 14, 1903. On June 19, 1905, she married John E. Stuart. A little later than this, namely, September 20, 1905, Mrs. Miller and Mr. and Mrs. Stuart conveyed to one Weed the remainder of the Klamath lands, and the net amount received therefor, according to Mrs. Miller, was $23,000. In this she is substantially corroborated by other testimony in the record. This money came to the hands of Mrs. Miller by check, and was deposited in a savings bank, and, according to Stuart's testimony, was later divided among other banks for deposit.

Mrs. Miller testifies that she paid to Alexander, at the request of Wana, several amounts of money, which are itemized by her, aggregating $6,370; that she paid to Wana, prior to her marriage to Alexander, the sum of $6,650, and to Wana, after her marriage to Alexander, the further sum of $2,300. These aggregates are likewise itemized by Mrs. Miller. Beyond this, Mrs. Miller shows that she paid expenses in connection with the Lake Labish lands aggregating $10,002.66. I am taking no note of many small items which it is claimed, under one list, that Stuart received aggregating $2,660, and, under another, that Wana received, prior to March 17, 1913, aggregating $1,976.60. Not all of this sum of $10,002.66 was paid prior to the date of the deed by Stuart and wife to Mrs. Miller, namely, August 1, 1910. In order to get at the expense from this source paid prior to that date, the above amount should be reduced by $1,825, consisting of $200 overcharge in item of mortgage paid on Lake Labish lands, item paid Holmes $1,500, and paid Bush in 1911, taxes, $125, leaving the actual expense paid to that date $8,177.66. Thus was paid to and expended on Wana's account by Mrs. Miller up to that date, August 1, 1910, the total sum of $23,497.66, leaving Wana in debt to her in the sum of $5,747.66. This gives credit to Wana for one-half of the Melhase sale of $12,500, and one-half of the Weed sale of $23,000, and charges her with one-half of the $600 that Alexander obtained for which he did not account to Mrs. Miller.

In this accounting, Mrs. Miller does not pretend to be able to give an accurate detailed statement of the moneys paid to Wana or by her request, or the expense borne on account of the Lake Labish lands, which were a constant source of outlay without a particle of income. Mrs. Miller has always been economically frugal in her habits, and has lost no substantial amounts in business adventures. She had been put to a great deal of trouble respecting the Lake Labish lands, and had expended considerable sums of money in payment of taxes, in bearing the expenses of much litigation, and in trying to drain the land, so as to get it in condition to realize from it by sale, all without any appreciable

success. Alexander, who was a lawyer, tried to do what he could to relieve the situation, and Stuart had taken part in the effort to bring profit out of the wild first condition, all without avail. It may be said here that the Lake Labish lands were what the name implies, lands under the water, and the lake required to be drained before the lands could or would become of agricultural value. But when properly drained they would be rendered of great value, because of the peculiar quality of the soil, which is commonly known as beaver dam land. The problem at this time confronting Mrs. Stuart and Mrs. Miller was what should be done to bring these lands into the market, so that something of profit could be realized from them, rather than the large expense, which could not theretofore be avoided.

Another feature of the situation should not be overlooked. Stuart was engaged in the shoe business, and, although at this time his business was incorporated, he was indebted on his personal account, as he says, in "quite a large sum of money," all of which was known to his wife and Mrs. Miller.

Now, in view of these premises, let us inquire why the deed of August 1, 1910, was given, what was its purpose, and what the nature of the title granted. The instrument is an ordinary bargain and sale deed, without covenants of warranty respecting title. It was recorded in the Marion county records on August 8th following its execution. There was no written agreement accompanying it, defining its purpose, or otherwise limiting or circumscribing its legal effect. The deed was prepared by F. H. Bloomingdale, the notary who took the acknowledgment. Mrs. Miller says she requested Stuart to "come up and sign the deed," which he did. Stuart says he understood that it was prepared in J. O. Hayes' office, but it was merely an understanding that he could not verify. Mrs. Miller is positive, however, that it was prepared by Bloomingdale, and not Hayes. Mrs. Miller relates that, having carried the burden of paying the expenses relative to the Lake Labish land, she decided that she could not do that any longer, and, on taking the matter up with Wana, the latter agreed to deed the land to her. It was in pursuance of this understanding that the deed was made. On being questioned further, she says there was no understanding that she was to hold the land in trust for Wana; that Wana understood, when she made the transfer, that it settled everything up to that date; and that a contract was made after that whereby Mrs. Miller agreed to give Wana $10,000, and that Wana then transferred everything to her absolutely that she had. Mrs. Miller at once, on receipt of the deed, came up to Salem and had it recorded, and took up the settlement of affairs, so as to get the title cleared up. She gave an option to Hartman & Thompson for purchase on their part of the land, thus indicating that, so far as she was concerned, she believed, at least, that she had good title to the land and was entitled to deal with it as her own. Mrs. Miller says further about this transaction:

"I not only wanted the title in my own name, but she [Wana] had had so much money, and she paid it off by giving me the deed of August 1, 1910. Now, that is exactly what I took the deed for. The deed was to satisfy all the indebtedness that existed between her and I up to that time."

According to Mrs. Miller, Stuart was not satisfied, though he said, when asked to sign the deed, "I don't want any of your property." Stuart says of this transaction that Mrs. Miller proposed to his wife and himself that the land be put in her name, "so that she could continue to see if she could not in some way bring about a settlement up there with the Wattiers and get the thing straightened out." Stuart further relates that the first talk about Mrs. Miller's taking charge of the land was early in 1910; that it came up in connection with a letter that Mr. W. H. Holmes had written to Stuart about some litigation, which bears date March 4, 1910; and that "it was finally determined, on Mrs. Miller's representations and on Mr. Hayes' advice, to transfer this land to Mrs. Miller," which was done. Being asked what representations were made that led to the final culmination of the execution of the deed, Stuart answered:

"One of the principal representations that were made about the matter in connection with that property was in regard to my indebtedness to Mr. Richards. Mrs. Miller worried a great deal about the amount of money that I owed Mr. Richards, and she said that Mr. Richards could come onto my wife and take all of her property; that I owed him this immense sum of money, and was in his power; and she brought that up whenever the matter was referred to, and she talked about it to Wana a great deal. And I think Mr. Hayes himself mentioned to me in one of our conversations that Mr. Richards could come onto my wife for these amounts of money, or this large amount of money, that I owed him; that her interest would not be safe. And I know that my wife was very strongly impressed with that belief, that her property could be in fact confiscated by Mr. Richards, or, in fact, any other creditors that I might have. * * * She believed that her property could be reached by my creditors, whatever creditors I might have. I believe she believed that always."

In further indication as to why Stuart himself signed the deed, he says:

"I simply signed the deed because my wife asked me to. I had no particular interest in not signing it. It seemed to be for my wife's interest. * * * It was necessary for me to sign it, and she asked me to sign it."

As to why Wana gave the deed, witness further says:

"She gave the deed to her mother, so that her mother could go up there and handle the property directly, and try to untangle the troubles it was in for her. * * * She said she was simply giving the property in charge of her mother, till it could be straightened out and gotten in shape for development. * * * But it was a perfectly well understood circumstance that the transfer was simply for the better handling of the property."

A little later the witness says:

"My wife never regarded any of these transactions as in any way affecting her ownership of that property."

He still later asserts that the transfer was absolutely not that Mrs. Miller should get the title forever.

Thus stands the case from the respective viewpoints of Mrs. Miller and Mr. Stuart; they disagreeing, of course, one seeming to believe that the deed of August 1, 1910, was absolute, and designed to settle all matters pecuniary between Mrs. Miller and her daughter, and the other holding to the idea that the deed was given only to enable Mrs.

Miller to settle the matters pertaining to the land, and that no title absolute was intended to pass. Much testimony has been offered with a purpose of showing that Mrs. Miller exerted undue influence over her daughter and thereby induced her to make the deed, and virtually controlled her action thereafter with relation to the handling of the title to this land.

A careful reading of the testimony of Stuart does not disclose that he believed that Wana was dominated by the will of her mother as it affected this transaction. He does say:

"Mrs. Miller always seemed to me to treat Mrs. Stuart as though she were a child in regard to property matters, and she simply assumed the direction and management of their property matters as though Wana did not cut any figure at all."

And at other times he gives the idea that Mrs. Miller kept pressing upon her daughter the thought that Stuart's creditors would come upon her and take her property. But Stuart failed utterly to intimate that Mrs. Miller, with willful and perverse intent, coerced her daughter to make this deed, contrary to the latter's will and wish in the premises. Nor was there any misrepresentation indulged in on the part of Mrs. Miller by which her daughter and Stuart were induced to execute it. Stuart tells specifically for what purpose the deed was given, that Wana understood fully why it was to be executed, and accordingly executed it after requesting that he join with her in the deed.

Mrs. N. S. Carman describes Mrs. Stuart as over-sensitive, very kind, and very considerate, always thoughtful of every one, and self-sacrificing; retiring in disposition, and not at all self-assertive. She relates, also, that Mrs. Miller and her daughter seemed to be congenial and companionable, but that Mrs. Miller had the stronger mind and appeared to dominate their actions and transactions; that Mrs. Stuart said to her, "I am giving her (Mrs. Miller) a deed, so as to buy them off, but it is my money that is going to pay for it;" that Mrs. Miller spoke slightingly of Stuart, and did not have any confidence in his business ability; that Mrs. Stuart told witness that Mrs. Miller told her (Mrs. Stuart) that Stuart's creditors could come back on her for his debts, and that Wana thought that she had to get this property out of her name, or the creditors of Stuart could take it for his bills. But, with all this, Mrs. Carman nowhere asserts that Mrs. Stuart indicated to her that she executed the deed against her will, or contrary to her voluntary and fixed purpose of conveying the land to her mother.

Other witnesses have testified along the line with Mrs. Carman, but none of them are so clear or explicit as she; nor do they go to the length that Mrs. Carman has gone, by reason of not being so intimate with Mrs. Stuart as she seems to have been; and it is unnecessary to refer to their testimony in greater detail.

Having examined the testimony thus far, let us pause to inquire whether the transaction of giving the deed of August 1, 1910, by Mrs. Stuart and husband to Mrs. Miller, constituted in the latter a constructive trust as to this Lake Labish land. If it be an express trust, and the nature of the instrument as constituting such a trust is to be estab-

lished by parol, then the complainant can have no relief, as the statute of frauds bars him, for it is statutory that no trust or power concerning real property can be created, transferred, or declared otherwise than by operation of law, or by conveyance, or other instrument in writing subscribed by the party creating, transferring, or declaring the same. Richmond v. Bloch, 36 Or. 590, 60 Pac. 385. Nor can the transaction be said to have terminated in a resulting trust, for such a trust arises where one, having the funds of another, has purchased property in his own name. In such a case the party holding the property so purchased is held to be the trustee for the party whose money he used.

[1] A constructive trust arises where the purchase is made and the title is acquired contrary to trust relations existing between trustee and cestui que trust, or ex maleficio through deceit and fraud, whereby the party whose title has been taken away from him has been misled and overreached to his injury and detriment. Barger v. Barger, 30 Or. 268, 47 Pac. 702; Parrish v. Parrish, 33 Or. 486, 54 Pac. 352; Chance v. Graham, 76 Or. 199, 148 Pac. 63. At the time that the August 1, 1910, deed was made, Mrs. Miller occupied no fiduciary relation toward Mrs. Stuart. While some time prior thereto she did occupy such a relation, and held money in trust for her daughter, that relation had ceased by reason of the fact that Mrs. Miller had paid out more money for her daughter and at her instance than was coming to her. The real condition was that the daughter was indebted to the mother in quite a large sum.

[2] Nor did the relation of parent and child exist in the sense that the child was of tender years and was dependent upon the mother for nurture, protection, and advice. Mrs. Stuart was 32 or 33 years old, was married, and living with her husband, with whom she was upon terms of cordiality and devotion. She was sui juris and altogether capable of taking care of her own concerns and transacting her own business, especially with the assistance of her husband. So that there existed between Mrs. Miller and her daughter no relation of trustee and cestui que trust, nor that of parent and child in the legal sense in which that term is used in the books, where the child is presumed to be dependent in some relation upon the parent. Because of the existence of these conditions, the authorities relied upon by complainant, namely, Wormley v. Wormley, 8 Wheat. 421, 5 L. Ed. 651, Adams v. Cowen, 177 U. S. 471, 20 Sup. Ct. 668, 44 L. Ed. 851, Ludington v. Patton, 111 Wis. 208, 86 N. W. 571, Springer v. Young, 14 Or. 280, 12 Pac. 400, Baldock v. Johnson, 14 Or. 542, 13 Pac. 434, Johnson v. Savage, 50 Or. 294, 91 Pac. 1082, and other like cases, do not seem to me to be in point.

That Mrs. Stuart was not controlled in the giving and execution of the deed by any undue influence exerted over her by Mrs. Miller is scarcely a debatable question under the evidence. Stuart himself yields to the proposition that the act was freely done. When he was asked if he thought Mrs. Miller dominated Wana in the making of the deed, or induced her to do anything that she was not willing to do willingly and freely, he answered:

"Why, I think that there was not any hesitancy about signing this deed, because it was represented to us that it would be just a temporary matter, and it was signed freely enough. * * * As far as I understand, the actual transfer of the property was made freely."

The next inquiry is: Was Mrs. Stuart deceived or misled into doing what she did? In other words, was there mala fides in the transaction on the part of Mrs. Miller? Mrs. Miller contends that the deed was absolute, and was intended to settle all matters between her and her daughter. It must be conceded that the money consideration for which Mrs. Miller claims the deed was given was wholly disproportionate to the value of the land. Mrs. Miller shortly subsequent gave an option to purchase at a stipulated price of $125 per acre. Hartog, who made a special survey to determine the present value, fixes it at $50 per acre, which would bring the worth of the land up to $33,750. I am inclined to believe his estimate was near the real value at that time. Mrs. Stuart owed Mrs. Miller at the time less than $10,000, possibly not largely above $5,000. This is a circumstance which would seem to discredit Mrs. Miller's contention, because persons do not willingly give another such marked advantages in business transactions.

If it be true, as Stuart claims, that Mrs. Miller took the deed with the promise and agreement on her part merely to use it to enable her to straighten out the affairs pertaining to the drainage of the land, and possibly to clear up the title in some respects, or, as Stuart expresses it, "simply for the better handling of the property," but intending at the time to disregard such promise, and to claim absolute title, this will amount to deceit, and she would be chargeable as a trustee ex maleficio. The principle applicable in such a case is well stated by Mr. Pomeroy (Pomeroy's Equity, § 1055, quoted in Parrish v. Parrish, supra), as follows:

"A second well-settled and even common form of trusts ex maleficio occurs whenever a person acquires the legal title to land or other property by means of any intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose—as, for example, a promise to convey the land to a certain designated individual, or to reconvey it to the grantor, and the like—and, having thus fraudulently obtained the title, he retains, uses, and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit."

But there is another moving and potent feature which actuated the giving of this deed, and which was well understood by all the parties. I refer to the indebtedness which was hanging over Stuart. Mrs. Miller had had an experience with Alexander, the former husband of Wana, which was not at all to her liking, and Stuart himself had incurred her distrust. Obviously her daughter was well aware of this, and had manifestly come to the conclusion that it would be well to protect herself from pecuniary danger from this source. And, being on cordial terms with her mother and willing to trust her implicitly, knowing that she was her only heir at law, she was persuaded that the best solution of the problem was to deed the property to her mother in absolute right. This will become more apparent as we examine what was subsequently done, after Hayes became interested in the property. Now, if such were Mrs. Stuart's purpose, having in mind,

also, that she was in her mother's debt, and was without means of handling the property so as to bring it into the market or to render it profit-bearing, then there was ample consideration for upholding this deed as a conveyance absolute to her mother.

I will pass now to an examination of the later transactions between the parties, including J. O. Hayes, the joint respondent with Mrs. Miller. It appears that it was soon discovered that a tract of 33.31 acres had been omitted from the deed of August 1, 1910. To correct this, Mrs. Stuart and her husband, on October 13, 1910, gave a warranty deed to Mrs. Miller for this tract. This deed was delivered, but never recorded. Stuart explains that it was given for the same purpose as the original deed. The Hartman & Thompson option had been renewed, running until the early spring of 1911. Hayes avows that the first time he had any conference with Mrs. Miller about this land was during the time that the option was in force. Mrs. Miller affirms this by saying that she never consulted with Hayes about the land prior to the date of the option. Near the close of the year 1911, or early in January, 1912, one Karn came to San Jose from Oregon for the purpose of completing an organization in view of furthering a scheme for the drainage of the land. Karn at this time made a proposal to Mrs. Miller to purchase the land at $35 per acre. Prior to this, however, some time late in the fall of 1911, Hayes, Mrs. Miller, and Mr. and Mrs. Stuart had a conference at the home of Mrs. Miller about this land, Mrs. Miller wanting to sell to Hayes, but no result was reached. But, when Karn came down, the subject was again taken up, and it finally resulted, on January 15, 1912, in Mrs. Miller giving a deed to Hayes for the land. The consideration for that deed was a verbal one, whereby Hayes was to bear the expense of draining, clearing, and selling the land, and to give her half of the proceeds. Mr. Hayes agrees with her, except that he states the primary understanding was "that the price was not to be less than $35" per acre, and that, if he thought the land was worth more, he would give her what it was worth. But he agrees that the final conclusion was as Mrs. Miller states it, with the qualification that Mrs. Miller was to have half of the proceeds after deducting the expense attending the drainage, clearing, etc. There is no further controversy as to this agreement remaining, as it has since been reduced to writing. It was not so reduced to writing, however, until after this suit was instituted.

According to Stuart, he knew about the making of the deed by Mrs. Miller to Hayes in this way, namely, that Mrs. Miller explained to him and his wife that Hayes was taking over the property out of pure kindness and friendship for Mrs. Miller, and in return for services that Mrs. Miller had rendered his (Hayes') family, and that the property was to be turned over to Hayes, so that he could handle it as though it were his own. Mrs. Miller and Hayes both deny that Hayes' services in connection with the land were to be a gratuity. On examining the abstract to the land, Hayes says he discovered that the 33.31-acre tract had been omitted from the deed of Mrs. Stuart and her husband to Mrs. Miller. Later, on February 7, 1912, at Hayes' request,

Wana and Stuart gave to Hayes a deed to this tract. Stuart seems to think that this deed was given merely to enable Hayes to carry out his understanding with Mrs. Miller that he was to handle the property as a gratuity for the family.

Hayes immediately took charge of the property, participated in the drainage organization, and has since expended approximately $60,000 in draining and clearing the land; $35,000 of this money was borrowed on the land, and mortgages given by Hayes to secure payment. The balance has been advanced by Hayes himself. A couple of pieces of the land have been sold, however, and Hayes has the proceeds in his hands, except a portion remaining unpaid. Hayes protests that, when he dealt with Mrs. Miller respecting the land, he had no knowledge whatever that Wana ever owned an interest in it, and that it was not until after he saw the abstract that he was advised of the fact. Whether he did or not, it is not very material in the view I have come to relative to the August 1, 1910, deed.

After Hayes had been handling the property for more than a year, and shortly prior to March 17, 1913, Stuart being in Hayes' office on some business of his own, said to Hayes that Mrs. Miller held the Lake Labish land in trust for Wana. Hayes denied that he knew anything of the kind. Hayes became concerned about it, and sent for Mrs. Miller. Their conference resulted in Hayes sending for Wana and a conference with her alone. He says that Wana corroborated her mother by stating to him that her mother owned the land, and that she (Wana) had "no interest in it at all." Thereupon Mrs. Stuart unfolded to Hayes that her mother had plans for the disposition of her property at her death, and that Mrs. Stuart was herself in perfect accord with her mother's plans. Further conference between Mrs. Stuart and her mother resulted in the agreement of March 17, 1913. The agreement was drawn by Hayes, and was signed and executed by them in his office, and was left in his hands for safe-keeping.

This document, after reciting that there had long been dealings between the parties in a pecuniary way, and that they had then settled all their mutual accounts, contains a declaration on the part of Mrs. Stuart that she has no interest in or claim to any of the Lake Labish lands, and that Mrs. Miller is the sole owner thereof, free and clear of any interest or equity therein on her (Wana Stuart's) part. It is further stipulated on the part of Mrs. Miller that she will pay Mrs. Stuart the sum of $10,000, on or before five years from the date of the agreement, or transfer to Mrs. Stuart securities or real property of that value, as Mrs. Miller may elect; and it was further agreed that Mrs. Stuart should have the right to make disposition by will of the money or property thus to be paid to her. On the same day Mrs. Stuart gave to Mrs. Miller a bargain and sale deed to all the Lake Labish lands. Stuart did not join in this deed, nor was he apprised of the execution of either the settlement agreement or the deed until after Mrs. Stuart's decease.

It seems that there was a general understanding between Mrs. Miller, Wana, and Mr. Stuart, at the time the August 1, 1910, deed

was given, and thereafter all through the transactions, that Mrs. Miller would make disposition of her property to Wana. Stuart himself concedes as much. I quote from his testimony:

"Q. Mr. Stuart, during Wana's lifetime the question of the disposition which Mrs. Miller was going to make of her property was discussed among you folks around the house, was it not? A. The discussion—the only discussion—in regard to that, that I can recall, was at the time of Mrs. Miller's trip to San Diego, and later her operation. Q. Well, so far as you ascertained from the discussions about the home, it was Mrs. Miller's intention, was it not, to leave all her property to Wana? A. That was—yes, that was understood generally. Q. That was always understood, wasn't it, in your discussions and arrangements? A. I think I might say that there was an understanding that the property, Mrs. Miller's property, would be left to Wana at her death. Q. That was the understanding among you people there, about the house? A. I think there was some such understanding. I don't know that there was any definite understanding that I could say, except, as I say, at the time Mrs. Miller went to San Diego, and at the time she was operated upon, there was a will made. Q. But you have heard Mrs. Miller, have you not, express her intention to leave all her property to Wana, during this period of years from 1909 on? A. I don't know that I could say that I have heard definite expressions in regard to it. It was a sort of general understanding, I think, sort of an indefinite thing. Q. That understanding, as you describe it, existed at the time this deed in 1910 was made, did it not? A. So far as I know, I don't think there has ever been anything definitely said about it. Q. Isn't it the fact, Mr. Stuart, at the time this deed of 1910 was made, and all through these transactions, so far as you people understood, it was always Mrs. Miller's intention that when she died all her property should pass to Wana? A. I cannot say that there was a definite understanding about it, I say. It was, so far as I know, a general understanding that that would be the case. I don't know of any reason that it was not understood."

It is not confirmed that Mrs. Miller made a will at the time she went to San Diego, alluded to by Mr. Stuart, and it is a fact that she never made a will subsequently and prior to Wana's death; but it was in Mrs. Miller's mind to do so, as she had even gone so far as to discuss the details of her testamentary disposition, intending that Wana should have the principal part of her property.

Mention is made of Mrs. Miller's wanting to tie up the property in such a way that her daughter would be secure in its possession. Mrs. Miller speaks of this. On being asked:

"Now, what was your plan for disposing of your property after your death?"

—she goes on to say:

"All that I ever had, and the only (interruption) object I ever had, was for my daughter, to tie up * * * and keep everything, so she would have that after my death, so that she would have it, so that she could not—nobody could —get it, and she could not spend it, so that she would have enough to live on as long as she lived. That was the only idea that I ever had in my life, in all my life, was my child."

Her attention being called to the time the contract was drawn, she proceeds:

"I didn't have any will at that time, because I expected, as soon as I could get everything straightened up and tied up—I was going to have it tied up for her instead of any will about it. I wanted it tied up in a way that she never would want for anything."

There was talk of an arrangement for putting the property in the hands of a trust company, but that was not matured. Later Mrs. Miller testified further as to what she meant by tying up the property:

"Q. Yes; you testified this morning concerning your intentions as to what you were going to do with your property, where it was to go in case of your death. What was your intention as to who should receive your property? A. I wanted to tie it all up for my daughter as long as she lived; and then I made no further thought of it. Q. You had not decided yet what else you would do with it? A. No; I had not decided. I thought she could do that as she pleased before she died. If she lived to be 70, why she could use it, manage it, as she desired. Q. Did you discuss with your daughter, Wana, what your intentions were with regard to the disposition of your property? A. I did. We talked it over many, many times. Q. Was she agreeable to what you had decided to do? A. Very much so; very much so. Q. Did she at this time make any claim that any of the property which you had in your name belonged to her? A. What do you mean by that? Q. Did your daughter, Wana, at the time that this contract of 1913 was signed—did she at that time make any claim to any of this property that you intended to dispose of? A. No; she never made any claim to it after we made the contract. Then that settled all that, and then she made a deed following that. Q. She made a deed at the same time as the contract? A. Yes; at the same time. Q. Did she ever claim the Lake Labish property as her own after the deed of August 1, 1910? A. Never did; never did."

Hayes refers to the same matter, and thinks Mrs. Miller began to discuss it with him in 1911, some time after January 1st:

"Q. Very well, now, this testamentary proposition doesn't arise until 1913, as I understand you? A. Oh, yes; she talked with me before that. Oh, certainly; we had the matter well under way at that time. There was one thing that delayed it, why it had not been consummated before."

Then witness refers to the scheme for putting the "whole thing in the hands of a trust company."

This testimony of Mrs. Miller and Hayes indicates quite clearly what Mrs. Miller meant by tying up the property. It was to be a disposition on her part for Mrs. Stuart's benefit. Stuart understood very well Mrs. Miller's intention of disposing of her property by testament for his wife's benefit, but does not evince knowledge of the supposed purpose of tying up the property.

Now, recurring to the settlement agreement of March 17, 1913: Here we get the first intimation that Mrs. Stuart was concealing anything from her husband. She undoubtedly did keep this transaction from his knowledge, as he was not apprised of it until after her death. There is one of two reasons why she concealed this transaction from him: Either her mother and Hayes, one or both, had complete dominion and control over her, and prompted her in doing what she did, or she concluded for herself that it was best to keep the transaction from her husband, knowing that he had sought to interfere in the business dealings between her and her mother and her mother and Hayes. From a careful scrutiny of the testimony of Mrs. Miller and Hayes, the only witnesses alive to speak to the transaction of the agreement and deed of March 17, 1913, I am firmly persuaded that Mrs. Stuart thus asserted her independence of her husband with a view to furthering her own ideas as to the disposition of the property that she expected to come to her in the end, which in

the meantime she believed would be protected from the claims of Stuart's creditors. I have no reason for wholly discrediting Mrs. Miller and Hayes, and, to find that Mrs. Stuart was controlled by their overpowering persuasion, I should have to do so. Both are highly respected citizens of the community in which they live, and there is nothing inherent in their testimony that would seem to render them unworthy of belief.

To conclude: To my mind, after a careful study of the whole testimony in the case, the deed of August 1, 1910, was given for the purpose of passing the absolute title to Mrs. Miller. The deed is supported by the amount then owing to Mrs. Miller by her daughter, and the understanding that the transfer was necessary to avoid any complications with Stuart's creditors; the further condition being present that Mrs. Stuart was the only child of Mrs. Miller, and would be provided for by testamentary disposition on the part of Mrs. Miller. The agreement of March 17, 1913, is explanatory of this result. Mrs. Stuart was provided for in part, with independent means, during the life of her mother. Otherwise, their relations remained the same. The agreement itself, aside from providing Mrs. Stuart with an independent estate, was adopted as a measure for quieting the title in Mrs. Miller, and in Hayes holding under her, and its construction is well calculated as a means to that result.

Complainant's bill will be dismissed, with costs to the respondents.

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BALDWIN TOOL WORKS et al. v. BLUE, State Tax Com'r, et al.

(District Court, N. D. West Virginia. December 16, 1916.)

1. CORPORATIONS ⊕636—FOREIGN CORPORATIONS—POWER OF STATE TO REGULATE.

A state has power to prescribe conditions on which foreign corporations are permitted to do business within its limits.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505–2509, 2571; Dec. Dig. ⊕636.]

2. COMMERCE ⊕69—EXCISE TAX ON CORPORATIONS—VALIDITY OF STATUTE.

A state statute, enacted under authority given by the state Constitution imposing a special excise tax on corporations, both foreign and domestic, for the privilege of doing business, based on their net income from business done within the state, is not unconstitutional, as imposing a burden on interstate commerce, or otherwise invalid because, in case of a corporation doing business and having capital invested within and also without the state, the measure of the tax may be determined partly from income derived from business of an interstate character.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113–119; Dec. Dig. ⊕69.]

3. CONSTITUTIONAL LAW ⊕126—OBLIGATION OF CONTRACTS—STATE LAW IMPOSING EXCISE TAX ON CORPORATIONS.

A corporation of West Virginia takes its charter subject to Code W. Va. 1913, c. 53, § 8 (sec. 2841), which reserves to the Legislature the right to alter or repeal the charter of any corporation, or any law relating thereto, and the State Corporation Excise Law of May 24, 1915 (Acts 1915, c.

3), imposing a special excise tax upon all corporations for the privilege of doing business in the state, is not in violation of the federal Constitution, as impairing the obligation of the contracts made with domestic corporations.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 325, 366–369; Dec. Dig. ⊂⊃126.]

4. CONSTITUTIONAL LAW ⊂⊃230(3)—EQUAL PROTECTION OF LAWS—EXCISE TAX ON CORPORATIONS.

A state statute, imposing a special excise tax on corporations for the privilege of doing business in the state, is not unconstitutional, as depriving the corporations affected of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. ⊂⊃230(3).]

5. TAXATION ⊂⊃47(4)—EXCISE TAX ON CORPORATIONS—VALIDITY OF STATUTE.

A statute, imposing a special excise tax on corporations for the privilege of doing business in the state, is not invalid, as requiring payment of a double tax, because the corporations are also subject to a state license tax on their charters.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 108; Dec. Dig. ⊂⊃47(4).]

6. TAXATION ⊂⊃605—EXCISE TAX ON CORPORATIONS—VALIDITY OF STATUTE.

A state statute, imposing an excise tax upon corporations, is not invalid because of a provision requiring a corporation, as a condition precedent to the maintenance of a suit to enjoin collection of the tax as excessive, to pay into the treasury the amount of the tax admitted to be due.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1229; Dec. Dig. ⊂⊃605.]

7. TAXATION ⊂⊃608(9)—RESTRAINING ENFORCEMENT—STATUTORY REMEDY.

Where a state tax statute makes adequate provision for the testing in the courts of the validity of any tax imposed thereunder, claimed to be in violation of the federal or state Constitution, a federal court will not interfere by injunction to restrain its enforcement.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1238; Dec. Dig. ⊂⊃608(9).]

In Equity. Suit by the Baldwin Tool Works and others against Fred D. Blue, State Tax Commissioner, and others, for injunctions to restrain enforcement of the West Virginia Corporation Excise Tax Law. Decree for defendants.

George R. E. Gilchrist, of Wheeling, W. Va., for plaintiffs.

A. A. Lilly, Atty. Gen., of W. Va., and Fred O. Blue, of Charleston, W. Va., for defendants.

Before PRITCHARD and WOODS, Circuit Judges, and WADDILL, District Judge.

PRITCHARD, Circuit Judge. We will consider, in the order in which they are presented in the bill, the various grounds upon which it is insisted by plaintiffs that the statute is unconstitutional.

The plaintiffs' first proposition is that this law violates the provisions of subsection 3 of section 8, article 1, of the Constitution of the United States, which provides that the Congress shall have power "to

regulate commerce with foreign nations and among the several states."

Section 5 of the statute (Acts W. Va. 2d Ex. Sess. 1915, c. 3) is in the following language:

"Every corporation, joint-stock company, or association organized for profit, and having a capital stock represented by shares, and every insurance company, respectively, now or hereafter organized under the laws of this state, or under the laws of any other state or government and engaged in any business whatsoever in the state of West Virginia, shall pay an annual special excise tax for the privilege of carrying on or doing business in the state of West Virginia, equivalent to one-half of one per centum upon the entire net income of such company, received by it from all sources during the year, on business transacted and capital invested in this state, as hereinafter set forth: Provided, however, that nothing in this section contained shall apply to labor, agricultural or horticultural organizations; nor to mutual savings banks not having a capital stock represented by shares and which are operated exclusively for the benefit of their depositors; nor to cemetery companies, which are organized and operated exclusively for the benefit of their members; nor to fraternal beneficiary societies, orders or associations operating under the lodge system, or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders or associations, and dependents of such members; nor to domestic building and loan associations organized and operated exclusively for the benefit of their members; nor to any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes; nor to business leagues, chambers of commerce or boards of trade, or to any civic league or organization organized and operated exclusively for the promotion of social welfare, none of which said organizations, savings banks, cemetery companies, fraternal beneficiary societies or fraternities, building and loan associations, charitable, religious, scientific or educational associations, business leagues, chambers of commerce or boards of trade, or civic leagues, named in this proviso, are organized for profit, and no part of the net income of which inures to any private stockholder or individual."

Also section 13 is as follows:

"The special excise tax imposed by this act shall be a tax in addition to all license or other taxes now imposed or prescribed by law as a condition for the transaction of any business in this state, by any corporation, joint-stock company, association, or insurance company; and when paid, shall authorize the company making payment to engage in the business authorized by its charter, if otherwise lawful, and if such authority be not otherwise forfeited, within the state of West Virginia for the year for which the same is levied. At the time of paying the taxes the state tax commissioner shall issue to the company paying the same a certificate of payment for the proper fiscal year."

The special excise tax authorized by the above statute is a tax in addition to the license tax provided by sections 126 and 130 of the act. Inasmuch as the larger portion of section 7 relates to administrative features, we deem it only important to call attention to the latter part of the act, which is in the following language:

"It is the intention of this chapter to assess the tax imposed thereby on the net income as defined therein of the corporations, joint-stock companies, associations, and insurance companies named in section four [the term "four" apparently being used inadvertently for the term "five," and so interpreted and applied by the state tax commissioner] arising from business transacted and capital invested in this state. Every such company having capital invested in its business in this state only, shall pay the tax upon its entire net income ascertained as herein provided; and every such company, except an

insurance company, engaged in business and having capital invested and transacting business both in and out of the state, shall pay the tax upon that part of its entire net income which bears the same proportion to its whole net income that the assessed value for purposes of taxation of its assets and property within the state bears to the total assessed value of all of its assets and property in the jurisdictions where it is located. Insurance companies transacting business both in and out of the state shall pay the tax upon that part of the entire net income which bears the same proportion to the whole net income ascertained, as herein provided, that the gross receipts from business transacted within the state bears to the total gross receipts from all sources from the period the tax is assessed.

"No life insurance company, subject to the tax imposed by this act, and the tax of two per centum on its premium income imposed by chapter seventy-seven of the acts of one thousand nine hundred and seven, nor any agent thereof, shall be required to pay a license or other like tax to any municipal corporation for the privilege of transacting business therein."

Section 1, article 10, of the Constitution of West Virginia, provides:

"The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations."

[1] Thus it will be seen that under the Constitution of West Virginia the state has the power to tax all privileges or franchises of persons and corporations within the borders of that state, and this power relates not only to corporations created by the laws of West Virginia, but also applies to corporations permitted to transact business within the borders of the state. In the case of St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 183, 27 Sup. Ct. 132, 57 L. Ed. 144, it was held:

"A state has power to regulate its own creations, and a fortiori foreign corporations permitted to transact business within its borders."

This proposition is well established, and we content ourselves by citing the following additional cases in support thereof: Maine v. Grand Trunk Railway Co., 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994; St. Louis S. W. Ry. v. State of Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265; Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

Plaintiffs insist that the statute undertakes to regulate interstate commerce. While the statute imposes a special tax in addition to other license taxes, ascertained in some instances by the income that may arise in interstate transactions, nevertheless this is not a tax upon interstate commerce, nor can we conceive of any theory upon which it may be properly said to be a burden upon interstate commerce.

[2] It is urged by plaintiffs that the method employed by the state to ascertain the measure of tax is not a proper one, in that it imposes a burden upon interstate commerce because the entire net return shall be made whether such net income is earned wholly within or partly without the state; further, because the tax is determined partly by the assessed value of property within the state, and has assessed the valuation of property without the state as to such corporation as may be doing business partly within the state and partly without the state; also that under the provisions of the act the same corporation is assessed on a comparatively higher basis within the state than its prop-

erty in other states is assessed. A careful consideration of the provisions of the statute as respects this question leads us to the conclusion that the method employed for ascertaining the amount of tax which the corporation is required to pay is perhaps as fair, as a general rule, as any scheme that could be devised for that purpose. Undoubtedly the state of West Virginia has the right to base its tax upon the return of the entire net income in the respective states, and to apportion the amount of income thus ascertained as a means of ascertaining the net income subject to taxation by the state. Maine v. Grand Trunk Railway Co., supra, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994; Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127; U. S. Ex. Co. v. Minnesota, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459.

It has been held repeatedly that the entire value of an interstate corporation engaged as an interstate carrier may be considered, and the entire value of such corporation may be fixed as the value of the property in a state, as the mileage in that state is proportioned to the entire mileage of the road. The Supreme Court of the United States, in the case of Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Backus, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041, in referring to this point, said:

"Now, when a road runs into two states, each state is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values and attempt to extract from the total value of the entire property that which would exist if the miles of road within the state were operated separately. Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Ind. Whatever of value there may be resulting from the continuous operation of that road is partly attributable to the portion of the road in Indiana and partly to that in Ohio, and each state has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, How can equity be secured between the states? and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taking a mileage share of that in Indiana is not taxing property outside of the state.

"The second question must also be answered in the negative. It has been again and again said by this court that, while no state could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce. See, among many other cases, Marye v. Baltimore & Ohio Railroad, 127 U. S. 117 [8 Sup. Ct. 1037, 32 L. Ed. 94]; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 [11 Sup. Ct. 876, 35 L. Ed. 613]."

As we have stated, the statute provides for the assessment and collection of the tax under the power conferred upon it by the Constitution of the state; but the fact that the measure of that tax may be determined partly from the business of an interstate character could not be said to be such an interference with interstate commerce as to render the act unconstitutional. The Supreme Court of the United States, in the case of United States Express Co. v. Minnesota, supra, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459, said:

"While we have no disposition to detract from the authority of these decisions, this court has had also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the state by receipts which came in part from business of an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce, and laws where the measure of a legitimate tax consists in part of the avails or income from the conduct of such commerce. In Maine v. Grand Trunk Ry. Co., 142 U. S. 217 [12 Sup. Ct. 121, 35 L. Ed. 994], this court sustained a tax which required every railroad operated within the state to pay an annual tax for the privilege of exercising its franchises therein, determined upon a proportion of gross transportation receipts, which in that case were shown to be those of a railroad partly within and partly without the state, such gross receipts being derived from its entire business, state and interstate. The resort to the gross receipts, in the opinion of the court, was merely a means of ascertaining the business done by the corporation, and thus measuring the tax, which was held to be within the power of the state. In Wisconsin & Michigan Railway Co. v. Powers, 191 U. S. 379 [24 Sup. Ct. 107, 48 L. Ed. 229], a tax was sustained which made the income of the railway company within the state, including interstate earnings, the prima facie measure of the value of the property within the state for the purpose of taxation."

[3] It is also insisted by plaintiffs that section 10 of article 1 of the Constitution of the United States provides that no state shall pass any law impairing the obligation of contracts. The law of West Virginia bearing upon this point is to be found in section 8 of chapter 53 (sec. 2841) of the Code of that state, and reads as follows:

"Where the Legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint-stock company, or to alter or repeal any law relating to such company, nothing contained in this chapter shall be construed to surrender or impair such right. And the right is hereby reserved to the Legislature to alter any charter or certificate of incorporation hereafter granted to a joint-stock company, and to alter or repeal any law applicable to such company. But in no case shall such alteration or repeal affect the right of the creditors or the company to have its assets applied to the discharge of its liabilities, or of its stockholders to have the surplus, if any, which may remain after discharging its liabilities and the expenses of winding up its affairs, distributed among themselves in proportion to their respective interests."

This question was passed upon by the Supreme Court of West Virginia in the case of State v. Petroleum Co., 58 W. Va. 108, 51 S. E. 865, 1 L. R. A. (N. S.) 558, 112 Am. St. Rep. 951, 6 Ann. Cas. 38. The court held in that case that, when the defendant obtained its charter, section 8 of the Code, above quoted, being in force, the charter was granted subject to the provisions of such section; that the reservation contained therein of the right either to amend the charter or to change the law regulating it was without legislative limitation; and that it included the right of repeal. It also held that the provisions of this section should be read into the charter and be treated as a part of it—in other words, that when the defendant accepted the charter, it did so with full notice of the fact that the state had reserved the right to alter, amend, or repeal the law by which it was created. In the case of Blue Jacket Copper Co. v. Scherr, Auditor, 50 W. Va. 533, 40 S. E. 514, a case in which this question was involved, the court, among other things, said:

"Little is presented here, by way of argument, to show that there is any violation of the provisions of the Constitution of the United States prohibit-

ing any state from passing any law impairing the obligation of a contract. This corporation obtained its charter from the state after this classification had been made. Since it obtained its charter, the state has increased the annual license tax upon it. So it only amounts to a question of whether the state has the right to increase a tax of that kind. Where a certain tax is imposed on a corporation by its charter, the Legislature does not thereby disable itself from imposing upon it a different or more onerous tax in the future."

From what we have said it necessarily follows that the statute does not violate the provisions of section 10, article 1, of the federal Constitution, and that the Legislature was well within the meaning of section 8 of chapter 53 of the Code of West Virginia in the enactment of the statute in question.

It is also insisted that the statute is in violation of section 2, article 4, of the Constitution of the United States, which provides that citizens of each state shall be entitled to all privileges and immunities of citizens of the several states. The Supreme Court, in the case of Selover, Bates & Co. v. Walsh, 226 U. S. 112, 33 Sup. Ct. 69, 57 L. Ed. 146, as well as in a number of other cases, has disposed of this proposition. The last syllabus in that case is in the following language:

"A corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the laws of a state. Western Turf Association v. Greenberg, 204 U. S. 359 [27 Sup. Ct. 384, 51 L. Ed. 520]."

It is further insisted by plaintiffs that the passage of this act is inhibited by the following provisions of the Constitution of the United States:

"Fifth. Section 1 of the Fourteenth Amendment to the federal Constitution which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, and authorities supra.

"Sixth. Section 1 of the Fourteenth Amendment which further forbids any state to deprive any person of life, liberty or property without due process of law."

These propositions have been decided adversely to the contention of plaintiffs by the Supreme Court of the United States, as well as other courts, notably among the cases being Flint v. Stone Tracy Co., supra, 220 U. S. 108, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Baltic Mining Co. v. Massachusetts, supra, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127; Blue Jacket Copper Co. v. Scherr, Auditor, supra, 50 W. Va. 533, 40 S. E. 514; State v. Petroleum Co., 58 W. Va. 108, 51 S. E. 865, 1 L. R. A. (N. S.) 558, 112 Am. St. Rep. 951, 6 Ann. Cas. 38.

In the eighth paragraph of the bill it is alleged that:

"One or more of the plaintiffs is a mere holding company, all of whose income is received from property located outside of the state of West Virginia. Under said section 147, which provides that every such corporation 'engaged in any business whatsoever in the state of West Virginia' shall pay the tax prescribed by said law upon the entire net income of such company received by it from all sources during the year on business transacted in this state, every such plaintiff is required by said state tax commissioner to pay

said tax on all of its income, because the receiving of such income constitutes doing business within this state, and constitutes all of the business which said company does, although none of its earning property is in fact located in this state."

In response to this allegation it is averred that the state tax commissioner—

"does require a holding company, when such holding company is a resident corporation with its principal place of business in West Virginia, and transacting its business as such, in such state, to return the income that it receives in its business as such holding company as a measure to determine the tax; but this is required only of such holding companies, as such, when the holding company is a West Virginia resident corporation with its principal place of business in the state of West Virginia and carrying on such business in the state of West Virginia."

It will be observed that defendants expressly deny that a holding company "engaged in any business whatsoever in the state of West Virginia" is required to return the income that it received in its business as such holding company as the measure to determine the tax, except when it appears that such holding company is a West Virginia resident corporation, with its principal place of business within the state. Thus it will be seen that the defendants by their answer squarely present an issue, and on this issue the burden is upon plaintiffs to establish the truthfulness of the allegations of the complaint. This the plaintiffs have failed to do, and we therefore assume that defendants' contention as respects this point is correct.

We fail to understand the theory upon which it is contended that where the state of West Virginia has granted a charter to a domestic corporation, whose principal place of business is in that state, the fact that its net income is derived principally or wholly from business outside the state relieves it from the payment of the tax authorized by the statute. Such corporations accepted their charters with full knowledge of the provisions of the Constitution and the laws of that state. Therefore, as we have already stated, we think that the contention of plaintiffs that the state exceeded its power in the enactment of the statute is without merit.

[4] It is also insisted that the statute is in violation of section 1 of the Fourteenth Amendment, which forbids any state to deny to any person within its jurisdiction equal protection of the law. It is well settled that, where an act requires the payment of a privilege or immunity tax by a corporation, such requirement does not deprive such corporation of the equal protection of the laws. If the state should be denied this power, it would result in great confusion and embarrassment, and render it practically impossible to raise a sufficient revenue with which to defray the necessary expenses of the state. Such being the case, it has been very properly held to be within the power of the state to levy and collect taxes of this character.

[5] It is also urged that plaintiffs were denied a substantial right by this statute, in that it requires them to pay a double tax. The section referring to this matter is in the following language:

"Every resident and nonresident domestic corporation shall pay a license tax on its charter for the fiscal year beginning the first day of July, one thou-

sand nine hundred and fifteen, and annually thereafter, based on its authorized capital stock as follows." Section 3.

Under the foregoing provision it appears that the statute was not in effect on the 1st day of July, 1915. However, it is insisted by counsel for defendants that, inasmuch as it was passed and approved prior to the 1st day of July, 1915, it was thereby notice to all corporations engaged in business during the months of May and June that, if such corporations desired to continue in business during the fiscal year beginning on the 1st day of July, 1915, they would be required to pay the tax provided for by the statute. In other words, all corporations in the state on and after the 24th day of May, 1915, had notice of the fact that on and after the 1st day of July of that year they would be required to pay this additional tax, and that it was optional with them as to whether under such circumstances they would continue to transact business in the state subject to the provisions of the statute, and, having decided to continue to do business in the state, they thereby acceded to the terms of the statute, and cannot now be heard to say that the state has dealt unfairly with them in the enactment of this law. A double tax, properly speaking, would be to tax the same property twice for the same purpose; but such is not the case in this instance. Among other things, the statute provides that this special excise tax—

"shall be a tax in addition to all license or other taxes now imposed or prescribed by law as a condition for the transaction of any business in this state, by any corporation, joint-stock company, association, or insurance company; and when paid shall authorize the company making payment to engage in the business authorized by its charter, if otherwise lawful," etc. Section 13.

[6] The plaintiffs insist that the statute fails to provide any means by which they can take an appeal to the courts from the action of the board of public works, where they may feel aggrieved by the orders of that board. Section 10 of the act is in the following language:

"If any company, making a return as provided by this act, feels aggrieved by the assessment so made upon it for any year by the state tax commissioner, it may apply to the board of public works by petition, in writing, within thirty days after notice is deposited as provided in the preceding section, for a hearing and a correction of the amount of the tax so assessed upon it by the state tax commissioner, in which petition shall be set forth the reasons why such hearing should be granted and the amount such tax should be reduced. The board shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the petitioner shall be forthwith notified thereof; if granted, the board shall notify the petitioner of the time and place fixed for such hearing. After such hearing the board may make such order in the manner as may appear to them just and lawful, and shall furnish a copy of such order to the petitioner."

Section 11 provides that:

"No injunction shall be awarded by any court or judge to restrain the collection of taxes imposed by this act, * * * except upon the ground that the assessment thereof was in violation of the Constitution of the United States, or of this state; or that the same was fraudulently assessed; or that there was a mistake made in the amount of taxes assessed upon such corporation, joint-stock company, * * * or insurance company."

It is further provided that no such injunction shall be awarded unless application has first been made to the board of public works to correct such mistake, and it shall apply if the board has refused to do so, which fact is required to be stated in the bill. As a condition precedent it is provided that the injunction shall not be allowed unless the plaintiffs pay into the treasury all the taxes alleged to be due. Thus it clearly appears that if the plaintiffs should apply to the board of public works to correct an alleged mistake, and the board should fail to correct the same, the plaintiffs in that event would be entitled to their remedy in a suit in equity to restrain the collection of any portion of the taxes alleged to have been improperly assessed.

[7] We find nothing unfair in the requirement that the plaintiffs pay into the treasury any taxes they may concede to be due as a condition precedent to the relief afforded by this section. This is a principle well recognized in equity. In addition to what he have said, an examination of section 11 shows that a court of equity has unlimited jurisdiction to restrain the collection of taxes, if it is in violation of the state or federal Constitution, or if fraudulently assessed. Thus it will be seen that the right to test the constitutionality of the act in question is fully provided for by the statute, and in any case where a corporation may desire to attack the validity of the act upon the ground that it is in violation of the Constitution of the United States, such corporation may institute suit in a court of equity, and if in the court below the judgment should be adverse to plantiffs, then they would have the right to carry the same to the Supreme Court of the state, and if again defeated in that forum would still have a right to take the case to the Supreme Court of the United States for final determination. The statute having provided what we conceive to be a complete and adequate remedy, this court will not by injunction interfere with the state in the exercise of the rights conferred upon it by the statute. Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651; Dalton Adding Machine Co. v. State Corporation Commission of the Commonwealth of Virginia, 236 U. S. 699, 35 Sup. Ct. 480, 59 L. Ed. 797.

The plaintiffs insist that this is an income rather than an excise tax. An examination of the statute impels us to the conclusion that this is not an income, but a special excise, tax. Therefore many of the cases relied upon by plaintiffs do not, in our opinion, apply to the case at bar. We have carefully examined all cases cited by plaintiffs, but find nothing therein to cause us to modify the views herein expressed.

For the reasons stated, we are of opinion that the plaintiffs have not shown that they are entitled to the injunctive relief prayed for, and the same should be denied. Further, even if plaintiffs had a good cause of action, the statute, as we have said, affords a full and adequate remedy.

A decree will be entered accordingly.

Ex parte CALLOW.

(District Court, D. Colorado. July 1, 1916.)

No. 6526.

1. ALIENS ⟸49—DEPORTATION—PUBLIC CHARGE.
In a proceeding for the deportation of an alien, evidence *held* insufficient to show that he was likely to become a public charge, so as to be subject to deportation, under Act Feb. 20, 1907, c. 1134, 34 Stat. 898.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 107.]

2. ALIENS ⟸53—IMMIGRANTS—INSPECTION—EFFECT OF.
One favorable inspection does not entitle an alien who has entered the United States and departed to re-enter at a future time; and this is so regardless of the alien's belief as to his rights.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112.]

3. ALIENS ⟸53—INSPECTION—DEPORTATION.
Under Immigration Act Feb. 20, 1907, c. 1134, § 36, 34 Stat. 908 (Comp. St. 1913, § 4285), declaring that all aliens who shall enter the United States, except at the seaports thereof or at such place or places as the secretary of labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported, an alien who entered from Canada at a designated port of entry, but walked by unobserved the place of inspection, is subject to deportation; the act placing the burden on the alien to present himself at the proper place for inspection, and the result being the same, though the alien had been inspected and passed on a previous entry into United States.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112.]

4. ALIENS ⟸54—DEPORTATION PROCEEDINGS—EVIDENCE.
Where an alien's deportation was properly ordered, because he had not been inspected as required by Immigration Act, § 36, the fact that he was improperly denied by the inspector of immigration the right to rebut charges that he was guilty of statements and demonstrations of anarchistic tendencies was immaterial; such matters not affecting the propriety of his deportation.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112.]

5. ALIENS ⟸54—DEPORTATION PROCEEDINGS—WARRANTS.
A warrant of deportation should expressly name the country to which the alien is to be taken, and is too indefinite where it merely directed return to the country whence the alien came, and that fact was susceptible of more than one interpretation.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112.]

6. HABEAS CORPUS ⟸92(1)—DEPORTATION PROCEEDINGS—AUTHORITY OF COURT.
On habeas corpus to obtain release from restraint under a warrant for deportation, the District Court will not in the first instance determine the country from whence the alien came, where that question could be determined in more than one way and was left open by the warrant of deportation.

Habeas Corpus. In the matter of the application of Harold E. Callow, otherwise known as H. E. Callow, for writ of habeas corpus to secure his release from restraint in deportation proceedings. Order nisi granted on condition that, if the country to which deportation shall

be had be designated, the writ will be discharged, and petitioner remanded to custody.

Whitehead & Vogl, of Denver, Colo., for petitioner.

H. B. Tedrow, U. S. Dist. Atty., and Otto Bock, Asst. U. S. Atty., both of Denver, Colo., for respondents.

LEWIS, District Judge. This is a proceeding in habeas corpus. The petitioner is a British subject, and the restraint complained of is by an inspector of immigration who, at the time the writ issued, held the petitioner under a warrant for deportation.

[1] The warrant of arrest was issued February 28th last and named two grounds as violative of the Act of February 20, 1907, and its amendment (Act March 26, 1910, c. 128, 36 Stat. 263), to wit:

"That he (H. E. Callow) was a person likely to become a public charge at the time of his entry into the United States; and that he entered without the inspection contemplated and required by said Act."

The arrest was made March 3d and the hearing under the charges in the warrant came on March 29th. The proofs were then submitted to the Secretary of Labor who issued the deportation warrant on May 15th last, after finding that both of the charges in the warrant of arrest had been sustained by the proof.

After return had been made to the writ of habeas corpus the matter was submitted to the court on a transcript of the testimony taken at the hearing before the inspector,—one page of the testimony of the witness Schwab, a Denver police officer, appears, however, to have been omitted. Arguments of counsel were heard at length, and since then all of the testimony taken before the inspector (except the missing page) has been carefully read over, and the facts disclosed therein deliberately considered. From these facts it conclusively appears that the petitioner is a British subject about thirty-five years of age, that he is a single man, and that he is in good health and sound in body and mind. He was born in London and his parents reside there, but he claims to be a citizen of Canada, and entered the United States from that dominion in October, 1914, having about $75.00 on his person. In company with an American he walked across the international boundary line at Noyes, Minnesota, which has been designated and established as one of the Canadian border ports of entry for aliens, but was not inspected. He had been in Canada just prior to his entry since August, 1913, having landed at Quebec at that time. When in London he worked at wagon building. He had made a number of trips across the Atlantic from London, sometimes landing at a Canadian port and sometimes at a port of the United States. He first came over in 1902, and lived in Montreal about eleven months. He returned to England and came back to Montreal in 1903. He went back to England in the latter part of 1903 and came over to the United States in July, 1904. He returned to London on the S. S. London Bridge as a fireman in 1908, and returned to New York on the S. S. Mauratania in July, 1908. He left New York in December, 1912, on the S. S. Kroonland as a "trimmer" or "coal-passer"; then he sailed from Liverpool and landed at Quebec in August, 1913, and, as said, remained in Canada from that time for

about fourteen months until he came to the United States. While in Canada he had no fixed place of residence. He started from Winnipeg when he came to the United States in October, 1914; but before that had visited different places, sometimes looking for work in the harvest fields and obtaining such employment, and at other times engaged in other work for short periods. He also worked in the harvest fields when in the United States, and at the time of the hearing before the inspector was in the employ of McPhee & McGinnity Company, dealers in lumber and building supplies at Denver, though neither while in the United States nor in Canada did he work at all continuously, but traveled from place to place and sought employment from time to time as his inclination dictated and as his necessities might require. He owns some financial interests in London which bring him in a regular income of about $150.00 a year, and received remittances from this source at different times while in Canada and the United States, and at the time of his arrest had some money in a bank at Denver. The only time that he was unable to support himself was during a few days in the winter of 1914 when he went to the Municipal Lodging House in Chicago, but that appears to have been brought about by an unexpected delay in the transmission of a remittance from London due to European war conditions. He did not bring any baggage with him when he came into the United States, and it seems fairly inferable from all of the testimony that as he went from place to place in Canada and the United States he had nothing except what he carried with him on his person.

No reasonable inference can be drawn from these facts which in anywise support or tend to support the charge and finding, "That he was a person likely to become a public charge at the time of his entry into the United States," as set forth in the warrant of deportation. It must, therefore, be held that the Secretary of Labor was wholly without right or authority, under the Acts of Congress which define and limit his power to make such a finding, to use such a finding as a basis on which to issue a warrant of deportation, and on that warrant legally authorize the restraint of the petitioner of his personal liberty and thus transport him through and from the United States.

[2, 3] 2. The other ground set forth in the warrant raises only a question of law on the admitted facts. On each of the prior occasions that the petitioner entered the United States, whether at seaports of entry or along the international boundary, he came through inspection offices. He had entered on the S. S. Carpathia in July, 1904, on the S. S. Mauratania in July, 1908, from Emerson, Can. (landing port Noyes, Minnesota) in September or October, 1906, at Seattle in December, 1910, at Portal, N. D. (landing port), in October, 1912. He testified that on his last entry (October, 1914) he just walked across the boundary line at Noyes along the road in sight of the inspection office but was not inspected, and that he did not think it was necessary or required that he should be inspected. Both Portal and Noyes had been designated by the Secretary as Canadian border ports of entry. Of course, one favorable inspection does not give the alien a right to enter at all future times. It only applies to the one entry at which the in-

spection is made. The alien may be entitled to enter at that time, but when he seeks to enter again at a later period, conditions may have arisen that would require his exclusion. And it is not material as to what he may have honestly believed about his right to enter the second time without inspection. He is subject to the restrictions found in the Act however good his intentions may be. Section 36 of the Act reads in part in this way:

"That all aliens who shall enter the United States, except at the seaports thereof, or at such place or places as the Secretary of Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections 20 and 21 of this Act."

The plain purpose of this section, when considered with other pertinent parts of the Act, is to require all aliens who enter the United States to submit themselves to inspection when they so enter. If they enter at seaports they are inspected at the place of landing, and if not at seaports, they must present themselves for inspection at the places designated by the Secretary for that purpose. The Act justly places the burden on the alien to present himself at the proper place. It does not contemplate nor permit that he shall walk by, and if unobserved, then be entitled to claim that he is in by right; but to the contrary, the section expressly declares that he is thus unlawfully in the country and shall be deported.

I am, therefore, of the opinion that under the admitted facts it was clearly the lawful right and duty of the Secretary to issue his warrant for the deportation of the petitioner on that ground as set forth in the warrant, to wit:

"That he entered without the inspection contemplated and required by said Act."

[4] It is insisted by counsel that petitioner did not have a fair and impartial hearing before the inspector. That is, that the inspector called witnesses and adduced from them evidence of facts wholly irrelevant to either of the charges in the warrant of arrest; and additionally that there had been an express agreement and understanding between the inspector and petitioner's counsel that the matters so testified to would not be gone into. And also that after this evidence had been adduced the inspector arbitrarily refused to grant petitioner additional time in which he might have an opportunity to call witnesses who would refute the testimony so given. This testimony was transmitted as a part of the record to the Secretary, and was doubtless reviewed by him with the other proof before issuing the warrant. It is highly prejudicial but immaterial to both charges set out in the warrant of arrest. It discloses unpatriotic utterances, anarchistic in their tendencies; it represents the petitioner as denouncing both the governments of Great Britain and the United States, and cursing their flags. The petitioner denied making any such utterances, and denied the charges that he was opposed to organized government or in any manner unfriendly to the government of his own country or that of the United States. He and his counsel insisted that if they were given an opportunity they could produce evidence directly to the contrary.

That is, he would be able to show that he made none of the statements attributed to him in any of the street talks, nor at any other time attributed to him by the witnesses called by the inspector. That on the contrary he would establish by witnesses, if given an opportunity to call them, that he said nothing that could in any manner be construed as unpatriotic to his own country or denunciatory and critical of our country. That he belongs to the "Marxine School" which teaches the common brotherhood of man, that nations should not be divided and that all humanity should live under one organized system and under one social pact, and (inferentially) that he was opposed to any flag which should be hoisted as an insignia under which men should war one against another. But however unfair the conduct of the inspector may be believed to be, it can certainly have had no possible effect on the charge that the petitioner entered the United States without inspection and was thus here unlawfully. All of the facts in that respect were testified to by him, and no other evidence on the subject was introduced. I therefore am of opinion that this objection must be held to be without merit and wholly immaterial.

[5] 3. The warrant of deportation directs that the petitioner be returned "to the country whence he came." This is challenged for indefiniteness, and that for that reason the writ is void on its face. It does not designate the country to which the petitioner shall be taken on deportation. The officer executing the writ could not know from the writ what he was required to do in its execution. He could not execute it without looking outside of the authority under which he is authorized to act. It is not enough that the warrant recites that the petitioner "landed at the port of Quebec, P. W. ex. S. S. Megantic on the 10th day of August, 1913," and that he is to be returned to the country whence he came at the expense of the steamship company importing him. He is not without right simply because he is subject to deportation. He cannot simply be sent away. He has a right under the Act to be returned to the country from which he came, and to be protected in that right, the warrant which authorizes the deportation should expressly name the country to which he is to be taken; and that right should not be left to the determination of the officer executing the warrant or to the transportation company which brought him in as their judgment or convenience might dictate.

[6] 4. It was said in argument by petitioner's counsel that the purpose was to transport the petitioner to England, and this was freely conceded to be true by counsel for the inspector; and the petitioner thereupon earnestly contended that the only country to which he could be deported was the Dominion of Canada; that he had continuously resided there for more than one year before entering the United States, had acquired a domicile there and must be returned to Canada if deported. I was disposed at the argument to accept that view, but since a careful reading of the record I am in doubt whether under the facts disclosed his residence in Canada was such as to establish in him a right to be sent there rather than to England. In that respect I find no similarity between the facts here and those dealt with by Judge Amidon in Ex parte Gytl et al. (D. C.) 210 Fed. 918. In

that case the petitioners had gone to Canada with the purpose and intention of making it their future home. So far as the record disclosed they had no thought of returning to the country from which they came to Canada or of going elsewhere. I can reach no such conclusion in this case. Viewing the record of the petitioner during the last fourteen years it cannot be said that while he was in Canada for the fourteen months just prior to coming to the United States he at any time during the period had in mind the purpose of remaining there and of becoming a permanent resident. While in Canada on his various visits and also while in the United States he went from place to place, then back to England again, and then returned to North America. There is nothing to indicate that his conduct in the future will be otherwise than it has been in the past. At least the record is such as to render it highly uncertain whether he at any time had any desire, purpose or intention of remaining in Canada. I think opposite conclusions can be drawn from the record in this respect,—on the one hand, that he intended to remain in Canada, or the other, that his stay there was only temporary and that he would return to England. I am not disposed, therefore, to assume to try to control the judgment of the Secretary in this respect, whether it be that he should be returned to Canada or to England.

The order will be nisi. The petitioner may stand at large on his present bond, and if within twenty days from this date the Secretary shall issue a warrant of deportation on the ground above stated, designating the country, either Canada or England, to which the petitioner shall be deported, the writ will be discharged and the petitioner remanded to the custody of Henry H. Moler, local immigrant inspector at Denver. Otherwise, he will be set at liberty.

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## UNITED STATES v. COLORADO POWER CO.

(District Court, D. Colorado. January 8, 1916.)

No. 5853.

1. WATERS AND WATER COURSES ⇐27—EASEMENTS ON PUBLIC LANDS—RIGHTS.

Defendant's predecessors applied, under Act Feb. 15, 1901, c. 372, 31 Stat. 790 (Comp. St. 1913, § 4946), to the Secretary of the Interior for a permit to enter upon the public domain and there construct a diversion dam and plant for the generation of electricity. The Secretary, in granting permission, expressed his consent to the use of the right of way shown upon the map in accordance with the provisions of the act. *Held*, that defendant, having succeeded to the rights of its predecessors, was not entitled to greater rights than they obtained, and could not justify its use of the public domain under earlier statutes; the application being confined to the act of 1901.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 19.]

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. WATERS AND WATER COURSES ⟸27—PUBLIC DOMAIN—GRANTS OF RIGHTS OF WAY.

Under Act Feb. 15, 1901, authorizing and empowering the Secretary of the Interior under general regulations to be fixed by him to permit the use of rights of way through the public lands, forests, and other reservations of the United States for electrical plants, poles, and lines, for the generation and distribution of electrical power and for canals, etc., and for water plants, dams, and reservoirs, and providing that any permission given by the Secretary may be revoked by him or his successor, in his discretion, and shall not be held to confer any right, easement, or interest to or over any public lands, one constructing a plant on the public domain for the generation of electricity under permission from the Secretary, given pursuant to the act, has no more than a revocable permit.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 19.]

3. WATERS AND WATER COURSES ⟸27—PUBLIC DOMAIN—GRANTS OF RIGHTS OF WAY.

While the act does not indicate the burdens that may be imposed for the use of the permit, and clearly does not contemplate full compensation for the privilege to be enjoyed, yet the Secretary may exact a sum needful for the proper protection of the government's interest in the public domain, but the exaction cannot be graduated according to the amount of electrical energy produced, and hence defendant's refusal to pay an exaction based on the amount of electricity produced does not warrant the forfeiture of its rights, even though the imposition was reasonable; the statute leaving a doubtful field of action.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 19.]

4. WATERS AND WATER COURSES ⟸27—PUBLIC DOMAIN—GRANTS OF RIGHTS OF WAY.

While the Secretary of the Interior may in his discretion revoke the permission given under the act, such discretion cannot be exercised arbitrarily and without just cause; such exercise of discretion being invalid.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 19.]

5. WATERS AND WATER COURSES ⟸27—PUBLIC DOMAIN—GRANTS OF RIGHTS OF WAY.

The rights given an electrical company to construct on the public domain a plant for the generation of electricity cannot be revoked because the company, instead of carrying the water in ditches, in accordance with the application, constructed a tunnel in solid rock for that purpose; the country being inaccessible and unfit for any other purpose, and a tunnel being more satisfactory than an open ditch.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 19.]

In Equity. Bill by the United States against the Colorado Power Company, a corporation. Order nisi entered, granting defendant 60 days in which to make payments, failing in which, decree will be entered as prayed.

Harry B. Tedrow, U. S. Dist. Atty., of Denver, Colo., and Ethelbert Ward, Sp. Asst. Atty. Gen., for the United States.

Wm. V. Hodges, of Denver, Colo., for defendant.

LEWIS, District Judge. The defendant owns and operates an hydro-electric plant in Garfield County. It consists of a dam which diverts the waters from Grand river into a tunnel excavated through solid rock, a pressure pipe which receives the flow at the lower end of the tunnel, extending thence to the power house where the electric current is generated, and, in addition to the power house, several other buildings nearby used in connection with operating the plant.

All of the property and plant, except a part of the diverting dam, is situate on the public domain. The country is rugged and mountainous, and the distance from the dam to the power house is about two and a half miles through a deep cañon, having high precipitous and barren walls on either side of the river.

The bill seeks to have the entire plant and appurtenant structures removed as a purpresture and public nuisance, on the claim that it is on the complainant's lands without present right. It discloses that the defendant went in and constructed the plant under a permit granted to one De Remer and associates by the Secretary of the Interior on August 20, 1903, under the Act of February 15, 1901 (31 Stat. 790); that thereafter in January, 1907, the rights of De Remer and associates were transferred, with the acquiescence and consent of the Secretary of the Interior, to the defendant, or its predecessor, and that thereafter in 1909 the Secretary of the Interior and the Secretary of Agriculture canceled and revoked the permit.

Some basis for the action of the two secretaries is claimed on account of the fact that, as it is alleged, the defendant did not keep the letter of the De Remer permit in constructing a tunnel for the flow rather than carrying the water in an open ditch, and further because the line of the tunnel departed from that of the open ditch, both disclosed on the map presented to the land office with the De Remer application; but this claim seems to be more of form than substance.

The pleadings do not disclose the real cause of the controversy. After the plant was completed at great expense the Secretary claimed the right, under the said Act of February 15, 1901, to impose certain sums as annual charges against the defendant, based upon the amount of current generated. The exaction was not to the defendant's liking; it not only refused to pay, but denied the right of the Secretary to make the charge. Its attitude is twofold: First, lack of authority under the Act of February, 1901, to require payment; and, second, the assertion by the defendant that its right to remain upon the premises and operate its plant was not measured by the Act of February, 1901, but that it had acquired a perpetual easement under the Act of July 26, 1866 (14 Stat. 251, c. 262) and the Act of July 9, 1870 (16 Stat. 217, c. 235), and further that said two mentioned Acts, read and considered in connection with the Act of February, 1901, and other acts treating generally of the same subject-matter, gave to the defendant more than a revocable permit and that it was not subject to the exaction. This attitude brought about the alleged cancellation of the permit theretofore issued.

[1] We state briefly the reasons which impel us to the conclusion that the defendant's rights are fixed and determined by the Act of February 15, 1901, alone: (1) When De Remer and associates made

their written application in July, 1902, they expressly asked for "the benefits of the Act approved February 15, 1901," "with respect to permission to the use of the right of way hereby applied for." And thereafter the Secretary of the Interior on August 20, 1903, in granting the permission applied for, expressed his consent thus:

"The use of the right of way shown on this map is hereby permitted in accordance with the provisions of the Act of February 15, 1901—31 Stat. 790—and the regulations present or future thereunder."

After De Remer and associates had spent several thousand dollars on the venture under the permission thus given them, the defendant's predecessor took over, with the consent and approval of the Secretary, the rights theretofore given, and the plant was thereupon with reasonable diligence completed.

There was not only no claim under any other statute to occupy complainant's premises, but the express understanding and agreement at the time was that the only right claimed was that granted by the Act of February, 1901; nor was any claim or right asserted under any other statute, so far as the record shows, until long after the completion of the plant.

[2] In July, 1902, the Grand River Power & Transmission Company made an application under the same Act of February, 1901, for the same character of right made by De Remer and in the same locality. This right was approved and granted by the Secretary in the same terms as the one granted to De Remer. The defendant also took over the rights so granted to the Grand River Power & Transmission Company, with the consent of the Secretary. Of course, it obtained no greater right under the one than the other. It cannot now be heard to say that its rights are any other or greater than those given by the statute which the parties invoked and under which the permit was expressly given; and (2) the opinion of the Circuit Court of Appeals for this circuit in United States v. Utah Power & Light Company, 209 Fed. 554, 126 C. C. A. 376, does not leave the question open for debate in this court. The reasoning of the court in that case applies with more aptness and force to the Act of February 15, 1901, than to the Act there under consideration; and it cannot be doubted that the conclusion reached there should be applied here. For these reasons we must measure the rights and obligations of the defendant by the Act of February, 1901. That Act authorized and empowered the Secretary of the Interior "under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States" for electrical plants, poles and lines for the generation and distribution of electrical power, and for canals, ditches, pipes and pipe lines, flumes, tunnels or other water conduits, and for water plants, dams and reservoirs:

"And Provided further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or by his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

The statute is clear. The defendant never had more than a revocable permit.

[3] The Act in no manner indicates the burdens that may be imposed for the use of the permit or the character of the exactions that the Secretary may require of the permittee. He is empowered to permit the use of the rights specified under general regulations to be fixed by him. The undoubted intent and purpose was to clothe the Secretary with the right and duty to safeguard the interests of the complainant in the premises, and thus to burden the exercise of the permit with such restrictions and exactions as might be reasonably necessary to effectuate that purpose. On letting the permittee in it would seem to be clearly within the Secretary's power to require some guarantee or agreement against waste, not only of the particular property to be enjoyed but also of contiguous portions of the public domain and against trespassing upon the same and unnecessary damages that might be brought about in getting in and out. And while the Act clearly does not contemplate full compensation for the privilege to be enjoyed, otherwise it would have said so, still it seems reasonable that the power should include the right to exact a sum needful for the proper protection of the complainant's interests. Congress did not manifest any intent to give the Secretary the right and power to acquire for complainant an interest, directly or indirectly, in defendant's plant or business, nor to lay a tax on its product; and to put the defendant's business under public surveillance and thus subject it to examination as to the amount of electrical energy produced and disposed of, for the purpose of laying tribute thereon as a basis of a charge to be fixed by the Secretary, is to carry the power granted to him to a doubtful length and further than, I think, is given by the Act. The charge made, and to which the defendant objected and refused to pay, was ascertained in that way. There is no present duty or purpose in these expressions to finally determine and adjudicate the limit of power in this regard, further than to say that the statute left a doubtful field of action for both sides, and the course taken by the defendant ought not to be construed as a risk of all it had. The average amount thus fixed was approximately $100 per month. There is no proof that this is unreasonable and excessive, and more than necessary in the protection of the complainant's rights; and the manner in which it was fixed is not of present concern, except that it operated as the chief cause for the resistance to the demand. It is enough now to say that I cannot find on the proof that the amount demanded was excessive or unreasonable.

[4] I agree fully with the insistence of defendant that the power given to the Secretary by the Act to revoke at his discretion the permit, cannot be exercised arbitrarily and without just cause. While it is not presumed that the Secretary would in any case take such action, except under the belief that he had the right and power to do so, yet if such action were taken because of a refusal to comply with an exaction made beyond his power, it would be a mere brutum fulmen. There can be no purpose in the Act of dealing unfairly with the permittee and his investment, and its whole purpose contemplates that he shall be protected as long as he complies with reasonable requirements to be ascertained under the general regulations fixed by the Secretary. The rules of law controlling the exercise of discretion are set forth

in the many authorities cited to the point in the defendant's printed brief and it is unnecessary to restate them here.

[5] As already stated, the maps and plats which accompanied the original applications of De Remer and associates and the Grand River Power & Transmission Company disclose that the water was to be carried in open ditches. It also gave the lines or routes of the ditches, whereas it appears in proof that the defendant's structure carries the water through a tunnel excavated in the solid rock for the greater part of the way, and that the route of the tunnel varied, by necessity, from the line of the open ditches, as exhibited on the maps, in some places as much as five hundred feet. The Act authorizes the use of either open ditches or tunnels. The defendant's immediate predecessor at no time constructed or used a ditch to carry the flow, neither did De Remer and associates or the Grand River Power & Transmission Company ever construct, or use a ditch, but beginning with the first work upon the ground the construction of the tunnel was entered upon and vigorously prosecuted to its completion, so that long before there was any difference or controversy between the parties there has been laid out and expended more than two million dollars in the construction and completion of the plant. The tunnel is in solid rock and the surface over and about it is wholly unfit and unsuited to any other use or purpose. It is a more expensive and better conduit than an open flume or ditch and fulfills and complies with the general purpose and understanding of the parties at the time the permits were given. It lies for the greater part of its length in a cañon which is inaccessible, except along the river-bed, and I can find no merit in the complainant's claim of deviation from the original permits.

An order nisi will be entered giving the defendant sixty days in which to make payment in compliance with the demands of the Secretary, failing in which a decree will then be entered as prayed in the bill.

It is so ordered.

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## AUTOMOBILE INS. CO. OF HARTFORD, CONN., v. GUARANTY SECURITIES CORP. et al.

(District Court, S. D. New York. February 10, 1917.)

1. TORTS ⟸12—INDUCING ANOTHER TO BREAK CONTRACT.
   It is a tort for one person to induce another to break his contract with a third.
   [Ed. Note.—For other cases, see Torts, Cent. Dig. § 13.]

2. INJUNCTION ⟸63—SUBJECT OF RELIEF—CONTRACT—INDUCING BREACH.
   Where the defendant insurance company sought to induce another to break its contract with complainant and enter into a contract with it, defendant will be enjoined though the contract involves no distinctly personal relation.

3. INJUNCTION ⟸136(2)—SUBJECTS OF PROTECTION—CONTRACTS—BREACH.
   Defendant company, being engaged in the business of financing the sale at retail of automobiles by taking over notes for deferred payments and advancing money thereon to the dealers who had effected the sales, entered

into a contract with complainant to insure the machines for a period of three years, the contract providing that all new automobiles should be insured and that the provisions in the policies with respect to the right of cancellation should be waived. Before the end of the term, defendant repudiated its contract and sought to enter into an arrangement with another insurer to enable it to carry on the same business. Under the policies issued pursuant to the contract, many adjustments would be necessary, and the second insurer might, if allowed to supplant complainant, adjust its losses on a different basis, so that the damages suffered would be almost impossible of ascertainment. *Held*, that in such case, though defendant would not be guilty of a tort in breaking its contract, a preliminary injunction may be issued to restrain the breach.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 306.]

4. INSURANCE ⟸125(2)—FIRE POLICIES—WHAT LAW GOVERNS.
The laws of the state in which an insurance company writes its policies govern the contracts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 174.]

5. INSURANCE ⟸125(1)—FIRE INSURANCE—STATUTES—CONSTRUCTION.
Though a contract for the insuring of motor cars was entered into in Ohio, a provision therein waiving the provisions in the policies for cancellation is valid, the insured property not being located in that state; Gen. Code Ohio, § 9577, declaring that an insurance company doing business under the laws of Ohio, which issues policies covering property located therein and on such policies receives cash payments of premium, shall insert in every policy an obligation to cancel it upon the written request of the person insured, only preventing such waiver as to property located in Ohio.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 173.]

6. INSURANCE ⟸385—FIRE POLICIES—CONDITIONS.
Gen. St. Conn. 1902, § 3497, fixing standard form of policy containing a cancellation clause but authorizing the addition to the policy of separate slips or riders modifying the terms, permitted a Connecticut insurance company which entered into a contract to insure many automobiles, to waive the cancellation clauses.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1020–1023.]

7. INSURANCE ⟸385—FIRE POLICIES—CANCELLATION—AGREEMENT.
Insurance Law, N. Y. (Consol. Laws, c. 28) § 122, declaring that any corporation or company transacting the business of fire insurance shall cancel any policy upon the request of the insured or his legal representative, does not prevent an insurance company, insuring motor cars for the benefit of a company engaged in financing the retail sale of such cars on credit which received notes for deferred payments, from entering into an agreement waiving the cancellation clauses of the policies; the section not affecting the provision save in so far as it allowed cancellation of the policies by the owners of the cars.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1020–1023.]

In Equity. Bill by the Automobile Insurance Company of Hartford, Connecticut, against the Guaranty Securities Corporation and another. Preliminary injunction granted.

Hartwell Cabell, of New York City, for complainant.

Murray, Prentice & Howland, of New York City (Charles P. Howland and Charles F. Quantrell, both of New York City, of counsel), for defendant Guaranty Securities Corp.

AUGUSTUS N. HAND, District Judge. The defendant the Guaranty Securities Company is engaged in the business of financing the

sale at retail of automobiles. Their plan consists in the taking over of notes of deferred payments and the advancing of money on said notes to the dealer who has effected automobile sales. To carry out such a plan in a businesslike way required protection of the automobiles against fire and theft until the purchaser had paid for them, and to that end the Guaranty Securities Company of Toledo, Ohio, entered into a contract in Ohio with the complainant. This contract, with certain amendments, was thereafter continued with the Guaranty Securities Corporation, a New York company, which had succeeded to the business of the Ohio company. The form of insurance policy attached insured the Guaranty Company and the Commercial Savings Bank & Trust Company of Toledo, and its successors in trust as trustees. The successor in trust of the Commercial Savings Bank & Trust Company of Toledo is the Metropolitan Trust Company of New York, so that the contract is now between the complainant, which is a branch of the Ætna Insurance Company of Connecticut, the Guaranty Securities Corporation, a New York company, and the Metropolitan Trust Company, as trustee. Under this contract the Guaranty Securities Corporation insured automobiles which had been financed by that company.

The Guaranty Securities Corporation, in order to deal with the notes secured by the automobiles, entered into a trust agreement with the Metropolitan Trust Company, whereby the latter was to hold the trust notes as trustee for the parties interested therein, together with a duplicate participation certificate in the insurance furnished by the complainant; another certificate being held by the Guaranty Securities Corporation covering each automobile.

The contract of insurance contained an indorsement reading as follows:

"*Indorsement.*—As evidenced by the insured's acceptance of this indorsement and the policy to which it is attached, and of which it is made a part, it is understood and agreed by all the parties hereto as follows: * * *

"(9) That this insurance contract is written for a period of not less than three years from December 1, 1915, and, in consideration of the reduced rates of premium at which it is written and of the waiver of conditions 'f' and 'n' of the policy as hereinafter provided, that the Guaranty Securities Company of Toledo, Ohio, its successors and assigns and other parties in interest will in good faith require and undertake to provide coverage hereinunder as respects all new automobiles whose sale at retail within said period of not less than three years is or shall be wholly or in part financed by them (then follows an exception which is not germane to the discussion).

"(10) That condition 'f' of the policy is hereby waived in its entirety, and condition 'n' is hereby waived from December 1, 1915, to December, 1916, except as provided in condition '9' above, but the insurance herein be subject otherwise to all conditions and stipulations of the policy, except so far as same may be at variance with the conditions and provisions of this indorsement."

After the foregoing contract was made, differences arose between the Guaranty Securities Corporation and the complainant, and on January 4, 1917, the Securities Corporation mailed a notice of cancellation of the policy to become effective January 15th. The Securities Corporation had also prior to that time notified the complainant that it would refuse to recognize the latter's exclusive rights under the con-

tract for automobile insurance, and that it had received an offer from the defendant the London & Lancashire Fire Insurance Company, Limited, covering automobiles to be financed by the Guaranty Securities Corporation, and that it proposed in the future to insure with the London & Lancashire Fire Insurance Company, Limited, and had been solicited for said business by the latter. It is quite likely that the general officers of the London & Lancashire Fire Insurance Company, Limited, did not know of the contract with the complainant; but their agents who solicited the business and arranged the preliminaries apparently had full knowledge.

Upon the foregoing state of facts, the complainant has moved for an injunction pendente lite restraining the Guaranty Securities Corporation from taking out insurance with other companies and restraining the London & Lancashire Fire Insurance Company, Limited, from carrying out any arrangement as to insurance with the Securities Corporation.

The indorsement attached to the contract for insurance between the complainant and the Guaranty Securities Corporation, which I have quoted above, was made for an adequate consideration, and the only questions for this court are: (1) Whether ground appears under any circumstances for equitable relief, and (2) whether the agreement of insurance can be canceled.

[1, 2] Without fully discussing the authorities submitted by counsel, it is sufficient to say that the Circuit Court of Appeals of this circuit has recently expressed its opinion in the case of American Malting Co. v. Keitel, 209 Fed. 351, 359, 126 C. C. A. 277, 285, to the effect that it is a tort for A. to persuade B. to break his contract with C., and that the federal courts have in numerous cases issued injunctions to prevent the breach of contracts even though they were ordinary business contracts involving no employment, or other distinctly personal relation. Judge Rogers there said:

"We fail to discover any satisfactory distinction between an attempt to induce employés to break a contract of employment and an attempt to induce customers to break their business contracts for the purchase or sale of goods."

See, also, Bitterman v. Louisville & Nashville R. Co., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; Dr. Miles Medical Co. v. Park & Sons Company, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502.

I think it clear that the defendant the London & Lancashire Fire Insurance Company, by its agents, knew of the contract of the plaintiff to furnish insurance to the Guaranty Securities Corporation, and persuaded the latter company to break it and enter into a contract with itself. It therefore has committed a tort and, if the contract between the original parties subsists, should be enjoined.

[3] The situation of the Guaranty Securities Corporation is somewhat different, at least in theory, from that of the London & Lancashire Fire Insurance Company, Limited. It is very likely true that it would commit no tort in breaking its contract with the complainant. This is certainly so unless by reason of its confederation with the Lon-

don & Lancashire Fire Insurance Company, Limited, it might be regarded as a joint tort-feasor, but it should be enjoined from breaking any contract like the one under consideration (if the same subsists) for other reasons. The contract has attempted to establish a relation between the complainant and the Guaranty Securities Corporation that, while not personal, is peculiar. The writing of insurance by the complainant under the contract involves a multitude of details and, covering as it does a period of three years, would doubtless involve a great number of adjustments of losses. If the London & Lancashire Fire Insurance Company, Limited, be allowed to enter into a similar contract, the result would be to leave all of the details relating to the performance of the new contract and the adjustment of losses thereunder in the hands of the Guaranty Securities Corporation and the London & Lancashire Fire Insurance Company, Limited. Moreover, the methods of adjustment of losses of the London & Lancashire Fire Insurance Company, Limited, might not be the same as those of the complainant, so that their profits might not be any certain basis of what the complainant would have made out of the original contract if it had been allowed to perform it. Furthermore, the failure on the part of the Guaranty Securities Corporation to insure each car with the complainant would apparently be a separate breach of the contract upon which the complainant might sue if it did not choose to submit to the delay and inconvenience of waiting until the three-year contract had expired.

I think the difficulty of proving damages, the multiplicity of litigation which would be necessary if the complainant choose to assert its rights to recover for each loss, and the embarrassment caused by the fact that the possession of all data as to profits would be in the possession of the defendants, are all justifications for the intervention of a court of equity in this case.

A somewhat similar situation arose in Standard Fashion Co. v. Siegel-Cooper Co. and Butterick Publishing Co., 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749. There a demurrer to a complaint was interposed. The Siegel-Cooper Company had agreed to sell the Standard patterns, and Standard fashion publications of the plaintiff for two years, and had contracted not to sell on its premises any other make of paper patterns. The Butterick Publishing Company, a rival of the plaintiff, had persuaded the Siegel-Cooper Company to contract with it and to break its contract with the plaintiff. The New York Court of Appeals there said, per Vann, J., in an opinion overruling the demurrer:

"Contracts which require the performance of varied and continuous acts, or the exercise of special skill, taste, and judgment, will not, as a general rule, be enforced by courts of equity, because the execution of the decree would require such constant superintendence as to make judicial control a matter of extreme difficulty. * * * But, even if, upon a trial of the action, specific performance of the contract in its entirety were refused as impracticable, still the bill should be retained as one permitting an injunction, in the sound discretion of the court, to restrain the defendants from violating the negative and severable covenant of the Siegel-Cooper Company that it would not 'sell, or allow to be sold on its premises during the duration of this (the) contract any other make of paper patterns' than those of the plaintiff."

The court went on to say that the complaint set forth a situation where specific performance might be granted, but that it was a matter of judicial discretion for the court after hearing the testimony whether the contract between the parties might involve such a complication of details and multiplicity of court orders that specific performance ought not as a matter of discretion to be enforced.

This case considerably resembles a case of unfair competition. The complainant entered into business arrangements with the Guaranty Securities Corporation involving all the automobile insurance of the latter for three years. A competitor in business, doubtless by offering more satisfactory terms, is securing this business and inducing the breach of the contract with the complainant. I think the injunction prayed for should be granted provided the insurance contract is not at an end.

[4, 5] The contract of insurance appears to have been made in Ohio. By section 9577 of the Consolidated Code of Ohio it is provided that:

"A fire insurance company doing business under the laws of this state which issue policies of insurance covering property located herein, and on such policies receives from the persons insured either cash payments of premium, or notes subject to assessment for payment of losses, or notes for the installments of premium, shall be required to insert in every policy so issued an obligation to cancel it, upon the written request of the person insured on conditions as provided in the next following five sections."

The complainant when writing insurance in Ohio was undoubtedly bound by the provisions of the Ohio law affecting the public policy of that state, and it is urged by counsel for defendant that the foregoing provisions of the Ohio law make every policy of insurance where that law applies subject to cancellation. If this is so, I have little doubt that the attempt of the parties to waive the provisions of the policy relating to cancellation for the alleged consideration of the reduced premium provided for in the contract was inoperative. I do not find, however, in the provision of the Ohio statute above quoted any attempt to lay down a general policy as to contracts made in Ohio even by Ohio corporations. The clause quoted apparently limits the requirements of a cancellation clause to policies covering property located in Ohio.

[6] I have examined the statutes of Connecticut, where the complainant was incorporated, and find that the standard form of policy, which contains a cancellation clause and must be used under the Connecticut laws, may contain upon separate slips or riders to be attached to the policy provisions adding to or modifying those contained in the policy. Section 3497, Connecticut General Statutes.

The waiver by agreement of the parties of the provision of cancellation would therefore seem to have been good under the Connecticut law.

[7] There is a provision in the New York statute which is contained in section 122 of the Insurance Law and reads as follows:

"Any corporation, person, company or association transacting the business of fire insurance in this state shall cancel any policy of insurance upon the request of the insured or his legal representatives, and shall return to him or to such representative the amount of premium paid, less the customary

short rate premium for the expired time of the full term for which the policy has been issued or renewed, notwithstanding anything in the policy to the contrary."

I do not see that this section affects the provision waiving a cancellation clause, although it would doubtless render policies written upon New York business capable of cancellation at the instance of the insured.

Under all the circumstances, I think a preliminary injunction should be granted upon the filing of a bond to be fixed in the order.

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## NULOMOLINE CO. v. STROMEYER.

(District Court, E. D. Pennsylvania. March 17, 1917.)

No. 1669

1. INJUNCTION ⟸151—INTERLOCUTORY INJUNCTION—RIGHT TO RELIEF.
On a motion for an interlocutory injunction, the question is not what relief plaintiff may be able to prove itself entitled to after final hearing, but what relief it is then entitled to in order to make the anticipated relief effective.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 336.]

2. INJUNCTION ⟸137(1)—INTERLOCUTORY INJUNCTION—TRADE SECRETS.
In a suit to restrain a rival manufacturer from making use of plaintiff's secret processes communicated by a discharged manager, where there was a substantial controversy as to whether defendant was using any secret process, and it appeared that the manager had already divulged such secrets as he knew, so that the only relief was compensation for past injury, for which defendant was amply responsible financially, and prevention of further use of the secrets, while an injunction would result in great injury to defendant, an interlocutory injunction will not be granted.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 307.]

In Equity. Suit by the Nulomoline Company against Julius Stromeyer. On motion for preliminary injunction. Motion denied.

Leo Levy, of New York City, and Chester N. Farr, Jr., of Philadelphia, Pa., for plaintiff.

Michael J. Ryan and Reber & Granger, all of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1] As this is a motion for an interlocutory decree, the question before us is not to what relief the plaintiff may be able to prove it is entitled after final hearing, but to what it is now entitled in order to make this anticipated relief effective. We are in consequence confronted, not with the situation of the parties as it will be shown to be when the facts are fully developed, but with the situation as it now is.

[2] From the moving and answering affidavits, and the admissions made at the argument, we have this situation appearing: Maxwell Tausig was in the employ of the plaintiff as the manager of one of its departments. To him as such manager was imparted certain con-

fidential information. This included a knowledge of the customers of the plaintiff and of its processes of manufacture. The manager left the employ of plaintiffs, following a discharge. He was accused by the plaintiff of making improper and unfair use of the confidential information he had secured, and with making away with the property of the plaintiff by using and selling to others to be used the secret processes of manufacture belonging to plaintiff. This conduct of the former manager was not only a violation of the obligations he had assumed in his trust relations with the plaintiff, but was also a violation of the contractual obligations he had entered into, because he was divulging secrets which he had agreed not to divulge. These accusations against Tausig were voiced in a bill in equity against him, and the defendant was enjoined by decree of the Supreme Court of New York from a continuance of the acts of which plaintiff had complained. The cause is still pending on appeal to the Court of Appeals from the decree entered. The accusation against this defendant is that he has conspired with Tausig to have done for the defendant's benefit the very things within this district which Tausig has been enjoined from doing by the New York court. The present bill was filed, and we are asked to enjoin, before the facts are determined, the present defendant. The logic of the bill is that the defendant should be enjoined from conspiring with Tausig to have done by Tausig for the defendant's benefit the things which Tausig has been enjoined from doing.

An answer has been filed, full and responsive, denying all the pertinent averments of the bill. It meets the averment of the appropriation of the property of the plaintiff by the opposing averment that the plaintiff has no secret processes, and in consequence no property right in any process, and that if it had processes which it has used the defendant has not appropriated them. On the contrary, the averment of the answer is that the plaintiff and defendant have each for years been engaged in the manufacture of inverted sugars; that there is neither mystery nor secrecy in such manufacture; that the processes by which the product is turned out are well known to chemists and to those concerned with either the manufacture or the trade in such products, and that the relations between the defendant and Tausig are simply those between a manufacturer and a broker, and that Tausig is doing nothing for the defendant more than making the effort to sell for the defendant his make of product made by his processes and not those of the plaintiff. The averments of the answer are fully supported by the answering affidavits.

The real issue raised by the reply affidavits is the truth of the averments of the answer. The real complaint of the plaintiff is this: We have a process which is ours. We have customers who have been supplied for years with our product. They are satisfied with what we have supplied them, and will accept no others. Other manufacturers, including this defendant, who are our competitors, are not able to sell to these customers any make of product except ours. Some of these customers take one kind of our product; others take a different kind. The injury done us is this: Tausig knows our trade, knows the

special product which we supply to each customer, and knows the process by which we make each kind of product—our trade secrets. Defendant and Tausig have entered into a conspiracy to our hurt, in furtherance of which Tausig is to give to defendant the name of our customer, inform the defendant just what special kind of product the customer has been getting from us, tell the defendant how to make it, by informing him how we make it, so that the defendant can thus imitate our product and Tausig sell it to our customer. The things they have thus conspired to do they are now engaged in doing. Such form of competition, dependent upon such methods, is unfair and inequitable, and we ask to be protected by injunction. We know the defendant denies this, and we admit that, if he has not changed his make of product and gone over to our make, we have no legal ground of complaint; but we show the court by the correspondence between the defendant and Tausig the plain admission by both of them that this is what they are doing in the face of the denial.

The rejoinder is that the defendant has no concern with the litigation between Tausig and the plaintiff. The merits of that will be determined when a final adjudication is reached. Defendant was making his product years before he knew of Tausig. He was not to be told by Tausig how to make invert sugar. Whatever Tausig told him about the best processes he already knew. It made no change either in his processes or product, and he continued to sell what he had before been selling. The correspondence referred to was voluntarily disclosed by the defendant, because he had nothing to hide. Full and free opportunity was given the plaintiff to go over the defendant's plant, examine his formulæ and records and all his methods of manufacture, because all such formulæ and methods were already well known to the trade, and there were no trade secrets in the business to be protected. It will thus be seen that the right which plaintiff invokes turns upon a question of fact, which is not only in controversy, but is the subject of substantial dispute, and far from being merely colorable. The defendant's side of the controversy is supported by the testimony of witnesses who are at least apparently disinterested. He is also at least apparently abundantly responsible, and answerable to any decree the plaintiff may secure. The judgment of any one upon this essential fact is bound to be held in abeyance until a full hearing can be had upon it.

The question before us is whether the finding, which will after final hearing be made, should now be forecasted or anticipated. It is not unlike the somewhat analogous question which is presented to a court when it is to be determined whether a litigant is of right entitled to summary or plenary process. A contrast of the relative danger of doing harm by granting or withholding the preliminary relief asked for is invited. As against a responsible defendant, the plaintiff would seem to have ample protection in the relief which can be granted on final decree. To interfere now with the business of the defendant by a decree which may turn out to be unwarranted would do him an injury for which the court could on final decree give him no adequate redress. On the plaintiff's own showing there is no disclosure

of real or alleged trade secrets, which are likely to be made, which have not already been made, and no injury to plaintiff which cannot as well be redressed after final hearing as now. The complaint is essentially of harm done. That which belongs to the future would increase only the amount of the money award, which the plaintiff will secure if one is awarded. If this view of the situation should alter, the remedy is open to the plaintiff to apply at any time for a restraining order, should the exigency arise.

The present motion for a preliminary injunction is denied. We follow the accepted rule in neither expressing nor reaching a conclusion upon the facts in dispute. There is further no conflict between the conclusion now reached and the findings of the New York court. The issue there was between the plaintiff and Tausig, and it was there adjudicated that Tausig was disclosing trade secrets. The issue here is between the plaintiff and the present defendant. The essential fact in issue is whether the defendant is using the private processes of the plaintiff. Proof that Tausig disclosed them is no proof that defendant used them, and if defendant has made no change in his product he has done no legal injury by such manufacture to the plaintiff, even if it be true the products are identical.

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## SOLOMON v. PENNSYLVANIA R. CO.

(District Court, E. D. New York. March 16, 1917.)

REMOVAL OF CAUSES ⟸79(6)—TIME FOR PROCEEDINGS—STIPULATION—EXTENDING TIME TO ANSWER.

Under Judicial Code (Act March 3, 1911, c. 231) § 29, 36 Stat. 1095 (Comp. St. 1913, p. 1011), requiring a petition for removal to be filed at the time, or at any time before, the defendant is required by the laws of the state, or the rule of the state court, to answer or plead to the declaration or complaint of the plaintiff, a stipulation by plaintiff extending defendant's time to answer, but refusing to extend the time to demur or otherwise plead, filed after the time to answer or plead had expired, does not extend the time to remove the cause, especially where defendant had the removal papers in its possession before, but did not file them until after, the expiration of time to remove.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 144.]

At Law. Action by David Solomon against the Pennsylvania Railroad Company. On motion to remand to the state court. Motion granted.

Hardin & Hess, of New York City (Jerome S. Hess and Harold B. Elgar, both of New York City, of counsel), for plaintiff.

White & Case, of New York City (Howard C. Reid, of New York City, of counsel), for defendant.

CHATFIELD, District Judge. A motion has been made to remand this action to the state court upon a claim that the removal proceedings were not instituted until after expiration of the time provided for re-

moval by section 29 of the Judicial Code. The provision in question is as follows:

"Whenever any party entitled to remove any suit * * * may desire to remove such suit, * * * he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court to be held in the district where such suit is pending," etc.

In the case of Russell v. Harriman Land Co. (C. C.) 145 Fed. 745, it was held that, if the time to "answer or plead" has been extended, a petition to remove may be filed before the expiration of the extended time. In that case the extension was accomplished by a stipulation providing for an absolute stay, which was, by the terms of the stipulation, not to be counted as a part of the time elapsing in the litigation. The court therein referred to the case of Mayer v. Ft. Worth & D. C. R. Co. (C. C.) 93 Fed. 601, in which a written stipulation to extend defendant's time was held sufficient, even without order of the state court, and also to the case of Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 137 Fed. 284, in which a written stipulation extending the time to answer or plead was held to extend the time within which removal could be demanded.

In the present case, service was made upon the defendant on the 10th day of November, 1916. Upon the 27th day of November, an extension in writing was obtained by the defendant to the 20th day of December, of time "to answer, plead or make any motion." The New York Code of Civil Procedure provides, in section 487, as follows:

"The only pleading, on the part of the defendant, is either a demurrer or an answer."

"Demurrer" includes objections to jurisdiction. But an objection to jurisdiction, which is not waived by proceeding with the action, may be raised at any time upon the face of the record, and other applications in the way of motions are possible, which are therefore usually covered, in New York practice, by the words "answer, plead, *or otherwise move.*" This would include an application for further extension of time, which according to the court rule must be made upon two days' notice, unless it is ordered upon written stipulation.

Under the circumstances outlined above, the defendant waited until the last day of its extended time, viz. the 20th day of December, before seeking further extension. Failure to get in communication with the plaintiff's attorney compelled delay until the following morning, when the plaintiff's attorney stipulated that the defendant should have 20 days' further time to "answer," but struck out the words "demur or otherwise plead." This reinstated the defendant so far as the interposition of an answer was concerned and opened, to that extent, the default which had occurred upon the preceding day. But if such stipulation had not been signed, the defendant would have been compelled to appear in the state court and ask for an opening of the default, which would probably have been granted upon terms. Such relief

would have required an answer or defense in the state court, and an application to remove could not have been made.

The plaintiff had, upon December 21, 1916, the power to open the default and consent to reinstatement of the defendant's time, such that the defendant could still remove the case; but this the plaintiff did not do. He signed, instead, a limited stipulation granting merely time to "answer"; that is, to put in a defense in the state court, such as a general denial, affirmative defense, or counterclaim. On such a stipulation, even if we assume that the default was opened thereby, the power to remove was lost.

The cases cited above have no bearing upon the distinction between the word "answer" and the words "or plead." In the case of Martin v. Baltimore & Ohio Railroad Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311, a petition for removal was "filed at or before the time at which the defendant was required by the laws of the state to answer or plead to the merits of the case, but after the time at which he was required to plead to the jurisdiction of the court, or in abatement of the writ." The Supreme Court of the United States held that, as the petition for the removal of this case into the Circuit Court of the United States was not filed in the state court within the time mentioned in the act of Congress, motion to remand should be granted, and cases are cited showing that the privilege of removal has been restricted by the acts of Congress. In Williams v. Wilson Fruit Co. (D. C.) 222 Fed. 467, an extension of time, based upon an implied stipulation that no motion for removal should be made, was held to prevent removal into the United States court.

In the case at bar the petition for removal was accompanied by a bond of a surety company, which was signed and executed by the surety company upon the 15th day of December, 1916. It was executed by the defendant, together with the petition for removal, in Philadelphia, upon the 20th day of December, 1916, and the certificate of the prothonotary was attached upon the 21st day of December, 1916. It was evidently within the jurisdiction of the Supreme Court of New York, in the county of Richmond, and was ready for use, upon the 23d day of December, 1916, but was not filed until after the hearing of a motion upon the 28th day of December, 1916.

It is evident, therefore, that the defendant undertook to remove the case within the time in which that could have been done as a matter of right, and that through its own delay it did not file the removal papers until after the plaintiff had obtained the right to refuse its consent to such removal and after such consent was necessary. Under these circumstances the provisions of section 37 of the Judicial Code (Comp. St. 1913, § 1019) require a dismissal of the suit or its remand, as "justice may require."

There is no ground shown for dismissal of the action, and remand is the proper remedy. Motion granted.

## UNITED STATES v. FONG ON.

(District Court, S. D. New York. April 18, 1916.)

ALIENS ⇐32(8)—CHINESE—DEPORTATION.

In a proceeding for the deportation of a Chinese person, evidence *held* sufficient, under Act May 5, 1892, c. 60, § 3, 27 Stat. 25 (Comp. St. 1913, § 4317), declaring that a Chinese person or person of Chinese descent, arrested under the provision of the act, shall be adjudged to be unlawfully within the United States, unless he shall establish by affirmative proof his lawful right to remain in the United States, to establish defendant's citizenship and right to remain in the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84.]

At Law. Proceeding by the United States for the deportation of Fong On. Order of commissioner, authorizing deportation, reversed, and defendant discharged.

Edwin M. Stanton, of New York City, for the United States.
John N. Boyle, of New York City, for defendant.

LEARNED HAND, District Judge. Section 3, Act May 5, 1892 (27 Stat. 25, c. 60 [Comp. St. 1913, § 4317]) being valid (Chin Bak Kan v. U. S., 186 U. S. 193, 200, 22 Sup. Ct. 891, 46 L. Ed. 1121), the sole question is whether Fong On has made out his case. The arrest, though made under section 6 (Comp. St. 1913, § 4320), certainly cannot stand under that section, because there is no reason to hold him as a laborer, and his age in any case prevents his coming within that provision. The question, therefore, is whether he and his witness should be believed.

Of corroboration there is not much, except his understanding of English and his ability to read and write it, in which he shows a facility which presupposes long residence in the country. I can hardly agree with the commissioner that he does not testify as much as any one can that he was born in San Francisco. He does say categorically that he was born there, and could say no more. Of course, he could predicate this only upon hearsay, and I think that there was no need, unless he was asked, to say that his father or his mother had told him so; that must be presupposed. Fong Loy's corroboration contains nothing suspicious that I can see, except this: He says that he had known Fong On since he was a baby, 15 or 16 years ago; that he remembered his father's holding him on his arm. Now Fong On was 10 years old 16 years ago, hardly a baby. On the other hand, Fong On said he had known Fong Loy since he was born, which must be taken to mean for so long as he could remember, which would generally be from the time he was about 6 years old. As Fong Loy knew Fong On's proper age, logical consistency would require us to suppose that he thought a boy of 10 was a baby, and Fong On must be understood as saying that he could not remember back of the age of 10. Both of these facts are unlikely. However, I think it unreasonable to take lapse of time too literally; his recollection of Fong On as being a baby carried by his father is more apt to be true. We ought

not to press too much a statement such as "about 15 or 16 years." We should not do so in an ordinary case.

Except for this, the case would really be devoid of much question, if the defendant and his witness were not Chinamen. The temptation to claim citizenship is very great, no doubt, and absolute certainty I do not think the case admits of; but I must give some credence to the testimony of men who, so far as one can see, have the usual earmarks of veracity under the circumstances. If they were Italians, or Irish, or Germans, or Jews, no one would very seriously assert that I ought with justice to disregard their testimony, even where they had the burden of proof. I do not know, and surely I ought not to assume, that Chinamen are less likely to speak the truth than any one else. Until there is some authoritative requirement to the contrary, I ought not to have any preconceived notions about it.

Order reversed; defendant discharged.

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## UNITED STATES v. MANUFACTURING APPARATUS, OLEOMARGARINE, AND RAW MATERIALS OF WESTERN OLEOMARGARINE CO.

(District Court, D. Colorado. May 19, 1916.)

No. 6455.

JUDGMENT ⊂559 — BAR — CRIMINAL PROSECUTION — OLEOMARGARINE ACT — FRAUD BY MANUFACTURER—PROCEEDING FOR FORFEITURE.

The criminal prosecution of a stockholder and director of a corporation under Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (Comp. St. 1913, § 6229), for defrauding the United States of the tax on oleomargarine resulting in an acquittal, is not a bar to a subsequent proceeding under said section for the forfeiture of the oleomargarine and the manufacturing apparatus and raw materials for its manufacture owned by the corporation based upon the same alleged offense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1077, 1078.]

Information of libel by the United States against manufacturing apparatus, oleomargarine, and raw materials of the Western Oleomargarine Company. On demurrer to special plea. Demurrer sustained.

H. B. Tedrow, U. S. Dist. Atty., and Otto Bock, Asst. Dist. Atty., both of Denver, Colo.

Wm. H. Dickson, Smith, Brock & Ferguson, and Jno. P. Akolt, all of Denver, Colo., for defendant.

LEWIS, District Judge. This is an action in rem for the forfeiture of oleomargarine and manufacturing apparatus used in the alleged violation of the Acts relating to internal revenue (Act August 2, 1886, 24 Stat. 212, § 17). The information of libel alleges that the unlawful business was being carried on by the Western Oleomargarine Company, a corporation.

The second defense of the answer sets up a special plea, in that John R. Handy and Albert H. Flood were stockholders, officers and direc-

tors of the corporation at the time of the alleged unlawful acts, that they were indicted for a criminal violation of the same section of the Act, there was a nol. pros. as to Handy, trial and acquittal of Flood, and that the offense charged in the indictment is the identical offense that is attempted to be charged by the libel against the corporation, and that the evidence necessary to sustain the libel will consist of the same facts which were adduced in evidence in the trial of Flood; and thus the criminal prosecution is plead as a bar.

Flood and Handy are not parties to this proceeding and have not appeared, but the answer containing the special plea is set up by the Ætna Accident & Liability Company, it having become surety on the delivery bond for the return of the oleomargarine and manufacturing apparatus after they had been seized by the Collector of Internal Revenue.

To the special plea thus set up by the Accident & Liability Company the district attorney has entered a demurrer. Counsel who interposed the plea rely chiefly on United States v. One Distillery (D. C.) 43 Fed. 846, to sustain its sufficiency; and it must be conceded that the holding in that case is that way—it being there held that a stockholder in the claimant company comes within the principle announced in Coffey v. U. S., 116 U. S. 445, 6 Sup. Ct. 437, 29 L. Ed. 684. I am not disposed to carry the principle announced in the Coffey Case that far. Judge Morrow in U. S. v. Olsen (D. C.) 57 Fed. 579, expressed a doubt whether the opinion in 43 Fed. 846, should be applied in principle beyond the particular facts there involved which are quite unlike those in hand. In the Coffey Case he was the defendant in the criminal prosecution and also claimant. Likewise, in U. S. v. Rosenthal, 174 Fed. 652, 98 C. C. A. 406; U. S. v. Seattle B. & M. Co. (D. C.) 135 Fed. 597.

The Western Oleomargarine Company, claimant, was not put in jeopardy by the prosecution of Flood. The issue involved in that prosecution was not one under which the claimant could have been punished or its property taken. It was only the punishment of Flood and the taking of his property that could have been reached under that issue, and its final determination constitutes a bar only in his behalf. United States v. A Lot of Precious Stones & Jewelry, 134 Fed. 61, 68 C. C. A. 1; Stone v. U. S., 167 U. S. 184, 17 Sup. Ct. 778, 42 L. Ed. 127; United States v. Three Copper Stills (D. C.) 47 Fed. 495; United States v. Olsen, supra; Coffey v. United States, supra.

The plea is bad and the demurrer must be sustained.

It is so ordered.

## YATES CENTER NAT. BANK v. LAUBER.

(District Court, D. Kansas, Third Division. March 25, 1915.)

No. 187.

BILLS AND NOTES ⟸106—CONSIDERATION—LEGALITY—FRAUD.

Where, to enable bank officials to conceal the true financial condition of the bank, defendant without consideration executed his note payable to the bank to be held by it in lieu of worthless notes, it being agreed that defendant's note might be discharged by a return of the worthless notes then delivered to defendant, the transaction is fraudulent, and the note is unenforceable in the hands of the bank.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 219, 225–232.]

At Law. Action by the Yates Center National Bank against W. H. Lauber. Judgment for defendant.

Altes H. Campbell, of Iola, Kan., for plaintiff.

George R. Stephenson, of Yates Center, Kan., and F. J. Oyler, of Iola, Kan., for defendant.

POLLOCK, District Judge. This is an action by the Yates Center National Bank, a national banking association, now insolvent and in the hands of a receiver, to recover the contents of a promissory note made by defendant to the bank in amount of $5,300.

From the evidence it is seen no consideration moved from the bank to defendant for the making of the note in controversy. On the contrary, it clearly appears there were in the bank certain worthless notes made by one W. G. Toedman and his wife; that said notes were turned over to defendant in pursuance of the following agreement:

"Yates Center, Kansas, October 4, 1913.

"It is hereby agreed by the Yates Center National Bank of Yates Center, Kansas, that notes of W. G. Toedman and Pauline Toedman, his wife, amounting to five thousand three hundred dollars ($5,300), are to be accepted as in full payment of the note of W. H. Lauber for five thousand three hundred dollars ($5,300), dated October 1, 1913, due November 1, 1913, and that the Yates Center National Bank is to have no recourse against the said W. H. Lauber in payment of his said note except of W. G. Toedman and Pauline Toedman above mentioned, said notes being described as follows: No. 4420, dated Aug. 12, 1913, $800, due Nov. 11, 1913. No. 44684, dated Sept. 5, 1913, due Dec. 4, 1913, No. 44685, dated Sept. 9, 1913, $1,000, due Dec. 8, 1913. No. 44788, dated Sept. 5, 1913, $1,500, due Dec. 4, 1913. Total $5,300. The Yates Center National Bank, Yates Center, Kansas, by C. G. Ricker, President."

The purpose of the transaction was to assist the president and general managing officer of the bank by concealing its true financial condition. While the arrangement was at the earnest solicitation of the bank, yet it is beyond the credulity of man to believe all parties connected therewith were not aware of its actual purpose, for the natural, necessary, and inevitable result of such a scheme as these writings portray was to accomplish the very result desired by Ricker as president and managing officer of the bank.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

It follows, however much of reluctance one may have in permitting the maker of the note in controversy to escape payment, yet the illegality of the entire matter so clearly appears as to prevent a court of justice from affording any relief based thereon. In this regard the case is on a par with Cutler, Receiver, v. Fry (D. C.) 240 Fed. 238, this day determined.

It follows judgment must go for the defendant.

It is so ordered.

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CUTLER v. FRY.

(District Court, D. Kansas, Third Division. March 25, 1915.)

No. 163.

1. BANKS AND BANKING ⟸287(1)—RECEIVERS—RIGHTS OF.

A receiver of the assets of an insolvent bank has no greater right in obligations payable to the bank than the bank itself.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1126, 1127.]

2. BILLS AND NOTES ⟸106—ACTIONS—ILLEGAL TRANSACTION.

A note, executed by defendant for accommodation and without consideration to enable bank officials to conceal their defalcations from depositors and governmental inspectors, is tainted with fraud; so, the rights of no innocent purchaser for value having intervened, it cannot be enforced by the bank or its receiver, though the transaction was such that defendant must have known that the purpose of the note was to conceal the bank's financial condition.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 219, 225–232.]

At Law. Action by Alexis C. Cutler against Dan F. Fry. Judgment for defendant.

Altes H. Campbell, of Iola, Kan., for plaintiff.
Ewing, Gard & Gard, of Iola, Kan., for defendant.

POLLOCK, District Judge. This is an action brought by the receiver of the Yates Center National Bank, an insolvent national banking association, to recover from defendant the amount of a promissory note made by him to the bank, October 7, 1913, for $2,500.

It is clear from the evidence produced on the trial there was no consideration whatever for the making of this note. On the contrary, defendant was induced to make it solely as an accommodation to the bank at the earnest solicitation of its president and general managing officer, C. G. Ricker; the purpose on the part of that official of the bank evidently being to assist him in concealing his defalcations in the bank. Not only does the want of consideration for the making of the note appear from parol evidence received at the trial, but contemporaneously with the making of the note in controversy the bank, through its president and managing officer, Ricker, executed and delivered to

defendant the following instrument in writing, which clearly shows the utter want of good faith in the entire transaction:

"Yates Center, Kansas, October 7, 1913.

"It is hereby agreed by the Yates Center National Bank of Yates Center, Kansas, that a note of C. G. Ricker amounting to twenty-five hundred dollars ($2.500) is to be accepted as in full payment of a note of Dan J. Fry for twenty-five hundred dollars ($2,500) dated October 7, 1913, due on or before ninety days after date, and that the Yates Center National Bank is to have no recourse against the said Dan J. Fry in payment of his said note above mentioned except the note of C. G. Ricker also above mentioned.

"The Yates Center National Bank,
"By C. G. Ricker, President."

[1, 2] The defense of utter want of consideration for the making of the note being thus established, it is clear judgment must go for defendant unless, as contended by plaintiff, the very truth of the transaction, as stated, in its necessary result, tends to work such a fraud on the creditors of the bank represented by the receiver as of right should preclude defendant from proving the fraudulent character of the transaction. In support of this proposition, the case of Pauly v. O'Brien (C. C.) 69 Fed. 460, is cited and relied upon, in which it is said:

"If, however, this was not really the case, but that, in truth, the transaction was a mere trick to make it appear to the government and to the creditors and stockholders of the bank that it had a valuable note when in fact it did not have one, the result must be the same, for, when parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason, as well as pure justice, to leave him bound who has bound himself. It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act. Undoubtedly, the transaction in question originated with the officers of the bank, but to it the defendant became a willing party. It would require more credulity than I possess to believe that the defendant, when his brother, who was the bookkeeper of the bank, came to him with the proposition of its vice president, in its every suggestion and essence deceptive and fraudulent, did not know its true character and purpose. So far as appears, Naylor was a total stranger to him. Why should he execute his note to take up the note of Naylor? What moved him to do it, except to enable the officers of the bank to supplant the overdue note of Naylor with a live note, which he now insists was without consideration and purely voluntary, but which enabled the bank officers to make a deceptive, and therefore fraudulent, showing of assets? Obviously, nothing. There will be judgment for the plaintiff for the amount due upon the note sued upon, according to its terms, with costs."

However, the rights of the receiver of the bank to recover on the note in question rise no higher than the rights of the bank had insolvency not intervened. There can be no doubt, had the note in question come into the hands of an innocent holder for value before its maturity, in such hands it would be enforceable regardless of the separate contemporaneous agreement, but in the hands of the original payee, or its receiver, as is this case, both the note and the contemporaneous agreement constituted the entire contract between the parties, and, when the agreement thus formed is presented, the illegality of the whole matter so clearly appears the court will leave the parties where it finds them by refusing all relief. Rankin v. City National Bank, 208

U. S. 541, 28 Sup. Ct. 346, 52 L. Ed. 610; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; same case, below, Hoffman v. McMullen, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410.

It follows judgment must enter in favor of defendant for costs.

It is so ordered.

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YATES CENTER NAT. BANK v. SCHAEDE.

(District Court, D. Kansas. March 25, 1915.)

BILLS AND NOTES ⊂=106—LEGALITY OF CONSIDERATION.

A note, executed without consideration pursuant to a scheme of the president of a bank to enable him to conceal his defalcations and the bank's true condition, being tainted with illegality, cannot be enforced by the bank.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 219, 225–232.]

At Law. Action by the Yates Center National Bank, by and to the use of its receiver, against Ferdinand Schaede. Judgment for defendant.

Affirmed 240 Fed. 241, — C. C. A. —.

Altes H. Campbell, of Iola, Kan., for plaintiff.

George R. Stephenson, of Yates Center, Kan., and F. J. Oyler, of Iola, Kan., for defendant.

POLLOCK, District Judge. This is an action by plaintiff, an insolvent national banking association, now in the hands of a receiver, to recover from defendant the contents of a promissory note for the sum of $1,500 made by the defendant to the bank. The note in controversy is one of a series of renewal notes made by defendant at the solicitation of the president and general managing officer of the bank. It is the first of a series of like transactions engaged in by the president of the bank to conceal his defalcations in the bank, and the true financial condition of the bank, with paper apparently good, but in fact obtained without consideration, for the purpose of deceiving the Comptroller of the Currency or those whose duty it was to examine into the affairs of the bank, by giving it a false appearance of solvency.

The defense interposed is want of consideration. Not only is this defense made out, but it further appears that the whole transaction, from the making of the original note to the renewal in controversy, was without consideration, and in pursuance of the illegal and criminal design of the president of the bank. Such state of facts public policy and good morals alike condemn, and courts refuse to enforce. This case differs in degree only from that of plaintiff against Lauber (D. C.) 240 Fed. 237, and Cutler, Receiver, v. Fry (D. C.) 240 Fed. 238, this day determined.

It follows judgment must go for the defendant.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

## YATES CENTER NAT. BANK v. SCHAEDE.

(Circuit Court of Appeals, Eighth Circuit. September 13, 1916.)

No. 4620.

In Error to the District Court of the United States for the District of Kansas.

Action by the Yates Center National Bank, by and through and for the use and benefit of A. H. Gillis, as its receiver, against Ferdinand Schaede. There was a judgment for defendant (240 Fed. 240), and plaintiff brings error. Affirmed.

Altes H. Campbell, of Iola, Kan., for plaintiff in error.
George R. Stephenson, of Yates Center, Kan., and F. J. Oyler, of Iola, Kan., for defendant in error.

PER CURIAM. Affirmed, with costs, without a written opinion.

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## EWING v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 15, 1917. On Petition for Rehearing, April 14, 1917.)

No. 2887.

1. BAIL ⊂=55—"RECOGNIZANCE"—"BAIL BOND."
While the purpose of a recognizance and a bail bond is the same, a "recognizance" is an obligation of record entered into before some court of record, and need not be signed by the principal or the surety, while a "bail bond," is signed by the parties; the consideration being the release of one accused from custody.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 213–224, 228–238, 246–253.

For other definitions, see Words and Phrases, First and Second Series, Bail Bond; Recognizance.]

2. BAIL ⊂=47—ADMISSION TO BAIL—DUTY OF JUDGE.
Before an offender can be admitted to bail, the judge must determine the offense is bailable, fix the penalty of the bond, and approve the surety, or see that such approval is provided for; and it is sufficient that the judge, when informed by the deputy clerk that accused desired admission to bail and offered as surety an attorney well known to the judge, fix the amount and direct approval of the bond.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 165–183, 257.]

3. BAIL ⊂=47—BAIL BOND—JURISDICTIONAL FACTS.
Before there can be recovery on a bail bond, it must appear that the offender was bailed by one qualified to admit to bail.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 165–183, 257.]

4. BAIL ⊂=47—ADMISSION TO BAIL—AUTHORITY OF COURT.
Rev. St. §§ 1014, 1015 (Comp. St. Ann. 1916, §§ 1674, 1679), declaring that an offender may be bailed by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, etc., agreeably to the usual mode of process against offenders in such state, etc., are as to District Courts declarative of the inherent common-law power of such courts to admit offenders to bail.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 165–183, 257.]

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5. BAIL ⟸60—BAIL BOND—SUFFICIENCY.

Shannon's Code Tenn. § 7116, declares that a bail bond may be taken out of court, in which case it must be signed by the defendant and at least two sureties, approved by the magistrate or officer; while section 7118 provides that the undertaking may be given in open court and entered on the minutes. Section 7119 provides that every bond or recognizance deemed good or valid as a common-law bond shall be a good statutory bond, and no defense to any action or scire facias prosecuted to enforce such bond shall be available, unless it would be a legal and valid defense to a suit at common law upon the same; while sections 7125, 7126, respectively declare that a bail bond is not discharged for want of qualifications required by law, and that the undertaking shall be returned to the court having cognizance of the offense, with the other papers, if any. A bail bond given in the Federal District Court for Tennessee recited that the principal and surety acknowledged themselves indebted to the United States in the sum of $2,000, to be levied of their proper goods and chattels, lands and tenements, but to be void if the principal should make his personal appearance before the District Court, etc., and was duly signed by the principal and surety. The bond further recited that it was signed, sealed, acknowledged before, and approved by the deputy clerk. *Held*, that the bail bond, the judge of the District Court having fixed the amount and directed approval, was sufficient under the Tennessee statutes, containing all the elements of a common-law bond, though not taken in open court, and though signed by only one surety.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 225–227.]

6. BAIL ⟸82—RECOGNIZANCE—DEBT.

A recognizance or bail bond may be enforced by scire facias or civil action; debt lying on the recognizance.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 372.]

7. BAIL ⟸89(3)—BAIL BOND—SCIRE FACIAS.

A writ of scire facias is considered both as process and a declaration, and informalities which may be taken advantage of by demurrer can be cured by amendment; an amendment being permissible to show a custom of taking the bond out of court.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 397.]

8. BAIL ⟸82—BAIL BONDS—REMEDIES.

As the sovereign may maintain any action adapted to his case as his subject under like circumstances might maintain, the United States may adopt the remedy of scire facias to recover on a bail bond, and have entered judgment after return of process if no sufficient cause is shown for setting aside the conditional judgment.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 372.]

9. BAIL ⟸89(3)—BAIL BOND—SCIRE FACIAS—AMENDMENT.

In view of Rev. St. § 716, authorizing the issuance of scire facias out of the United States court, and Comp. St. 1901, § 954, providing for the amendment of such writs for any defect or want of form, a scire facias issued out of the Federal District Court for Tennessee to recover on a bail bond may be amended to show the missing jurisdictional fact that the court admitted the offender to bail.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 397.]

10. BAIL ⟸89(3)—BAIL BONDS—SCIRE FACIAS—AMENDMENT.

Comp. St. 1901, § 914, declares that the federal practice in actions at law shall conform as near as may be to the practice pleadings and forms in like causes in the state court. Act Tenn. 1897, c. 47, § 1 (Shannon's Code Supp. p. 853), sets forth the form of scire facias issued on a conditional judgment rendered on a recognizance or bail bond, while section 1a of the act provides that the statutory form may be so changed as to give the parties notice of the nature of the obligation on which the judgment is

rendered, and it shall not be necessary to set out in full all the jurisdictional facts in any scire facias, and when any writ fails to contain the necessary allegations it may be amended. *Held* that, in view of Shannon's Code Tenn. § 7119, declaring that a bail bond valid as a common-law bond shall be valid under the statutes, a writ of scire facias issued out of the federal District Court for Tennessee upon a conditional judgment on a bail bond may be amended so as to supply the jurisdictional averment that the offender was admitted to bail by the judge.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 397.]

11. BAIL ⟸90—BAIL BONDS—PROCEEDINGS.

In scire facias on a conditional judgment on a bail bond, testimony that the offender was admitted to bail by the judge is not objectionable, as contradictory of the record, where the record did not show by whom the offender was admitted to bail.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 401–406.]

12. BAIL ⟸93—SCIRE FACIAS—AVERMENTS—JUDGMENT.

Though scire facias on a conditional judgment on a bail bond did not allege that accused was admitted to bail by the judge, yet where evidence of that fact, which rested in parol, was received without objection, the judgment cannot be attacked on the ground that it was not supported by the writ.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 409, 410, 413–417.]

13. BAIL ⟸62—BAIL BOND—IMPLIED OBLIGATIONS.

The surety on a bail bond is a quasi jailer, and there is no implied obligation on the part of the principal to reimburse the surety for the amount paid on the principal's default.

14. BAIL ⟸62—BAIL BOND—ESTOPPEL.

Where an attorney, an officer of the court, secured the release of an offender on a bond accepted and approved by the deputy clerk, such attorney, the United States having changed its position to its detriment, is thereafter estopped to question the bond on the ground that the clerk was without authority.

15. BAIL ⟸74(1)—BAIL BOND—ADMISSION TO BAIL.

While one accused of a felony cannot waive, either himself or by his counsel, the right to be personally present at all steps in the trial, the giving of a bail bond for appearance at trial is not a step in the trial, and a bail bond accepted by the judge in the absence of accused cannot be attacked on the ground that it was invalid because of accused's absence.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 289–308.]

16. BAIL ⟸76—BAIL BOND—LIABILITY OF SURETY.

A surety on a bail bond can be held liable only within the absolute terms of his undertaking, which cannot be enlarged.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 322–327.]

17. BAIL ⟸75—BAIL BONDS—LIABILITY OF SURETY.

In a prosecution in the federal District Court for Tennessee accused was admitted to bail on a bond, the condition of which was that he should appear before the court at a fixed term, then and there to answer, and to continue in attendance from day to day and from term to term until discharged, and to abide the decision of the court in the premises. When accused was convicted, he was allowed liberty pending a motion for new trial on the theory that the bail bond, which was signed by his counsel, was a continuing bond; counsel so stating to the court. Acts Tenn. 1903, c. 99 (Shannon's Code Supp. p. 852), declares that a bail bond shall be valid and binding upon defendant and his sureties for defendant's personal presence before the court from term to term until the case is finally terminated or stricken from the docket, and defendant discharged by the court, and the defendant shall not be required to renew the bond unless

ordered to by the court because of its insufficiency in amount, etc., provided the sureties may surrender the prisoner and be released. *Held* that, in view of the statute, the bail bond was a continuing obligation until sentence, and where accused failed to appear for sentence the condition of the bond was forfeited, and his surety became liable.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 309–312, 315–321.]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Scire facias by the United States against Caruthers Ewing and another. There was a judgment for plaintiff, and the named defendant brings error. Affirmed.

A scire facias, issued to the marshal of the Western district of Tennessee, was executed by him on Caruthers Ewing, plaintiff in error; the other defendant thereto, C. A. Bonds, was not found within the district. So much of the writ as is important reads:

"Whereas, on the fifth day of December, A. D. 1911, before E. J. Heidel, deputy clerk of the United States District Court for said district, C. A. Bonds, as principal, and Caruthers Ewing, as surety, by their bond of that date, acknowledge themselves to owe and be indebted unto the United States in the sum of two thousand ($2,000) dollars, to be levied of their proper goods and chattels, lands and tenements, to the use of the United States: But to be void if said principal should, well and truly, make his personal appearance before the District Court of the United States for the Western Division of the Western District of Tennessee, at the courtroom in the city of Memphis, on the fourth Monday in May next, A. D. 1912, that being the first day of the regular May term thereof; then and there to answer the United States, on a charge against him for violation of the postal laws of the United States by unlawfully using the mails of the United States for fraudulent purposes, and continue in attendance at said term of said court from day to day, and term to term, until discharged, and abide the decision of said court in the premises, which said bond has been duly filed in said court. And it appearing, that on the thirtieth day of November, A. D. 1912, one of the days of the November term of the court aforesaid, the said principal being solemnly called to come into said court, and answer said charge, came not, but therein made default. And it further appearing that on said last named day the above named sureties of said defendant on his said bond, being so called to produce said principal according to the conditions thereof did not, but therein wholly failed. It was thereupon, then and there, considered by the said court that judgment nisi be entered against said principal and sureties for the aforesaid sum of two thousand ($2,000) dollars, the penalty in said bond specified, and that scire facias issue against them returnable to the next term of said court, to show cause, if any they have or know, why said judgment shall not be made final, and the United States have execution thereof. All of which appears to us of record.

"These are therefore to command you that you make known to the said C. A. Bonds, as such principal, and to the said Caruthers Ewing, as such surety, the contents of this writ, and summon them to appear before the judge of the United States District Court for the Western Division of the Western District of Tennessee, at the federal courtroom, in the city of Memphis, on the fourth Monday in May, A. D. 1913, then and there to show cause, if any they have or know, why the United States should not have judgment final and execution against them for the amount of the recovery so had as aforesaid. Herein fail not, and have you then and there this writ."

The bond reads:

"United States of America, Western District of Tennessee, Western Division.

"Know all men by these presents, that we, C. A. Bonds, as principal, and Caruthers Ewing, as surety, hereby acknowledge ourselves to owe and be indebted to the United States in the sum of two thousand ($2,000) dollars, to be levied of our proper goods and chattels, lands and tenements, to the use of the United States, but to be void if the said principal do well and truly make

his personal appearance before the District Court of the United States for the Western Division of the Western District of Tennessee, at the federal courtroom, in the city of Memphis, on the fourth Monday in May next, A. D. 1912, that being the first day of the regular May term thereof, then and there to answer the United States on a charge against him for violation of the postal laws of the United States, and continue in attendance at said term of said court from day to day and term to term until discharged, and abide the decision of the said court in the premises.

"Witness our hands and seals this fifth day of December, A. D. 1911.

"C. A. Bonds.

"Caruthers Ewing.

"Signed, sealed and acknowledged before me, at Memphis, Tennessee, and approved by me, this fifth day of December, A. D. 1911.

"E. J. Heidel, Deputy Clerk."

The bond was filed in the clerk's office.

To the writ the surety on the bond interposed the pleas that he did not owe the United States; that the bond was executed by him as surety, and is void for the reason that the deputy clerk had no authority to take it, the same not having been executed under the orders of, and Bonds not having been admitted to bail by, any court or other official of competent jurisdiction; that the terms of the bond have been fulfilled in every particular by Bonds, the principal in it; and that, if Bonds did depart from court, as alleged in the writ, it was after his conviction, and after all the undertakings under the bond had been fully performed by the principal and the surety thereon.

At the hearing a stipulation showed that Bonds was indicted, with others, in the Western district of Tennessee for a felony—a violation of the postal laws—and the following facts appeared from the testimony of the deputy clerk, no objection being made: Before the warrant in the hands of the marshal for Bonds' arrest had been served, he surrendered himself. Caruthers Ewing, his attorney, a lawyer of long experience and high standing, came with him to the clerk's office of the District Court at Memphis for the purpose of becoming surety on his bail bond. Bonds was then in the actual custody of either the marshal or a deputy marshal. The clerk being absent, his office was in charge of E. J. Heidel, his deputy. The clerk's office and the courtroom at that time were on the third floor of the government building at Memphis, and the judge's chambers were on the second floor. The deputy, before entering on the preparation of the bond, filling in the blanks, etc., left the accused and his attorney in the clerk's office, went to the judge's chambers, and "stated the facts with reference to the matter to the judge, and had him to fix the penalty of the bond." In answer to the question whether or not the judge had "anything to do with any matter besides fixing the amount on the application for the bond," he said: "I think, as is his usual custom, he asked me what the charge was, and I reiterated the charge in the indictment; and then he fixed the amount of the bond." He further testified that he returned to the clerk's office and prepared the bond, which was signed by the accused as principal and Mr. Ewing as surety. Thereupon the accused was released from the custody of the marshal.

At the time the bond was taken, it does not appear that any formal adjournment of court on that day had taken place. The minutes show the court was open all day, and it was shown by both the judge and the deputy clerk that the practice of taking bail bonds in the way this was taken was long established. See, also, United States v. Evans (C. C.) 2 Fed. 147. At the trial, Mr. Ewing conducted Bonds' defense. It appears from the testimony of the district attorney that, when the jury brought in a verdict of guilty, it was announced that a written motion for a new trial would be filed, and one of the counsel for the defendants, in behalf of all, requested that the defendants be allowed to stand on their same bonds pending the motion for a new trial. It is shown by the statement of Judge McCall that Mr. Ewing made the request in behalf of all the defendants, and that, after inquiry was, by the judge, made of the district attorney if the bonds were sufficient in amount, to which he responded affirmatively, the court granted the request.

Upon the record so made up, judgment was rendered against the surety for the penalty of the bond. To this he assigns error, in that the court did

not hold the bail bond to be void because Bonds was not admitted to bail and the bail bond taken by an officer or court competent and authorized to do so, and because he was admitted to bail by a deputy clerk not authorized to admit his principal to bail; in that the court did not hold that Bonds was admitted to bail by the deputy clerk, and was therefore void; and in that the court did not hold that all the terms and provisions of the bond were performed by Bonds according to its terms.

G. J. McSpadden, of Memphis, Tenn., for plaintiff in error.
Wm. D. Kyser, Asst. U. S. Atty., of Memphis, Tenn.

Before WARRINGTON and DENISON, Circuit Judges, and HOLLISTER, District Judge.

HOLLISTER, District Judge (after stating the facts as above). That a clerk or his deputy has no power to bail offenders, and that the power is judicial in nature and cannot be delegated, are propositions not disputed in this case, and need no discussion, for the offender was not bailed by the deputy clerk, but was bailed by the judge himself. If this conclusion is not correct, yet the surety is not in a position to deny the propriety of the proceedings through which the offender was released from custody.

[1, 2] The claim that the bond and scire facias show the bail to have been taken by the deputy clerk cannot be sustained. All the deputy clerk did was to certify the bond was signed, sealed, and acknowledged before him, and approved by him. All of these acts have been held to be done in the discharge of ministerial functions only if the bail has been fixed by the judge. Gregory v. State, 94 Ind. 384, 388, 48 Am. Rep. 162. The Supreme Court of Tennessee have decided that the taking of a bail bond is a clerical act. State v. Cooper, 120 Tenn. 549, 554, 113 S. W. 1048, 15 Ann. Cas. 1116. It was expressly decided by Judge Hammond in the Western District of Tennessee in United States v. Evans (C. C.) 2 Fed. 147, 152, in which the same memorandum at the foot of the bond is found as was adopted by the deputy clerk in this case, that a bond containing such a memorandum does not show the clerk acted in a judicial capacity. It was the opinion of Judge Hammond, and we agree, that such acts as these, when done by the clerk, are ministerial, and the bond itself does not show it was ordered or taken by any officer whatever.

This is a bail bond, not a recognizance. In some of the cases the terms are used interchangeably. Blackstone defines a recognizance to be "an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act, as to appear at the assizes, to keep the peace, to pay a debt, or the like" (2 Black. Comm. 341); and it is evidenced by a memorandum on the minutes, to which the signature of the principal and surety are not necessary.[1] The purpose of a bail bond is the same as a recognizance. They are both contracts between the

[1] People v. Kane, 4 Denio (N. Y.) *530, *536; United States v. Pickett, 1 Bond, 123, 125, Fed. Cas. No. 16,043; Campbell v. State, 18 Ind. 375, 376, 81 Am. Dec. 363; State v. Elder, 35 Ind. 368; Commonwealth v. Emery, 2 Bin. (Pa.) *431, *434; Tillson v. Kansas, 29 Kan. *452, *456, *457.

United States, on the one hand, and the offender and his surety, on the other.[2] Whatever requirements may attend a technical recognizance, there is no case, so far as we know, in which it is held that the offender and his surety, or either of them, is required to appear in open court, or personally, go before the judge, in court or elsewhere, before, or at the time of, executing a bail bond. The consideration running to the surety is the release of the offender from custody. Jones v. Gordon, 82 Ga. 570, 572, 9 S. E. 782; Hunt v. United States, 61 Fed. 795, 801, 10 C. C. A. 74. In the case last cited, on rehearing (63 Fed. 568, 569, 11 C. C. A. 340, 341), the Circuit Court of Appeals for the Eighth Circuit say:

"No law of which we are aware requires the sureties to appear personally before the judge, unless they are to become bound by a technical recognizance, such as is entered into in open court, and spread upon the journal of its proceedings. When a bail bond is taken, as in the present case, and the obligation assumed by the sureties is evidenced by their signature to the bond, and not by the court record, it is not essential that they should appear personally before the court or judge."

Nevertheless, the judge has duties to perform before the offender can be said to be properly bailed. It was said by Chief Judge Cranch, in United States v. Lawrence, 4 Cranch, C. C. 518, 519, Fed. Cas. No. 15,577, that the discretion of the magistrate in taking bail is "to be guided by the compound consideration of the ability of the prisoner to give bail, and the atrocity of the offense." These duties are elaborated to unnecessary detail in some of the cases, but we agree with the judges of the Circuit Court of Appeals in Hunt's Case that the judge is only required to determine whether the offense charged is bailable, fix the penalty of the bond, and approve the surety, or see that such approval is provided for.

To decide rightly he must have the necessary facts before him. Just what the deputy clerk said to Judge McCall does not clearly appear. What information he himself had, other than that which the clerk told him, is not disclosed; but we may justly assume he knew the accused was indicted with others for violation of the postal laws, and that the accused and Mr. Ewing, his attorney, were waiting in the clerk's office to execute a bail bond with the attorney as surety. The judge fixed the penalty of the bond. He knew the case was one in which bail might be taken, and the proposed surety was well known to him.

So far as appears, the judge did not, in so many words, direct the clerk to prepare the bond and accept it when executed. That was a matter of course. What was done was the same as if the judge, advised as to the nature of the case and financial responsibility of the surety, had directed the clerk to accept the bond from the principal and his surety at the penalty fixed, duly conditioned for the defendant's

[2] Reese v. United States, 9 Wall. 13, 21, 19 L. Ed. 541; United States v. Zarafonitis (C. C. A. 8) 150 Fed. 97, 99, 80 C. C. A. 51, 10 Ann. Cas. 290; United States v. Van Fossen, Fed. Cas. No. 16,607; United States v. Insley (C. C.) 49 Fed. 776, 778; Dennard v. State, 2 Ga. 137; Bothomly v. Fairfax, 1 P. Wms. 334; State v. Mayson, 2 Nott & McC. (S. C.) *425.

appearance, and was in substance an approval by the judge himself of that bond when accepted. Hunt v. United States, 63 Fed. 568, 570, 11 C. C. A. 340.

The only substantial difference between that case and this is that there the judge wrote a note to the clerk directing him to approve the "recognizance" (it was a bail bond) for the offender in a sum named, "with two sureties in addition to the principal, the same to be sufficient and approved by you." Hunt v. United States, 61 Fed. 799, 10 C. C. A. 74. The note did not go on the minutes, but was on file with the bond in the clerk's office.

[3] But it is urged that the scire facias, which speaks from the record, must show the manner of taking the bond, or its return into court, and, failing to do so, is fatally defective. If this writ is, under technicalities, open to criticism at all, it is that it fails to show that the offender was bailed by one qualified to admit to bail. As that fact was not a matter of record, the scire facias was necessarily silent on the subject. It may be admitted for the purposes of this case that the existence of that fact is jurisdictional in a proceeding to forfeit either a bail bond or a recognizance.

[4] We pause to consider the power conferred by Congress upon District Judges to bail offenders against the criminal laws of the United States. It is found in sections 1674 and 1679, 3 U. S. Comp. Stat. Ann. 1916, pp. 3447, 3485, Rev. Stat. §§ 1014 and 1015. (The power is inherent at the common law.)[3] The offender may be bailed by "any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, judge of a Supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state"; and in all cases where the offense is not punishable by death, bail may be taken by any of these persons.

It has been assumed that the phrase "agreeably to the usual mode of process against offenders in such state," found in Revised Statutes, § 1014, regulates and controls the steps to be taken upon bailing one who has been indicted by a grand jury of the United States, as well as those preliminary examinations to which parts of the section are particularly appropriate. It does not seem necessary to decide, in this case, how far the statutes and practice of Tennessee may determine the validity of this bond, since we think its validity sufficiently rests upon other grounds; but, as it has been attacked upon the theory that it did not comply with the Tennessee "mode of process," and is for that reason invalid, it is appropriate that this attack be met and considered.

[5] We look, therefore, to the statutes of Tennessee, and, referring to Shannon's Annotated Code, find that an undertaking may be given in open court and entered on the minutes (section 7118), and that it may be taken out of court, in which case it must be signed by the de-

[3] Fanshaw v. Morrison, 2 Ld. Raym. 1138, 1141; 8 Viner's Abridg. (2d Ed.) "Recog." 4, p. 163; United States v. Evans (C. C.) 2 Fed. 147, 152; "for if a man will voluntarily enter into it, a judge has power to take it." Holt, C. J., Anonymous, Case 76, 11 Mod. *53.

fendant and at least two sureties and approved by the magistrate or officer (section 7116); but it is not discharged for want of the qualifications required by law, or by reason of there not being the requisite number of bail (section 7125), and the undertaking shall be returned to the court having cognizance of the offense with the other papers, if any (section 7126). It is provided by section 7119, which is descriptive of the bond as well as of the remedy, that:

"Every bond or recognizance deemed good and valid as a common law bond, shall be a good statutory bond, and no defense to any action or scire facias, prosecuted to enforce such bond or recognizance, shall be available, unless it would be a legal and valid defense to a suit at common law upon the same."

The Supreme Court of Tennessee felt constrained, notwithstanding this statute, to hold, under their former ruling in State v. Arledge, 2 Sneed (Tenn.) 229, that, as the writ made no reference to the manner of taking the bond or its return, it was bad (State v. Patterson, 7 Baxt. [66 Tenn.] 246); and in State v. Johnson, 6 Baxt. (65 Tenn.) 198, no bond or recognizance being set out, and nothing from which the liability of the defendant arose as being of record appeared on the face of the writ, it was held to be insufficient by reason of former decisions, notwithstanding section 7119. But the court were of opinion that a declaration on a bond at common law for the appearance of a party in court should show that the party had made the bond and the terms of his obligation, so that on its face the court could say that it had been broken, and, without that, it was demurrable.

This bond contains every element of a common-law bond. It need not be taken in open court, and in other respects it satisfies the Tennessee statutes.

[6, 7] We next consider the remedy on a forfeited bail bond, to find out whether or not the jurisdictional fact, not being in the record, and hence absent from the scire facias, can be supplied. Debt lies on a recognizance. Grimston v. Wade, 3 Keb. 221 (Chief Justice Hale). It may be enforced either by scire facias, or by ordinary civil action.[4] The writ is considered both as process and declaration, informalities to be taken advantage of by demurrer, when the writ may be amended. 8 Bac. Abridg. Bouv. E. 624. It is in the nature of a declaration (State v. Patterson, 7 Baxt. [66 Tenn.] 246), and is so in the nature of an original action that defendant may plead to it, and it is in that respect considered as an action (8 Bac. Abridg. Bouv. A. 598). It is in the nature of an action. State v. Kinne, 39 N. H. 129, and cases cited. Scire facias is a civil action. Shaw, Chief Justice, Commonwealth v. McNeill, 19 Pick. (Mass.) 127, 138. See Hunt v. United States, 166 U. S. 424, 425, 426, 17 Sup. Ct. 609, 41 L. Ed. 1063.

Whether or not at common law amendment might ordinarily be permitted to show any other facts than those appearing of record, it would seem that it could be done for the purpose of showing a custom of taking a recognizance out of court, which must be alleged.

[4] State v. Gorley, 2 Iowa, 52, 56; State v. Glass, 9 Iowa, 325; State v. Welch, 59 N. H. 134; United States v. Insley, 54 Fed. 221, 224, 4 C. C. A. 296 (C. C. A. 8).

Caul v. Llemark, 3 Keb. 249, per curiam (Chief Justice Hale, Twisden, and Rainsford, Justices of the King's Bench).

It was shown by Judge McCall that the method of procedure in taking this bond in this form has been the practice in his court during the many years of his service, and Judge Hammond's decision in Evans' Case, heretofore cited, was in 1880. It may be added that this form of bond and certificate are identical with the bail bond and the clerk's certificate thereto taken in the District Court for the Southern District of Ohio from time immemorial, with nothing on the minutes to show that the judge had acted in the matter. However, while the letting to bail by the judge sufficiently appears in this case, and it might be possible to make the necessary showing in any case, yet we all think a practice should not be approved which allows that important fact to rest on parol evidence. It is a simple matter, and will save all doubt, for the judge to indorse upon the indictment or bench warrant:

"Let the respondent be held to bail in the sum of $———, with surety or sureties to be approved by the court, judge, or clerk."

[8, 9] That the United States might have brought an action at law on this bail bond cannot be doubted, for the king may maintain any action adapted to his case which a subject under like circumstances might maintain.[5] The courts of the United States have with "great unanimity" adopted the remedy of scire facias, and have entered judgment after return of process "if no sufficient cause was shown for setting aside the forfeiture." Judge Thayer in United States v. Insley, 54 Fed. 221, 223, 224, 4 C. C. A. 296 (C. C. A. 8). From such courts scire facias may issue. Section 716, Rev. Stat. By section 954, 1 U. S. Comp. Stat. 1901, p. 696, the writ may be amended for any defect or want of form, and the court shall proceed to give judgment according as the right of the cause and matter in law shall appear to it, etc., and shall amend every defect and want of form other than those to which the party has expressly demurred, and at any time may permit either of the parties to amend any defect in the process or pleadings on discretional terms.

We hold, therefore, that under the federal practice and without regard to the statutes of Tennessee, to be considered, this writ could have been amended in the District Court, so as to supply the missing jurisdictional fact, by showing the circumstances under which the bond was taken. It will be seen by reference to Insley v. United States, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163, that the District Court having jurisdiction of forfeitures and penalties and to issue scire facias, and that writ having issued on a forfeited bail bond, the cause could proceed, although the state statute involved provided for the enforcement of such bonds only by civil action.

[10] But scire facias is a remedy prescribed by the statutes of Tennessee, and, conforming the federal practice, pleadings, forms, and

[5] Commonwealth v. Green, 12 Mass. 1, 2; People v. Van Eps, 4 Wend. (N. Y.) 387; Commonwealth v. McNeill, 19 Pick. (Mass.) 127, 138; State v. Kinne, 39 N. H. 129, 135.

mode of proceeding in civil causes "as near as may be" to the practice, pleadings, forms, and mode of proceeding existing in like causes in the state court (section 914, 1 U. S. Comp. Stat. 684), we find ample provision for amending the writ to show jurisdictional facts. By section 1 of the Tennessee Acts of 1897, c. 47, Shannon's Supp. (1897–1903) p. 853, the form of scire facias issued on a conditional judgment rendered on a recognizance or bail bond is set forth. The writ in this case contains not only the requirements of the statutory form, but incorporates unnecessary facts, including the preamble that the principal and surety acknowledged themselves to be bound before the deputy clerk, etc. Unnecessary allegations have been held to be surplusage. State v. Rye, 9 Yerg. (17 Tenn.) 386. It is provided by section 1a of that act that the statutory form may be so changed "as to give the parties notice of the nature of the obligation on which it" (conditional judgment) "is rendered, and it shall not be necessary to set out in full all the jurisdictional facts in any scire facias as heretofore required, and when any scire facias fails to contain the necessary allegations or facts as required under this act, it may be amended in court according to the practice in reference to amendments of other writs and pleadings."

By these acts, and section 7119, heretofore referred to, held by the Supreme Court of Tennessee to abolish the distinction between statutory and common-law bonds and recognizances and to provide that the latter should be equivalent to the former (State v. Quinby, 5 Sneed, 419, and Brewer v. State, 74 Tenn. 198, 204), the Legislature of Tennessee have sought, and we think successfully, to do away with technical defenses through which sureties on recognizances and on bail bonds have sometimes been able to escape the just penalty for the breach of obligations to which they had voluntarily become parties, and have intended that a scire facias may be treated as a declaration at common law and amended according to the justice of the case to show such pertinent facts as the proof establishes.

[11, 12] The circumstances under which this offender was admitted to bail could only be disclosed by parol testimony. Counsel must have appreciated the admissibility of such testimony, for they have made no objection to the statement of the judge and the testimony of the district attorney or of the deputy clerk. That testimony cannot be said to contradict the record, for it is already shown the record does not disclose who the officer was. And further, a stipulation of counsel filed in the cause, after reciting in terms the bond, judgment nisi and the scire facias, concludes:

"Nothing in this agreement is intended to in any way conflict with or contradict the testimony of any witness, as shown in this bill of exceptions. * * *"

Counsel now say that proof without allegations will not support a judgment. If he objected seasonably, the court then, no doubt, would have permitted an amendment to the writ; but, in any event, it is now too late. Roberts v. Graham, 6 Wall. 578, 581, 18 L. Ed. 791; Railroad v. O'Reilly, 158 U. S. 334, 335, 15 Sup. Ct. 830, 39 L. Ed. 1006.

We have no doubt of the legality of the proceedings through which

the prisoner was bailed and the bond enforced, and that such irregularity as may appear from the fact that the writ was not amended to conform to the evidence is now immaterial.

[13, 14] But there is another reason why the surety must do what he agreed to do. He of his own motion and for purposes of his own presented himself in the clerk's office to obtain a release from custody of the offender, his client. He was an officer of the court. He knew the law. He made no objection to the way in which his client was bailed. His relation to the bond was nominally that of surety; yet it was different from that assumed by a surety in ordinary cases of suretyship. There is here no implied obligation of the principal to repay the amount the surety pays on default, and no right of subrogation arises in his favor. United States v. Ryder, 110 U. S. 729, 736, 4 Sup. Ct. 196, 28 L. Ed. 308. The money the surety pays on default is not to the principal's use, or on his account; it is on the surety's account, and for neglect; the sureties are quasi jailers. Littleton v. State, 46 Ark. 413, 418, 419.

The custody of the offender was surrendered by the marshal to the surety upon his agreement to produce the offender according to the terms of the bond. The dominion the surety acquired was in continuance of the original imprisonment.[6] The surety's obligation is rather primary than secondary in nature. If it is true that in legal effect the deputy clerk bailed the offender, how can the surety be permitted to escape the just penalty of his failure to produce the offender as he agreed to do by saying the deputy clerk had no power to do the act through which, at his request, he assumed the custody of his client? By his act, the position of the United States was changed, and to its detriment. Under such circumstances, he is estopped to deny the deputy clerk's power.[7]

[15] But it is urged (quoting from counsel's brief):

"As a matter of law it was impossible for the district judge to have taken the bond, because the accused was never in his presence and the law requires that the accused must be present at every step of his trial, and he cannot waive that right and the record must show that fact affirmatively."

There is nothing in section 9 of the Declaration of Rights in the Constitution of Tennessee conferring the right on one charged with crime to be in open court or in the presence of the judge when giving a bail bond. It is an ancient rule that it is not in the power of the accused, charged with the commission of a felony, to waive, either himself or by his counsel, the right to be personally present during the trial (Lewis v. United States, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011); but, giving a bail bond for appearance at the trial is not a part of the trial, and no case has been cited, and we know of none, which

[6] Taylor v. Taintor, 16 Wall. 366, 371, 21 L. Ed. 287. See also Reese v. United States, 9 Wall. 13, 21, 19 L. Ed. 541, and Cosgrove v. Winney, 174 U. S. 64, 68, 19 Sup. Ct. 598, 43 L. Ed. 897.

[7] United States v. Evans (C. C.) 2 Fed. 147, 151; Hunt v. United States, 61 Fed. 795, 800, 10 C. C. A. 74, et seq.; Id., 63 Fed. 568, 570, 11 C. C. A. 340; McLean v. State, 8 Heisk. (Tenn.) 22, 247, 248; Jones v. Gordon, 82 Ga. 570, 571, 9 S. E. 782.

holds that it is. The cases cited in behalf of the surety are beside the point, for they, with one exception, have to do with proceedings in the trial itself.[8]

Hutchinson v. State, 3 Cold. (Tenn.) 95, was a case in which the defendant, convicted of robbery in a circuit court in Tennessee, appealed to the Supreme Court. He secured his release on a bond conditioned for his appearance in the circuit court at the next term after the decision of the appeal by the Supreme Court. It was held that the circuit court ought to have required the defendant to enter into a recognizance for his appearance before the Supreme Court, and that for felonies, as contradistinguished from misdemeanors, the circuit judge, under the statutes of Tennessee, could not admit the accused to bail to appear in the circuit court after the decision of his appeal. The court, following Andrews v. State, 2 Sneed (Tenn.) 550—that the accused "must be present during the trial, and until the final judgment"—was of opinion that on such a bond, the accused being absent, the court had no jurisdiction over his person and could not render any judgment on the appeal, but that the court could (and did) order a capias to issue, to the end that the accused might be brought before the court. Clearly the surety can take nothing from that decision.

In Hopkins v. State, 10 Lea (78 Tenn.) 204, the accused, indicted for murder, petitioned the court for a change of venue, which was granted in the absence of the accused. The court were of opinion that in such a matter the accused could, if within the custody and control of the court, waive his right to be present since "that right in all preliminary steps is personal to the accused and may be waived." See 12 Cyc. 526, note 31.

In Alexander v. United States, 138 U. S. 353, 355, 11 Sup. Ct. 350, 351 (34 L. Ed. 954), error intervened, as afterwards held in another case (Lewis v. United States, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011, on substantially the same facts), in impaneling a jury in a trial for murder. The error was made the ground of a motion for a new trial, but the court, speaking through Mr. Justice Brown, held that the question was raised too late, saying:

"It is the duty of counsel seasonably to call the attention of the court to any error in impaneling the jury, in admitting testimony, or in any other proceeding during the trial by which his rights are prejudiced, and in case of an adverse ruling to note an exception."

In Givens v. State, 103 Tenn. 648, 55 S. W. 1107, in which the accused was indicted for murder and about to be tried, one Aslinger, after being accepted as a juror, was discharged by the court upon discovery that he was neither a householder nor a freeholder. The defendant was temporarily absent. His counsel was present and fully informed, and, if not actually consenting, at least made no objection.

[8] Lewis v. United States, 143 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011; Hopt v. Utah, 110 U. S. 578, 4 Sup. Ct. 202, 28 L. Ed. 262; Andrews v. State, 2 Sneed (Tenn.) 550; Witt v. State, 5 Cold. (Tenn.) 11; Clark v. State, 4 Humph. 253, 254; Richards v. State, 91 Tenn. 723, 20 S. W. 533, 30 Am. St. Rep. 907; State v. Mannion, 19 Utah, 505, 57 Pac. 542, 45 L. R. A. 638, 75 Am. St. Rep. 753.

The court were of opinion that counsel's protest after trial was too late, and they should have objected at the time, since, if they had, the court would have postponed action until the accused was present.

It is true that in Lewis v. United States, 146 U. S. 371, at 372, 13 Sup. Ct. 136, at 137 (36 L. Ed. 1011), it was said by Mr. Justice Shiras:

"A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner"

—yet it will be seen from the context that in making this statement the learned justice had in mind the requirement that the accused must be present during his trial. But, whatever he meant, the point decided in the case was that a prisoner on trial for a felony had not the power, himself or by his counsel, to waive the right to be personally present at his trial, which includes the steps taken in impaneling the jury.

We hold, therefore, that the giving of the bond was not a part of, or a step in, the trial, but is only preliminary thereto, is a privilege to be availed of by the accused, if he desires to avail himself of it and is able to do so, and can be waived by him at his election; further, that it is now too late for the question to be raised.

[16] It is, however, earnestly contended for the surety that in any event he has complied with all the terms of his agreement. He invokes the rule that he can only be liable within the clear and absolute terms of his undertaking, which cannot in any way be enlarged or changed. Granting the application of the rule to such a bond as this (Reese v. United States, 9 Wall. 13, 21, 19 L. Ed. 541), the failure of the surety to make good his promise is easily shown.

[17] The bond was to be void if the principal should make his appearance before the District Court "then and there to answer," etc., "and continue in attendance at said term of said court from day to day and term to term until discharged, and abide the decision of the said court in the premises." When the accused was convicted by the verdict of the jury, he was, upon the statement of his counsel that a motion for a new trial would be filed, and upon his counsel's request in his presence, instead of being remanded into the custody of the marshal, permitted to go upon his old bond; the court being of opinion that it was a "continuing" bond. If the court had pronounced sentence, a different question might be presented, or, if the court had ordered the defendant into the custody of the marshal, perhaps the question would not be in legal effect the same as the question under consideration. But in this case the accused was not discharged, nor did he "abide the decision" of the court, since no judgment was rendered on the verdict, or upon the motion for a new trial.

Whether or not, on principles of estoppel, applied also to this phase of the case, the surety could be held, need not be decided; for, under the terms of the bond as given, the responsibility of the surety was not brought to an end and completed by the conviction itself. The Supreme Court of Tennessee (Suggs v. State, 129 Tenn. 498, 500, 167 S. W. 122, 123) discuss the difference between the rights and obligations of the surety after conviction, but before sentence, and after sentence, and say:

"Where a bail bond stipulates that the principal is not to depart without leave of the court, the sureties are not exonerated by the mere conviction of the principal. * * * But when a conviction is followed by a pronouncement of sentence, such pronouncement, it has been held, has the legal effect of a direction to the sheriff to hold the convicted defendant in custody, and operates to exonerate the sureties."

A number of cases are cited in support of each of these conclusions. No case has been cited, and we have found none, in which, upon a mere conviction, without sentence pronounced thereupon, it has been held that the custody of the accused passed from the surety to the officer who, under the law, would take the accused into his custody. If the case is to be assimilated to the mode of proceeding in Tennessee, all debate on the subject is foreclosed by the statute of Tennesse of 1903 (Acts 1903, c. 99; Shannon's Supp. to Code, 852), which provides that, when such a bond as this has been executed, it—

"shall be valid and binding upon the defendant and his sureties thereon, for the defendant's personal appearance before the court from term to term until the case is finally terminated or stricken from the docket, and the defendant discharged by the court; and the defendant shall not be required to renew said bond or recognizance, unless ordered to do so by the court because of the insufficiency of said bond in amount or the insolvency of the same or on forfeiture of bail, or for other good and sufficient causes; provided that the sureties on said bond may surrender the prisoner and be released on said bond as now provided."

Of course, that provision of the statute is as much a part of the bond as if written into it. If it were so written, however, it would not add to the express agreement of this bond that the accused should attend "until discharged" and "abide the decision of the said court in the premises." The surety, by failing to produce the accused, must pay the penalty for his default.

The judgment of the District Court is affirmed, at the costs of the plaintiff in error.

On Petition for Rehearing.

The petition for rehearing filed in this case will be denied. The ultimate conclusions reached, as appear in the opinion heretofore filed, were that the offender was properly bailed by the judge, in that the facts warranted the finding that the judge himself was advised of the nature of the offense, that he fixed the amount of the bond and approved the surety, and that in any event the surety is not in a position to deny that the offender was properly bailed. We think these conclusions are right.

We take the opportunity, however, of saying that it was not necessary in the disposition of this case for us to go so far as to express an agreement with that part of the opinion of the Circuit Court of Appeals in the Eighth Circuit in the case of Hunt v. United States, 61 Fed. 795, 10 C. C. A. 74, and 63 Fed. 568, 11 C. C. A. 340, which in effect holds that a bail bond is sufficiently approved when, after the judge has found the offense to be bailable and has fixed the amount of the bond, the clerk approves the sureties upon direction of the judge to do so. The statement, therefore, of agreement with that

part of that opinion, is withdrawn as an authoritative statement of the views of this court on the question involved.

Necessarily the suggestion in the opinion of a course of conduct in bailing offenders to be followed by the District Judges in this circuit may be expunged from the opinion, and also the statement of the practice in the District Court for the Southern District of Ohio, for the reason that the statement was inadvertently made.

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## VEITIA et al. v. FORTUNA ESTATES.

(Circuit Court of Appeals, First Circuit. December 29, 1917.)

No. 1224.

1. INJUNCTION ⊂=143(2)—PRELIMINARY INJUNCTION—NOTICE TO ADVERSE PARTY.

The notice to adverse parties required by equity rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix) before the granting of a preliminary injunction may be dispensed with as to nonresident parties, who are not within the jurisdiction of the court, and have not yet been served with process, and where they are represented by a resident agent, who in their behalf is committing the acts sought to be enjoined, who is made a party and is before the court, and against whom the injunction runs.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 315.]

2. WATERS AND WATER COURSES ⊂=247(2)—SUIT FOR INJUNCTION—INDISPENSABLE PARTIES.

To a suit to enjoin the taking of water from a stream under a contract made by defendants with the Porto Rican Commissioner of the Interior on behalf of the people of Porto Rico, and for which said people were to receive payment, as conflicting with prior grants and a prior contract made by complainant with the Commissioner, the people of Porto Rico are not only a necessary, but an indispensable, party.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 314.]

3. TERRITORIES ⊂=32—SUIT AGAINST PORTO RICO—JURISDICTION—WAIVER OF IMMUNITY.

While the government established in Porto Rico by Organic Act April 12, 1900, c. 191, 31 Stat. 77, is of such nature as to come within the general rule exempting a government, sovereign in its attributes, from being sued without its consent, if it voluntarily becomes a party to a suit involving its interests, either in its own courts or in the federal court for the district of Porto Rico, on application of its Attorney General, this is consent on its part waiving such immunity, which consent and waiver cannot afterward be withdrawn; and if the suit is in the federal court, the government will also be held to have accepted the jurisdiction of that court.

[Ed. Note.—For other cases, see Territories, Cent. Dig. § 25.]

4. APPEAL AND ERROR ⊂=329—PARTIES—INTERVENTION OF NEW PARTIES.

Only parties to the appeal record can be recognized as parties by the appellate court, and briefs filed by one not a party to such appeal will be considered only as addressed to court by amicus curiæ.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1836.]

5. WATERS AND WATER COURSES ⊜247(2)—SUIT FOR PRELIMINARY INJUNCTION —SUFFICIENCY OF SHOWING.

Where defendants, in compliance with the requirement of a contract made with the Porto Rican Commissioner of the Interior, reconstructed an intake from a river, and through it for several months had received water from the river, for which they paid the government in accordance with the contract, a court could not justifiably disturb such situation by a preliminary injunction at the instance of one asserting rights under an earlier contract with the same authorities, except upon the showing of a clear right of complainant to the water in question.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 314.]

Appeal from the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Suit in equity by the Fortuna Estates against Rafaela Castillo Veitia and others. From an order granting a preliminary injunction, defendants appeal. Reversed.

Charles Hartzell of San Juan, Porto Rico, for appellants.

Francis E. Neagle and Rounds, Hatch, Dillingham & Debevoise, all of New York City, for appellee.

Samuel T. Ansell, of Washington, D. C. (Howard L. Kern, of New York City, on the brief), for the People of Porto Rico.

Before DODGE and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

DODGE, District Judge. This is a controversy about water rights. Fortuna Estates, a New York corporation, owning and operating four sugar-producing estates in Porto Rico supplied from the Jacaguas river, filed this bill against the appellants (hereinafter called defendants) April 7, 1916. The defendants named therein are eight in number. Seven of them, according to the bill, were variously interested in another sugar-producing estate called "Boca Chica," also supplied from the same river, but from a point higher up thereon. The remaining defendant is described as the attorney in fact of two among the other defendants, and as the manager or administrator of a sugar mill on the "Boca Chica" estate, and it is alleged that said estate is devoted to the growing of sugar cane intended for grinding at said mill.

The bill charges all the defendants with diverting to their estate water from the river rightfully belonging to the plaintiff's estates. An order that the defendants show cause on April 17, 1916, why a preliminary injunction should not issue against them was made upon the filing of the bill. The record does not distinctly show any service of this order upon any of them. The omission, however, does not appear important for any purpose with which we are now concerned.

Three of the defendants answered the bill, April 17, 1916, and the application for preliminary injunction was heard on the same day upon the pleadings and upon affidavits filed by the plaintiff and by the three defendants thus before the court. May 19, 1916, the court issued the preliminary injunction from which this appeal is taken. It ordered the three defendants who had answered to desist from further diversion

of the water claimed by Fortuna Estates, and to restore to their original condition certain intakes recently opened, through which, as the court held, the water in question was being wrongfully diverted.

1. The assignments of error to be first considered assert that the injunction was issued without having necessary parties defendant before the court.

It appears from the pleadings that of the three defendants who were before the court and enjoined, as above, only one could have taken any actual part in the diversion of water complained of. This was the defendant Parra, the alleged attorney in fact of two among the defendants and the alleged manager or administrator of their sugar mill. As to him, the bill further alleged (paragraph 17) that as such attorney in fact he had entered into a pretended contract on behalf of his two principals with the people of Porto Rico, through the Commissioner of the Interior, authorizing the defendants to take the water claimed by Fortuna Estates, a copy whereof was annexed as Exhibit B; that he had been notified, as the representative of the other defendants, that said contract infringed the plaintiff's rights; that the defendants had, nevertheless, persisted in having the contract approved by the Executive Council of Porto Rico, had had certain specified intakes reconstructed, so as to obtain delivery of said water, and had taken or were threatening to take it according to the contract. Parra's separate answer expressly admitted that he was attorney in fact of the two defendants named in the bill as his principals, and also that he was manager and administrator of the sugar mill referred to. It further admitted that he had made the contract for and on behalf of the two defendants whom he represented as attorney. It then alleged that he had no personal interest or title to any of the properties involved in the controversy, and, except as above, no other or different interest in the matters involved. It denied no allegation made in the bill, all the averments whereof, except as to value or amount of damage, are to be deemed confessed, so far as Parra is concerned, according to rule 30. This includes the allegation that he had reconstructed the intake referred to, so as to admit the water claimed to have been diverted.

The two defendants for whom Parra had been acting were Gustavo M. Cabrera and Emilia V. Henna. The former, according to the bill, was lessee in possession of an undivided half interest in the "Boca Chica" estate, and the latter was "usufructuary" of the other undivided half interest, which is understood to mean that she had a life estate therein. Neither was a resident of Porto Rico and neither, as below appears, was before the court when the injunction issued.

As to the two remaining defendants who were before the court, both were residents of Porto Rico and had been duly summoned; but it appeared from the bill that neither was in possession or had control of the "Boca Chica" property. The undivided half interest under lease to Gustavo M. Cabrera belonged, according to the bill, to them and another defendant, nonresident and not summoned before the court. Neither was a party to or named in the contract with the people of Porto Rico, nor did the bill allege that Parra was attorney for them, or either of them.

The owners of the other undivided half interest in the property, held, as above, for her life by Emilia V. Henna, were, according to the bill, said Gustavo M. Cabrera and three other defendants named, all, like him, nonresidents in Porto Rico, and not before the court.

The court had thus before it when it issued the injunction only (1) Parra, representing as above the two nonresident defendants having possession or control of the property at the time, and who represented them, so far as appears, only for the purpose of executing the above contract and the further purpose of managing the sugar mill on the property; (2) two defendants, whose only alleged connection with the estate was that they owned various undivided reversionary interests in it, without either possession or control at the time; and these three defendants, their agents, servants, etc., were the only parties enjoined.

Every other defendant, including the two then in possession and control of the property, was resident in England and not before the court. There had been no attempt to summon them by service on Parra as their local representative. On the day it heard the application for preliminary injunction, April 17, 1916, the court ordered notice to them all by publication and mailing; but this notice was not returnable until 90 days after that date, a period which had not expired when the injunction issued. The injunction, as has been stated, did not run against any of them.

[1] As to Parra's principals, it is true that, in general, an injunction is not allowed nor a decree rendered against an agent whose principal is not made a party. But it is also true that this is a rule that may be dispensed with, if the principal is not subject to the jurisdiction of the court. Osborn v. U. S. Bank, 9 Wheat. 738, 842, 843, 6 L. Ed. 204. We see no reason why it may not be dispensed with when, as in this case, the principal is nonresident and not, or not yet, before the court. If it justifiably found reason to believe that the diversion agreed on in the contract and effected by Parra was wrongful, we cannot say that the court was obliged to leave him free to maintain it, until his nonresident principals had appeared or could be notified. See Brown v. Pacific Mail, etc., Co., Fed. Cas. No. 2,025, 5 Blatchf. 525. The court held that rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix) does not require notice to absent defendants, and that since Parra was actually controlling for them the properties to which the water was being diverted, and had personally effected the diversion on his principals' behalf, notice to him was sufficient for the purpose of a preliminary injunction, such as it issued. We find no error in these rulings.

The two nonresident defendants in whose employ Parra had been acting were the only defendants immediately interested in the diversion of water complained of, or in the above contract, Exhibit B, annexed to the bill. To this contract neither the two resident defendants other than Parra who were before the court nor any of the nonresident defendants except his two employers were parties. If any of these persons were proper parties defendant in the suit, none of them were necessary parties, and we do not consider the fact that some of them were not before the court sufficient ground for holding that there was

error in proceeding in their absence. No interest of theirs appears to be directly involved in any issue then before the court.

The contract, Exhibit B, was made with Parra on behalf of his two principals, by the Porto Rican Commissioner of the Interior on behalf of the people of Porto Rico as party of the second part, which party therein agreed that, in consideration of $6 per day, to be paid by Parra or his principals, said party to the second part would deliver "excess" water to their canal, called the Maturi Canal; a different charge being fixed for water delivered at a rate less than three acre feet per day. The contract further authorized and required them to reconstruct the intake of their said canal, so as to facilitate the delivery of such excess water. The contract was to terminate upon the formation of a permanent irrigation district. The above were its leading provisions. The bill charges that the use of this intake thus agreed on deprives the plaintiff, at a lower intake leading to its lands, called the Aruz intake, of water to which it is entitled "by reason of concessions, royal decrees, user, and contracts."

The plaintiff's rights to water from said river are based, according to its bill, in part at least upon an earlier contact between it and the then acting Commissioner of the Interior, made August 26, 1914, also on behalf of the people of Porto Rico, whereby said people had agreed to deliver daily to the plaintiff specified quantities of water for each of its four estates at various intakes specified, and also, while the agreement should remain in force, "in addition to" the amounts of water specified as above, "water which may be available" at one of the intakes already named, known as the Aruz pumping station—

"to the extent that such taking shall not deprive any owners or users of subsisting water rights, or concessions, * * * of the water to which such owners or users may be entitled, either by virtue of such water rights or concessions, or by virtue of any agreement or agreements in regard thereto entered into or to be entered into by them with the people of Porto Rico: Provided, however, that should [said people] at any time undertake the development and utilization of the surplus waters of this part of [said river], this right shall be understood to be limited to a maximum usage of 3.86 second feet."

The above provisions are quoted from the third paragraph of said contract. They are the provisions especially relied on by the plaintiff.

No payment by the plaintiff was agreed on as the consideration for these deliveries of water to it, but the agreement was stated to have been made in order to determine a fair equivalent for all rights in the water in the river previously enjoyed by the plaintiff or its predecessors, which rights were expressly not to be prejudiced by the contract—in view of possible interruption thereof by plans for storing the water of the river then contemplated by the Porto Rican government. The contract recited that the plaintiff's anterior rights were claimed by it to exist by virtue of prior royal decrees, concessions, and user. As described in the contract, these were rights appurtenant to each of its four estates, respectively, to take specified quantities of water for use upon each of them, and also rights to take what is called "torrential water," with which this case is not concerned. No mention is made in the contract of any prior right to take what is called surplus or ex-

cess water, being water other than torrential, remaining in the river after satisfying all rights to regular specified deliveries. If the plaintiff had any such prior right, it was superseded while the contract was in force, and could be asserted only to the extent that the terms of the contract permitted the taking of such water.

[2] The appellants contend that the people of Porto Rico, or its Commissioner of the Interior, neither of whom is made a party by the bill, were, one or the other, necessary parties, and that to proceed in the absence of both was error.

We think this contention well founded. So far as the plaintiff's alleged rights prior to its above contract with said people were important, they were rights acquired by user against said people, or existing under concessions to which it was a party as successor to the Spanish government. Its rights under the contract were rights granted directly by said people. It could claim no rights as riparian owner merely. See Trujillo et al. v. Succession of Rodriguez (heretofore decided in this court) 233 F. 208, 147 C. C. A. 214. The water which both the plaintiff and those defendants who were operating the "Boca Chica" estate were taking when the bill was filed was then being delivered to them respectively by said people, in pursuance of agreements on its behalf through the proper authorities. To interfere with the agreed deliveries to the defendants was also to interfere with the agreed payment to be made therefor to said people. Interference with the defendants' intake as reconstructed to receive said agreed deliveries was interference with structures which the people had expressly required and authorized the defendants to erect for the purpose of receiving the excess water to be received and paid for as above. The invalidity of the grant made and the authority given by said people to the defendants, asserted by the plaintiff, could be found by the court to exist only in case it adopted the construction claimed by the plaintiff, but disputed by the defendants, of certain provisions in said people's prior grant to the plaintiff. The construction contended for materially affected the administration of the Irrigation Service maintained by said people. No such decree or injunction as the bill sought could therefore be made or issued, without materially and injuriously affecting interests of said people, inseparable from those in controversy between the parties. This made said people not only a necessary, but an indispensable, party to the suit.

Not only did the plaintiff's bill omit to make said people a party in any form, but no notice to it of the pendency of the suit appears to have been given. The learned District Judge stated in his opinion that, if the Porto Rican government should seek to intervene, its application would be carefully considered, but that any opportunity for such intervention in the District Court was afforded does not appear. Whether it or its commissioner could be made a party without its consent the court regarded as doubtful. If to do so was in fact impossible, we think the case was one in which the District Court could not properly proceed. Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792; Minnesota v. Northern Securities Co., 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499; Hyams v. Old Dominion Co., 209 Fed.

808, 126 C. C. A. 532; Wm. A. Rogers v. Nichols, 224 Fed. 415, 417, 139 C. C. A. 643. But, as will appear, dismissal of the bill without prejudice on this ground will not be the necessary result.

[3] The government established in Porto Rico by the Organic Act (31 Stats. 77) "is of such nature as to come within the general rule exempting a government, sovereign in its attributes, from being sued without its consent." Porto Rico v. Rosaly, 227 U. S. 270, 273, 33 Sup. Ct. 352, 57 L. Ed. 507. If, however, it voluntarily becomes a party to a suit involving its interests, upon the application of its Attorney General, this is consent on its part, waiving such immunity, which consent and waiver cannot afterward be withdrawn. Porto Rico v. Ramos, 232 U. S. 627, 34 Sup. Ct. 461, 58 L. Ed. 763. If said government so becomes a party to a suit in the federal District Court for Porto Rico, it will be held to have also accepted the jurisdiction of that court, though its legislative consent has been given only to suits against it in its own courts. Richardson, Treasurer, v. Fajardo, etc., Co., 241 U. S. 44, 36 Sup. Ct. 476, 60 L. Ed. 879.

On behalf of the Attorney General of Porto Rico there was presented to this court, when the case was reached here for argument, what was entitled an "Information on Behalf of the People of Porto Rico." In this it was alleged, among other things, that by the injunction which the District Court had issued the property of said people is "sequestered to said Fortuna Estates," the administration of its irrigation system hindered, and the revenues therefrom impaired, to the irreparable injury of said people. The document concluded by asking that it be filed and considered by this court; that the District Court be directed to dissolve the injunction forthwith, and for other and further relief; that ten days be allowed for printing said information, serving it on the parties to the case, and preparation of a brief and argument in its support; also that the hearing be meanwhile continued.

The continuance of the hearing requested was refused, but the "information" and a brief in support thereof were allowed to be filed and printed. This brief has been considered, to the extent below stated, as has also a further brief later filed in reply to the plaintiff's brief at the argument.

[4] In both these briefs the people of Porto Rico are styled "interveners," but no leave to intervene in the case has ever been given them. Only the parties in the appeal record can be recognized as parties by this court. Harrison v. Nixon, 9 Pet. 483, 9 L. Ed. 201; The William Bagaley, 5 Wall. 377, 18 L. Ed. 583; Marsh v. Nichols, 120 U. S. 598, 7 Sup. Ct. 704, 30 L. Ed. 796; Blatchford v. Newberry, 100 Ill. 484. The so-called "information" contains allegations of fact not found in the record, which the plaintiff has never had an opportunity to answer, because they were not made in the court of first instance. Obviously the plaintiff could neither be required nor allowed to answer them here, nor can they affect our determination of the issues properly before us in the case. As to the briefs filed as above, we have treated them, so far as they apply to the issues presented by the appeal record, as arguments addressed to the court by an amicus curiæ. In no other aspect could we properly have given them any consideration.

The Attorney General's application, however, may be regarded as sufficiently indicating that the people of Porto Rico is prepared in this case to waive its immunity against suit in a federal court, to the extent of becoming, for some purposes at least, an intervening party, and that it desires to be heard as such. The District Court is, as matters now stand, the only court which can afford it the opportunity of being so heard. Its right to be so heard in that court, upon suitable application there, seems to admit of no question. See Percy Summer Club v. Astle (C. C.) 110 Fed. 486. Due opportunity for such application, given before the injunction issued, does not appear, as has been stated, from the record. The District Court will therefore be directed to afford such an opportunity in any further proceedings.

2. The defendants contend, under other assignments of error, that the plaintiff had established no right in itself to the water in question sufficient to justify the issue of any preliminary injunction against them; still less the issue of a mandatory injunction requiring them to close intakes which they had constructed and were then maintaining and using under the requirements and by the authority of said people of Porto Rico, through its proper officers.

An affidavit submitted by the defendants showed without dispute that, after the execution of the last-mentioned contract and before the plaintiff's bill was filed, not only had the authorized and directed reconstruction of defendants' intake been completed, but deliveries of excess water had been received and paid for by them according to the contract. Such deliveries continued to be received until February 8, 1916, after which date there was not water enough in the river to make them, nor even to make the full regular deliveries required by all existing concessions. The defendants' intake remained ready to receive the agreed excess water when there should again be any for them to receive. This was the situation existing when the plaintiff's bill was filed, on the 7th of the following April. The defendants had thus been exercising, for some months, rights granted them by public authorities having power to make such grants, in a manner recognized by such authorities as within the grant made.

[5] Aside from the above question of parties, the court could not justifiably disturb such a situation by injunction at the instance of a party asserting rights under an earlier contract with the same public authorities, unless the earlier contract clearly appeared to have covered what they were permitting the defendants to receive under their subsequent grant.

It cannot be said that the plaintiff's contract of August 26, 1914, plainly vested in the plaintiff such rights to excess water as it now claims. The terms of the third paragraph, whereon the plaintiff relies, do not, in express terms, grant any right to excess or surplus water. Neither expression is used, and the burden was on the plaintiff to establish the construction for which it contends as the true construction, in view of all the other provisions of the contract and the circumstances therein referred to.

According to the plaintiff, the true meaning of this third paragraph is that all the water in that part of the river bordering the Fortuna Estates, extending, as appears, some five miles in all above the Aruz

intake, not required under existing concessions to fulfill regular deliveries to be made above or below, was to be allowed to come down, without diversion, to that intake, and was to belong there to the plaintiff alone, so long as it does not exceed 3.86 second feet. If, as there was evidence to show, such water never exceeds 2.50 second feet, the plaintiff claims the whole of it. Of course, if such a claim is established, there could be no excess water remaining to be granted by or delivered under any later contract.

The plaintiff has attempted to satisfy us that the construction for which it contends is in accordance with the clear meaning of the paragraph in question. But it appears that when the contract was made the Irrigation Department was engaged with plans for storing the upper waters of the river, such as might well result in considerably increasing the available quantity of excess or surplus waters. Section 13 of the Public Irrigation Law, as amended in 1913 (Laws of Porto Rico 1913, p. 38), had authorized the sale or lease of excess water by the Commissioner of the Interior, and was presumably before the minds of the parties to the contract at the time, as well as the prospect that action under it might well become expedient. With this in view, it is reasonable to suppose that any intent to grant the plaintiffs all excess water up to a quantity so much exceeding that available in the river at the time would have been expressed in unmistakable terms, as might easily have been done. The paragraph in question, as it stands, seems to us at least reasonably capable of a construction which, instead of giving the plaintiff exclusive water rights in excess of its regular deliveries, so extensive as to enable it to appropriate all water in the river other than torrential, for a time extending so far into the future, enables it only to appropriate such proportion of the excess water as present or future agreements with others then enjoying concessionary rights might leave available at the plaintiff's Aruz intake, but not in any event to appropriate more than 3.86 second feet.

We do not find it necessary to determine the true construction of the above paragraph, or to discuss at length the various arguments for or against the construction contended for by the plaintiff, because neither that construction nor any other was adopted by the District Court, whose determination of the meaning of the words "water which may be available there," and all questions as to the principles which should govern in interpreting either the plaintiff's or the defendant's contract, was expressly reserved until the final hearing. These questions should be left unprejudiced until passed upon by the District Court at a hearing wherein the people of Porto Rico has opportunity to be heard.

But if the District Court, as appears to have been the case, was not prepared to find an apparently clear right in the plaintiff to the water in question, we think it erred in issuing its injunction. Without such a finding there could be no proper ground for treating the defendants' apparent existing right as inferior to the right asserted by the plaintiff, and for suspending its exercise in the plaintiff's favor, during the pendency of the suit.

3. The assignments of error not fully covered by what has been said do not require separate notice in view of the above conclusions. It may be stated, however, that those numbered 11, 12, and 13 assume that there have been findings or rulings by the District Court which do not appear from the record to have been in fact made.

The order of the District Court granting the preliminary injunction is reversed, and the case is remanded to that court, with directions to afford the people of Porto Rico an opportunity to intervene, and for further proceedings thereafter not inconsistent with this opinion, and the appellants recover their costs of appeal.

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WITTE v. SHELTON, U. S. Marshal, et al.

TIEDEMAN v. SAME.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1917.)

Nos. 4691, 4693.

1. STATUTES ⟸159—IMPLIED REPEAL—PRESUMPTIONS.

Repeal by implication is not favored and may be lawfully inferred only when the later statute is so repugnant to or inconsistent with the earlier one that it is clear the legislative body must have intended to repeal the former.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229.]

2. INTOXICATING LIQUORS ⟸111—STATUTES—IMPLIED REPEAL—FICTITIOUS DELIVERIES.

Pen. Code (Act March 4, 1909, c. 321, 35 Stat. 1136 [Comp. St. 1913, § 10408]) § 238, making it punishable for an agent of a common carrier to deliver intoxicating liquor shipped in interstate commerce to a fictitious person or to any person under a fictitious name or to any person other than the consignee except upon the latter's written order, was not impliedly repealed by Webb-Kenyon Act March 1, 1913, c. 90, 37 Stat. 699 (Comp. St. 1913, § 8739), which prohibited the shipment of intoxicating liquor in interstate commerce into any state, territory, or district wherever such liquor was intended by any person interested therein to be received, possessed, or sold or used in violation of any law of such state, territory, or district, since the later act contains no provision repugnant to the former act and no provision indicating any intention to repeal the former act.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 121.]

3. STATUTES ⟸162—IMPLIED REPEAL—SPECIAL AND GENERAL LAWS.

Specific legislation on a particular phase of a subject is not affected by a subsequent law relating to the general subject which neither refers to the earlier law nor is repugnant to nor inconsistent with it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 235–237.]

4. INTOXICATING LIQUORS ⟸111—STATUTES—SUSPENSION—FICTITIOUS DELIVERY.

The Webb-Kenyon Act, prohibiting shipment of intoxicating liquor in interstate commerce into a state to be received, sold, or used in violation of a law of the state, did not suspend Pen. Code, § 238, prohibiting agents of a carrier from delivering interstate shipments of liquor to fictitious persons even as to shipments into the state intended to be used contrary to a state statute prohibiting the delivery of liquor intended for sale, since

the state statute does not prohibit the fictitious delivery which is the gist of the offense under section 238, and there is no concurrent federal and state jurisdiction over that offense, even if it be conceded that the state could enact a statute covering the offense; and therefore it was not error to exclude evidence offered by one charged with conspiracy to violate section 238 that the liquor intended to be delivered to the fictitious person was intended for sale contrary to the state statute.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 121.]

5. CONSPIRACY ⊜27—OVERT ACT—INNOCENT ACT.

Where a conspiracy had been formed to violate Pen. Code, § 238, by causing an interstate shipment to be made for the purpose of having the agent of the carrier deliver it to a fictitious person, telegraphic orders by one of the conspirators to another directing the shipments to be made are overt acts to effect the objects of the conspiracy within Pen. Code, § 37 (Comp. St. 1913, § 10201), though it was physically impossible for the agent to make the fictitious delivery until after the shipment had been made, and though such acts would have been innocent apart from the conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39.]

6. HABEAS CORPUS ⊜85(1)—EVIDENCE—PRESUMPTION—DEPORTATION FOR TRIAL—HEARING—INDICTMENT.

In habeas corpus proceedings to procure discharge from an order directing petitioners to be taken to another district for trial, allegations of the indictment against petitioners that the overt acts were committed in furtherance of the object of the conspiracy cannot be presumed to be false, in the absence of conclusive evidence in conflict therewith.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78.]

7. HABEAS CORPUS ⊜85(1)—EVIDENCE—SUFFICIENCY—DEPORTATION FOR TRIAL.

Evidence at the hearing before a commissioner who ordered petitioner for habeas corpus to be taken to another district for trial *held* sufficient to show probable cause that defendant was guilty of the offense charged in the indictment, a conspiracy to cause an agent of an interstate carrier to deliver intoxicating liquors to a fictitious person, so as to justify the refusal of petitioner's discharge from custody under the mittimus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78.]

8. HABEAS CORPUS ⊜85(1)—PRESUMPTIONS—CORRECTNESS OF FINDINGS.

On petition for habeas corpus to procure discharge from a commissioner's order of removal to another district for trial, the commissioner's finding of probable cause is presumed correct, unless there was no substantial evidence to sustain it.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78.]

9. CRIMINAL LAW ⊜242(5)—REMOVAL FOR TRIAL—EVIDENCE—INDICTMENT.

An indictment charging a criminal conspiracy, introduced in evidence in proceedings before a United States commissioner for removal of defendant to another district for trial, is itself prima facie evidence of probable cause.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 509, 510.]

Appeals from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Separate applications by M. F. Witte and by C. H. Tiedeman against W. A. Shelton, as United States Marshal for the Western District of Missouri, and others, for writ of habeas corpus to procure the discharge of petitioners from custody under a mittimus issued by a

United States Commissioner. Petitions dismissed, and petitioners appeal. Affirmed.

Paul A. Ewert, of Joplin, Mo., and Norman R. Haskell, of Oklahoma City, Okl. (E. G. McAdams, of Oklahoma City, Okl., on the brief), for appellant in No. 4691.

Norman R. Haskell, of Oklahoma City, Okl. (E. G. McAdams, of Oklahoma City, Okl., Ralph W. Grier, of St. Joseph, Mo., and Harold Lee, of Oklahoma City, Okl., on the brief), for appellant in No. 4693.

William G. Lynch, Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., and Sam O. Hargus, Asst. U. S. Atty., both of Kansas City, Mo., on the briefs), for appellees.

Before SANBORN and SMITH, Circuit Judges, and AMIDON, District Judge.

SANBORN, Circuit Judge. These are appeals from dismissals by the District Judge below of petitions for writs of habeas corpus and for the discharge of the petitioners. The stronger case for the petitioners is that of Witte v. Shelton, and if Witte is not entitled to a reversal of the order below the case of Tiedeman must follow that conclusion. The discussion of the cases is therefore confined to the Witte Case. Witte sought a discharge by writ of habeas corpus from the custody of the United States marshal for the Western District of Missouri, who held him under a final mittimus issued by the United States commissioner of that district, which commanded the marshal and the keeper of the jail of Newton county safely to keep the prisoner in custody to the end that he might be deported to the District Court of the United States for the Western District of Oklahoma for trial under an indictment for the violation of section 37 of the federal Penal Code. Section 37 of the Penal Code provides that if two or more persons conspire to commit any offense against the United States, and one or more of them does any act to effect the object of the conspiracy, each of the parties to the conspiracy shall suffer a fine or imprisonment. The indictment charged that Witte, Elkins, Creekmore, Filler, Franke, and Tiedeman, conspired together to commit the offense specified in section 238 of the Penal Code. Section 238 denounces, under penalty of a fine or imprisonment, the offense of the delivery by an agent or employé of an express company, or other common carrier, to any fictitious person, or to any person under a fictitious name, of any intoxicating liquor shipped in interstate commerce, and this section became effective January 1, 1910.

The mittimus under which the marshal held the prisoner was issued after a hearing before the commissioner at which the indictment, the testimony of the prisoner, and other evidence were introduced and considered by him. Counsel for Witte insist that the court below should have issued the writ and discharged him because the evidence before the commissioner, which was introduced in evidence before the court below, conclusively showed that neither that court nor the commissioner had any jurisdiction to hold him: (1) Because section 238 had been repealed by the Act of March 1, 1913, commonly known as the Webb-Kenyon Act, 37 Stat. c. 90, p. 699; (2) because, if it had

not been repealed in whole, it had been suspended by the Webb-Kenyon Act as to the intoxicating liquor shipped into Oklahoma in interstate commerce intended for sale, barter, or gift in violation of the statutes of Oklahoma (1 Rev. Laws of Oklahoma 1910, § 3605; Joplin Mercantile Co. v. United States, 236 U. S. 531, 546, 35 Sup. Ct. 291, 59 L. Ed. 705), and the commissioner committed a fatal error at his hearing in rejecting evidence offered by the prisoner to the effect that the person to whom the liquor specified in the indictment was alleged to have been shipped under a fictitious name intended to resell it to other persons in Oklahoma in violation of the laws of that state; (3) because no act to effect the object of the alleged conspiracy is alleged in the indictment or in the complaint for the arrest and removal of the prisoner or is proved by the evidence before the commissioner; and (4) because the testimony of the prisoner overcame the presumption of probable cause to believe that he was guilty of the offense charged in the indictment which arose from the allegations of that instrument.

[1] Did the Webb-Kenyon Act repeal section 238 of the Penal Code? It contains no express repeal of it, and it makes no reference to it. If it is repealed, therefore, the repeal is by implication, and such a repeal is not presumed. It is only when the later statute is so repugnant to or inconsistent with the earlier one that it is clear that the intention of the legislative body must have been thereby to repeal the former that a repeal by implication may be lawfully inferred.

"To induce a repeal of a statute by the implication of inconsistency with a later statute, there must be such a positive repugnancy between the two statutes that they cannot stand together." Arthur v. Homer, 96 U. S. 137, 140, 27 L. Ed. 811; Gowan v. Harley, 56 Fed. 973, 978, 6 C. C. A. 190, 195.

[2, 3] Section 238 created, denounced, and prescribed the punishment for the specific offense of the delivery, by an agent, officer, or employé of a common carrier, of intoxicating liquor shipped in interstate commerce, to a fictitious person, or to any person under a fictitious name, or to any person but the consignee, except upon the latter's written order. The Webb-Kenyon Act, 37 Stat. 699, prohibited the shipment of intoxicating liquor in interstate commerce into any state, territory, or district of the United States wherever such intoxicating liquor was intended by any person interested therein to be received, possessed, sold, or used in violation of any law of such state, territory, or district. The latter act contains no provision repugnant to the former act, no provision indicating any intention of the members of Congress thereby to repeal or strike down the denunciation of the delivery by agents or officers of a common carrier of liquor in interstate commerce to persons under fictitious names, or to permit them so to do. The former act is of the nature of a special law creating and enacting special legislation as to the new offense it creates. The latter is of the nature of a general law prohibiting the shipment of intoxicating liquor in interstate commerce under the circumstances therein specifically noted. Specific legislation upon a particular phase of a single subject is not affected by a subsequent law relating to a general subject which neither refers to the earlier law nor is repugnant to nor inconsistent with it, but the two laws must stand together,

the former as the law of its specific phase of the subject, and the latter as the general law relating thereto. State v. Stoll, 17 Wall. 425, 436, 21 L. Ed. 650; Gowen v. Harley, 56 Fed. 973, 978, 6 C. C. A. 190, 195; Board of Com'rs of Seward Co. v. Ætna Life Ins. Co., 90 Fed. 222, 227, 32 C. C. A. 585, 590; Christie-Street Commission Co. v. United States, 136 Fed. 326, 333, 69 C. C. A. 464, 471; Priddy v. Thompson, 204 Fed. 955, 959, 123 C. C. A. 277, 281. There is no such inconsistency or repugnancy between the Webb-Kenyon Act and section 238 of the Penal Code as will warrant the conclusion that Congress intended by the passage of the former to repeal the latter, and it was not repealed thereby.

[4] The second contention is that, although section 238 has not been repealed in toto, yet it has been suspended by the Webb-Kenyon Act as to all shipments in interstate commerce of intoxicating liquor into Oklahoma which were intended, as the act reads, "by any person interested therein, to be received, possessed, sold, or in any manner used * * * in violation of any law" of that state, that as the laws of Oklahoma prohibit the manufacture, sale, barter, gift, or furnishing of such liquor only, and do not prohibit its receipt, possession or use by consignees for their own consumption (1 Revised Laws of Oklahoma 1910, § 3605), section 238 is suspended as to the delivery by any officer or agent of a common carrier of such liquor as any one interested in intends to resell or give away in violation of the laws of that state, and is in force only as to the delivery of such liquor as persons interested in intend shall be received, possessed, and used for their own consumption or use; that consequently the evidence offered by the prisoner to show that the person to whom the indictment alleged the liquor was to be delivered under a fictitious name intended to resell it in violation of the laws of Oklahoma would have shown that the delivery in this case and the case itself were not within the reach of section 238, and consequently were never within the jurisdiction of the court in Oklahoma, the commissioner, or the court below.

The strongest argument in support of this contention is the argument by analogy based on the decision of the Supreme Court in Joplin Mercantile Co. v. United States, 236 U. S. 531, 546, 35 Sup. Ct. 291, 59 L. Ed. 705. It is said that the facts in the case at bar are analogous to the facts in that case, and that for that reason section 238 should be held to be suspended to the extent above stated, as section 8 of the Act of March 1, 1895, c. 145, 28 Stat. 693, was in that case held to be suspended in part though not repealed by the enabling act of Oklahoma of June 16, 1906, c. 3335, 34 Stat. 267. An argument by analogy never rises to the strength of a well-founded syllogism, is always liable to mislead, and its strength is measured by the closeness of the analogy of the facts. Let us compare the pertinent facts in the Joplin Mercantile Company's Case with those in the case at bar and observe their similarities and differences. In that case section 8 of the act of 1895 had provided:

"That any person * * * who shall, in said (Indian) territory, manufacture * * * any vinous, malt, or fermented liquors, or any other intoxicating drinks * * * or who shall carry, or in any manner have carried, into

said Territory any such liquors or drinks * * * shall, upon conviction thereof, be punished," etc.

By the enabling act of Oklahoma of June 16, 1906, Congress provided for the admission of Oklahoma, which comprised the former Indian Territory and large tracts of land outside that territory into the Union, and in section 3 required that the convention to form the Constitution of the new state should provide in that instrument, among other things, that the manufacture, sale, barter, giving away, or otherwise furnishing intoxicating liquors within those parts of the state then known as the Indian Territory be prohibited for 21 years from the admission of the state, and thereafter, until the people of the state should otherwise provide, and that "any person, individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish intoxicating liquor of any kind * * * or who shall ship or in any way convey such liquors from other parts of said state" into the former Indian Territory, shall be punished by fine and imprisonment. The people of the state of Oklahoma had embodied these provisions in section 7, art. 1, of their Constitution, had therein declared that upon the admission of that state into the Union those provisions should be immediately enforceable in the courts of the state, and the Legislature of that state had enacted a statute to the same effect. 1 Laws of Oklahoma 1910, § 3605. The Supreme Court conceded that the question with which they were compelled to deal was "by no means easy of solution," that the act of 1895 was not repealed, but that, in view of the specific requirements of the enabling act and the serious inconvenience and confusion that would result from the concurrent jurisdiction of the nation and the state over the same offenses, the active exercise of the federal authority to enforce the provisions of section 8 of the act of 1895, so far as it related to intrastate transactions, was suspended and those provisions were not enforceable, while so far as they related to interstate transactions they remained in force. 236 U. S. 544, 545, 546, 547, 35 Sup. Ct. 291, 59 L. Ed. 705. But in that case the Supreme Court held that the act of 1895 was suspended respecting intrastate transactions only, and that it remained in force respecting interstate transactions. It is respecting an interstate transaction, a delivery of a shipment from Joplin, Mo., to the city of Oklahoma in the state of Oklahoma, that the offense in the case at bar is charged. In the Joplin Mercantile Company's Case, the Congress had expressly required the state to provide in its Constitution for the punishment by the state itself of the offenses over which the court held the exercise of the federal authority to be suspended. In the case at bar, the Congress has never required the state of Oklahoma to denounce or to prescribe any punishment for the offense charged in the indictment in hand, and it has never done so. The offenses respecting intrastate transactions concerning which the Supreme Court held the federal authority suspended in the former case were the same offenses made punishable by the state Constitution and laws, the manufacture, sale, furnishing, and carrying of intoxicating liquor within the state. In the case in hand, there is no provision of the Constitution or statutes of the state of Oklahoma denouncing or prescribing any punishment for the offense of delivering or caus-

ing the delivery by an officer, employé, or agent of a common carrier of intoxicating liquor shipped in interstate commerce to a fictitious person, or to a person under a fictitious name; therefore none of that serious inconvenience and confusion from the exercise over this offense of concurrent federal and state authority which induced the Supreme Court to hold that the act of 1895 was partially suspended. Hence it is that the argument by analogy utterly fails, and section 238 may not be lawfully suspended in whole or in part on the authority of the case of the Joplin Mercantile Company.

Counsel cite decisions of the courts of the states to the proposition that since the enactment of the Webb-Kenyon law interstate shipments of intoxicating liquor become subject to seizure under the laws of the states as soon as they arrive in the state of their destination and persons by selling, giving away, or carrying them are from that time subject to punishment for the violation of state laws regarding them. Conceding, without deciding, the soundness of this proposition, the conclusion which counsel seek to deduce from it, that the passage of that act repealed, or suspended, or renounced the power of the nation to enforce any part of section 238, neither logically nor reasonably follows. It still remains true that the state of Oklahoma has never enacted any law prohibiting or prescribing any punishment for the offense of the delivery by an officer, agent, or employé of a common carrier of intoxicating liquors shipped in interstate commerce to a fictitious person, or to a person under a fictitious name, so that none of the confusion or inconvenience of concurring national and state jurisdiction can result from the enforcement of section 238, that the offense thereby created is an offense respecting interstate and not respecting intrastate transactions, that the Joplin Mercantile Company's Case is not analogous to this case and does not rule it, and that no persuasive reason is presented in the argument or authorities of counsel for the prisoner why the reasons stated above for holding that the Webb-Kenyon Act did not repeal section 238 in toto are not also decisive of the question whether or not that act suspended or repealed it in part. For these reasons, our conclusion is that section 238 has not been repealed or suspended either in whole or in part by the Webb-Kenyon Act, or otherwise, and that it is in full force and effect. There was therefore no error in the rejection of the evidence offered to show that the person to whom it was alleged in the indictment the intoxicating liquor was to be delivered intended to resell it in Oklahoma in violation of the laws of that state.

[5] But counsel insist that the record in this case discloses the absence of jurisdiction of the United States District Court of Oklahoma to try the prisoner for the offense charged in the indictment and the absence of jurisdiction of the commissioner and of the court below to direct his removal to Oklahoma for trial because the indictment fails to charge any crime. In entering upon the discussion of this issue, counsel write in their brief as follows:

"We do not claim the right here to question the technical sufficiency of the indictment, nor even to ask the determination of close and doubtful questions of law. Neither do we contend that we are entitled to demand the weighing of conflicting evidence by the commissioner or by the court upon application for

removal or for a writ of habeas corpus. For the purpose of this hearing, we concede to the government the broadest and most liberal construction of the indictment. We concede that if it even inferentially charges a crime, no matter how defectively, it is sufficient for the purpose of removal. We go farther and concede that, though the indictment wholly fails to charge a crime, the government is yet entitled to prevail if it has offered a scintilla of proof dehors the record to supply the deficiency."

On another page of their brief, this appears:

"However, for the purpose of this proceeding we construe the indictment as alleging a conspiracy between Elkins, Witte, Tiedeman, and others, to have and cause Tiedeman, as agent for the express company, to violate section 238 of the Penal Code by the delivery of the liquor to Elkins under a fictitious name, and that Elkins sent these telegraphic orders with the intention that they should be shipped by the Milwaukee Beer Company to him at Oklahoma City under the fictitious name of 'W. Moran,' and that when such liquor should be received at Oklahoma City Tiedeman should violate section 238 by delivering to him the liquor so ordered. Our sole contention on this branch of the case is that, assuming the truth of all these allegations, no act to effect the object of the conspiracy within the meaning of the statute has been alleged or shown."

The foregoing admissions and concessions are accepted, and the discussion will be limited to the consideration of the sole contention here stated on the basis of the soundness of the law and the facts conceded.

[6] The telegraphic orders mentioned in the last concession quoted were orders for the shipment of whisky which were alleged in the indictment to have been sent by Elkins, one of the conspirators, in pursuance of the conspiracy, "and while the same was in full force and effect and to effect the object thereof," to Milwaukee Beer Company at Joplin, Mo., at various dates from four months to nine months after August 1, 1914, at which time it was alleged in the indictment that the conspiracy had been formed and after which time until August 2, 1915, it was also alleged in the indictment that the conspiracy was continuously in existence. The sending of these orders were the only overt acts alleged in the indictment to have been done to effect the object of the conspiracy, and, though it is alleged that they were done for that purpose, counsel strenuously argue that they could not have been done to effect the object of the conspiracy: (1) Because, until the indispensable interstate shipment had been made and had reached the possession of Tiedeman, the agent of the common carrier at the point of destination, a violation of section 238 was legally and physically impossible; but the offense charged is not the violation of section 238, but the formation of a conspiracy to violate it and the performance by one of the conspirators of acts to effect the object of the conspiracy, and such a conspiracy to violate section 238 must in the nature of things be formed before the violation and before the overt acts to effect the object of the conspiracy, such as the ordering or procuring the interstate shipments which are indispensable to such a violation, may be done, and it is alleged in the indictment that these overt acts were done in violation of section 37 of the Penal Code. (2) Because the acts of Elkins in ordering the beer were parts of the agreement of conspiracy to violate section 238 and were not acts done to effect the object of it; but the averments of the indictment are that the agreement of conspiracy was made before these acts were

done, and that the acts were done to effect its object, and on this application for a writ of habeas corpus the courts may not presume that these allegations of the indictment are false in the absence of conclusive evidence in conflict with them. (3) Because the acts of sending the orders for the shipment of the whisky did not tend to effect the object of the conspiracy, but were innocent acts which might have been, and as is insisted by counsel were, done without effecting or intending to effect that object. It is conceded that the telegraphic orders in themselves might have been innocent, and that they might have been made without any intent or purpose to effect the object of the conspiracy; but it was essential to the accomplishment of that object that Tiedeman, the agent of the common carrier, should receive and have in his possession or control an interstate shipment of intoxicating liquors, that Elkins or some other person should ship it, or cause it to be shipped, and the averments of the indictment are that Elkins, by means of the telegraphic orders, directed that these interstate shipments should be made to Tiedeman for the purpose of effecting the object of the conspiracy. Acts otherwise innocent may become criminal when they are performed by the members of a criminal conspiracy to effect its object. The telegraphic orders of Elkins were well calculated to assist in effecting the object of this conspiracy. They tended to cause the interstate shipments indispensable to the attainment of that object to be made, they were in the train or line of causal connection with the unlawful object, and although if they were not performed to effect that object they were innocent, yet, as it was directly alleged in the indictment that they were done to effect that object and as it is clear that they might have had that effect, the contention of counsel for the prisoner, that "no act to effect the object of the conspiracy within the meaning of the statute has been alleged or shown," cannot be sustained. Houston v. United States, 217 Fed. 852, 855, 133 C. C. A. 562, 565; United States v. Benson, 70 Fed. 591, 17 C. C. A. 293; United States v. Sanche (C. C.) 7 Fed. 715; United States v. Donau, 11 Blatchf. 168, Fed. Cas. No. 14,983; Gantt v. United States, 108 Fed. 61, 47 C. C. A. 210; United States v. Shevlin (D. C.) 212 Fed. 343.

[7] Finally, it is insisted that the commissioner was mistaken in his finding that there was probable cause to believe that the prisoner was guilty of the offense charged in the indictment. The evidence before the commissioner on this subject consisted of the indictment, of undisputed evidence of the prisoner's identity, and of his own testimony to the effect that the averments in the indictment, so far as he was concerned, were not true. The telegraphic orders charged to have been sent by one of the conspirators were alleged in the indictment to have been signed Frisco Club and to have been sent by Elkins. The prisoner in his testimony before the commissioner stated that he was the person named in the indictment, that he was the manager of the Milwaukee Beer Company at Joplin, Mo., that he knew Elkins and Tiedeman, that he received the telegraphic orders signed Frisco Club from Elkins or Franke, that the Frisco Club, by Elkins or Franke, directed him to ship intoxicating liquors ordered by that

club, when not otherwise directed, to W. Moran, until further orders, that he shipped all liquors ordered by the Frisco Club or Elkins to this W. Moran and charged them to the Frisco Club, that he never knew W. Moran, and W. Moran never paid him for any of the liquors sent him, but the Frisco Club or Elkins paid therefor.

[8] On an application for a writ of habeas corpus to relieve a prisoner from a commissioner's order of removal to another district, the legal presumption is that the latter's finding of probable cause is correct. It is only when there was no substantial evidence to sustain that finding, and not when the commissioner reached an erroneous conclusion upon the question of the weight of substantially conflicting evidence, that courts may lawfully grant relief by writ of habeas corpus on the ground of no probable cause.

[9] In this case the indictment was introduced in evidence and was itself prima facie evidence of probable cause. Hyde v. Shine, 199 U. S. 62, 84, 25 Sup. Ct. 760, 50 L. Ed. 90; Price v. Henkel, 216 U. S. 488, 491, 30 Sup. Ct. 257, 54 L. Ed. 581. The prisoner admitted his identity and testified to the receipt of the telegraphic orders for the liquor from Elkins signed by the Frisco Club and the shipment of this liquor to W. Moran, who never paid for any of it and whom the prisoner never knew. The record before the commissioner was not, therefore, so barren of all evidence of probable cause to believe the prisoner guilty of the offense charged in the indictment that the commissioner can be lawfully held to have erred in committing him for removal, or that the court below can be decided to have erred in denying his petition for the writ of habeas corpus and for his discharge.

The order and judgment below in each of the cases in hand must therefore be, and they are hereby, affirmed.

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## ALASKA PACIFIC FISHERIES et al. v. UNITED STATES. *

(Circuit Court of Appeals, Ninth Circuit. March 19, 1917.)

1. FISH ⊂⊃3—RIGHT TO FISH—RESERVATION BY PRESIDENT—AUTHORITY OF.
Despite the power of Congress to control and dispose of the territories and other property of the United States, the President may reserve public land and adjacent waters for useful purposes without being authorized to do so by express statute. Hence Congress having by Act March 3, 1891, c. 561, § 15, 26 Stat. 1101, reserved a body of lands known as Annette Islands in Southeastern Alaska, for the use of a tribe of Indians and such other Alaskan natives as might join them, the President may, though not authorized, the islands being unfit for agriculture and the Indians not being agricultural people, reserve for the benefit of the Indians fishing rights in waters adjacent to such islands, such reservation being the practical method of carrying out the purpose of Congress, and government being a practical affair intended for practical men.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 3, 4, 6–8.]

2. FISH ⊂⊃3—PUBLIC WATERS—RESERVATION.
The United States, as to the territory of Alaska, exercises all sovereignty, national and municipal, and hence, in view of the powers of the

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing denied May 14, 1917.

king over lands flowed by the tide, United States has complete control over Alaskan waters flowed by the tide which are within its maritime jurisdiction. Consequently, the President, in view of his powers to reserve public lands, may, to carry out the purpose of an act of Congress, reserve such waters.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 3, 4, 6–8.]

3. FISH ⟸3—PUBLIC WATERS—RESERVATIONS.

Where Congress by Act March 3, 1891, § 15, reserved a group of islands for an Indian tribe, and such other natives of Alaska as might join them, the President's reservation of fishing rights in adjacent waters was not only for the benefit of the whole people, but was for a public purpose, being calculated to prevent the possibility of Indians becoming a public charge.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 3, 4, 6–8.]

4. NAVIGABLE WATERS ⟸19—AUTHORITY OF CONGRESS—POWER.

Alaskan waters within the maritime jurisdiction of the United States are under the control of Congress, and the erection in such waters without consent of Congress of a fish-trap is, in view of the government's ownership of the soil, a trespass; the structure being termed a purprestur which the government may at pleasure cause to be removed.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59–63, 67–72.]

Appeal from the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Suit by the United States against the Alaska Pacific Fisheries, a corporation, its officers, agents, employés, and all persons acting by, through, or under it or in privity with it. From a decree for complainant, defendants appeal. Affirmed.

C. H. Hanford, of Seattle, Wash., Hellenthal & Hellenthal, of Juneau, Alaska, and James M. Shoup, of Ketchikan, Alaska, for appellants.

James A. Smiser, U. S. Atty., and John J. Reagan, Asst. U. S. Atty., both of Juneau, Alaska, and John W. Preston, U. S. Atty., and M. A. Thomas, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from a final decree entered by the District Court of Alaska, in favor of the United States, enjoining the appellants from driving, constructing, or completing any fish-trap or structure whatsoever on and at Annette Islands reservation or in the waters appurtenant thereto or surrounding the same and being the waters within 3,000 feet from the shore at mean low tide of Annette Island, in Southeastern Alaska, and from maintaining or operating any trap or structure for fishing therein, and from fishing there in any manner whatsoever, and particularly from driving, operating, completing, or maintaining a fish-trap at or near Cedar Point, Annette Island, and from delivering or causing to be delivered any material whatsoever for the construction of fishing traps upon such reserve or in said waters. The decree further ordered that the defendant Alaska Pacific Fisheries vacate the lands and waters mentioned in the proclamation of the President of the United States of

April 28, 1916, and to remove therefrom and to remove any and all structures therefrom heretofore erected therein by it directly or indirectly, and to refrain from in any manner trespassing in and upon said waters and said reserve.

By section 15 of the Act of Congress of March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes" (chapter 561, 26 Stat. 1095, 1101), a body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's entrance, was set apart as a reservation for the use of the Metlakahtla Indians and those people known as Metlakahtlans who had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as might join them, to be held and used by them in common, under such rules and regulations and subject to such restrictions as might be prescribed from time to time by the Secretary of the Interior.

By the proclamation of the President, dated the 28th day of April, 1916 (39 Stat. pt. 2, Proclamations of the President, p. 57), it was recited that the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, had decided to place in operation a cannery on Annette Island. It was therefore necessary that the fishing in the waters contiguous to the therein described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery. It was accordingly proclaimed by the President that the waters within 3,000 feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets located within the area segregated by a broken line upon a diagram attached to and made a part of the proclamation, and also the bays of said islands, rocks, and islets, were thereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as had joined them or might join them in residence on these islands used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

By section 10 of the Rivers and Harbors Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151 (Comp. St. 1913, § 9910), it was provided that:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or *other structures* in any port, roadstead, haven, harbor, canal, navigable river, or *other water of the United States, outside established harbor lines*, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

On the 7th day of April, 1916, the appellant Alaska Pacific Fisheries, a corporation, by its agents and employés, entered upon the navigable waters adjacent to Annette Island, less than 2,000 feet south of a

point of land designated as Cedar Point, and within 3,000 feet from the shore of the island at mean low tide, and began the erection of a fish-trap in said waters by driving a large number of piles in such navigable waters for the purpose of holding the web to be suspended between the piles; and upon the 8th day of April the appellant named had this apparatus completed for fishing, with the exception of the suspension of the web between the piles. The fish-trap so constructed and being constructed was the usual and ordinary fishing apparatus ordinarily used by those engaged in the catching of salmon in the waters of Southeastern Alaska. The portion of the trap nearest the shore of Annette Island was situate 200 feet to the seaward from the line of extreme low tide, and was within the navigable waters surrounding Annette Island. The entire trap is embraced within the area referred to in the President's proclamation of April 28, 1916, and, as no harbor lines have ever been established at Annette Island, the structure is in waters of the United States outside of any established harbor lines, and has been erected upon plans not submitted to or recommended by the Chief of Engineers of the United States and without any authority from the Secretary of War.

On the 2d day of May, 1916, the appellants were served with a notice, by the assistant United States attorney for the district of Alaska, that, by virtue of the proclamation, 3,000 feet of waters contiguous to Annette Island, Alaska, had been set aside for the exclusive rights of the Metlakahtlans; and the appellants were warned against trespassing on the said reserved area of waters and to cease driving or attempting to drive any traps for the purpose of catching fish within the said area and to cease fishing any traps within the said area. To this notice the attorney of the appellant corporation replied that the corporation denied that the President had lawful power to extend a reservation beyond the boundaries prescribed by an act of Congress or to include public navigable water, and suggested that, as the validity of the rights asserted would have to be adjudicated, the most expeditious manner of making an issue would be to initiate judicial proceedings. The present suit was thereupon commenced by the United States, praying for an injunction restraining the appellants from continuing the construction of the trap mentioned in the complaint, or from fishing same, or interfering in any way whatsoever with the free and uninterrupted passage of fish in and through the waters described in said proclamation, or from in any way trespassing upon the lands described in said act of Congress, or the waters adjacent thereto or upon the littoral rights of the said natives. The complaint also prayed for a mandatory injunction compelling the defendants to vacate the lands and waters and to remove therefrom and to remove said structures therefrom.

It is alleged in the complaint and admitted in the answer that the United States, by virtue of its sovereignty, is the owner and seised in fee of the body of land known as Annette Island and the waters adjacent thereto, and that prior to March 3, 1891, said island was occupied by an association of Indians known as the Metlakahtlans or Metlakahtla Indians. The date of this occupation appears to have been

in 1886, when the Indians came to the island from British Columbia under the leadership of one Father Duncan.

The complaint recited section 15 of the Act of Congress of March 3, 1891, setting aside and apart said Annette Island and islands adjacent thereto as a reservation for the use of the said Indians and such other Alaskan natives as might join them, and it is alleged that by virtue of that act the said Annette Islands, the uplands together with the shore lands, became and were at all times reserved to the exclusive use and benefit and occupancy of the Indians mentioned in the act, with the exclusive right to the use of the shore or tide lands at all places on said islands to deep water, free from obstructions erected or maintained by others; and to the right of fishing in the waters surrounding said islands exclusively; that ever since the passage of the act, the Indians mentioned in the act have been in the sole, exclusive, quiet, and peaceable possession of said islands and the waters surrounding the same and adjacent thereto; that they have improved said lands, built a town thereon known as the village of Metlakahtla, built and maintained a school, a water system, a fish cannery, and saw mill, have governed themselves and by ordinances provided for fire and health protection, and have been in the exclusive possession of the fisheries in the waters surrounding said islands, and, in addition thereto, have built and erected one of the largest churches in the territory of Alaska; that in the year 1914, by ordinance of the council of said Annette Islands, existing under the regulations of the Secretary of the Interior as provided by the act of Congress, and with the approval of said Secretary, permits were granted to natives among the class mentioned in the act of Congress, to drive and maintain fishing traps in the waters surrounding said island, and like permits were granted in the year 1915; that at no time since the passage of the act of Congress of March 3, 1891, has there been any interference by any person not mentioned in the act with the possession and rights of the persons mentioned in the act, until the interference by the appellant corporation in April, 1916, in the building of the fish-trap on the western shore and shore line of Annette Island, heretofore mentioned. The complaint sets up the President's proclamation of April 28, 1916, reserving for the benefit of the Metlakahtla Indians and such other Alaskan natives as might join them the waters surrounding Annette Island within 3,000 feet from the shore of the island, for fishing purposes, and the act of March 3, 1899, prohibiting the creation of any obstruction to the navigable capacity of any of the waters of the United States not affirmatively authorized by Congress, and making it unlawful to build or commence to build any structure in any of the waters of the United States outside established harbor lines except upon plans recommended by the Chief of Engineers and authorized by the Secretary of War. The particulars concerning the intrusion of the appellants into the waters reserved by the President's proclamation are set out in detail, together with the notices served upon the appellants, warning the appellant corporation against such intrusion.

The complaint prayed for an injunction restraining the appellants from continuing the construction of the fish-trap mentioned in the complaint, and from fishing same, or interfering with the free and uninterrupted passage of fish in and through the waters described in the President's proclamation, and from trespassing upon the lands described in the act of Congress or the waters adjacent thereto or upon the littoral rights of the natives. The complaint also prayed for a mandatory injunction compelling the appellants to vacate said lands and waters and to remove therefrom.

The appellants in their answer admit that, subsequent to the passage of the act of Congress referred to in the complaint, Annette Island has been occupied by the Metlakahtla Indians or the Metlakahtlans referred to in the act, but the appellants deny that the shore lines or any part of said shore lines—that is to say, the tidelands lying between low water and the ordinary line of high tide—have been reserved by virtue of said act of Congress, or have been occupied by said Indians, either in whole or in part, and the appellants deny that the right of fishing in said waters surrounding the island was by virtue of said act of Congress or otherwise reserved to the use of the said Metlakahtla Indians or others referred to in the said act or at all. The appellants deny that the said Indians, Metlakahtlans or others referred to in said act, or any other person or persons whatsoever, have had, by reason of said act or otherwise, the exclusive right to use, occupy, or control the tidelands lying between low-water mark and the line of ordinary high tide along the shore of Annette Island, or any part of said tidelands; allege that the President's proclamation was issued without authority of law and is void and of no effect. The answer sets up other matters relating to the occupation of the islands by the Metlakahtlans and the circumstances connected with its construction of the fish-trap mentioned in the complaint. Upon these matters of minor importance the reply of the United States takes issue; but the dominant question, as presented by the complaint and answer, is the right of the appellants to enter upon the waters mentioned in the complaint and erect the fish-trap at the place designated.

The errors assigned relate to the refusal of the court to make and adopt certain findings of facts as requested by the appellants, the making and adopting by the court of certain other findings of facts, the refusal of the court to adopt certain conclusions of law proposed by the appellants, and the action of the court in adopting certain other conclusions of law, resulting in the final decree in favor of the United States. The main questions at issue, as presented by the assignments of error, are stated in the following conclusions of law proposed by the appellants and refused by the court, to which refusal the appellants took exceptions:

(1) "In the construction of a fish-trap off Cedar Point, Annette Island, and the maintenance thereof the defendants were engaged in the exercise of their common right of fishery, and being so engaged in the exercise of a lawful right they acquired a vested right in said fish-trap from which they could not be divested by a subsequent proclamation of the President or otherwise without compensation."

(2) "The reservation of Annette Island, as made by act of Congress March 3, 1891, reserved the lands to ordinary high-water mark only and did not include any of the navigable waters of the United States, and that the proclamation of the President referred to in the pleadings herein was made without authority of law, in that the power to control and dispose of the territories and other property of the United States is by the Constitution vested in Congress."

[1] Referring to the last proposition first, it may be conceded, without so deciding, that the reservation of Annette Island as made by the act of Congress of March 3, 1891, reserved the lands of the island to ordinary high-water mark only and did not include the shore between the high and low water marks, nor any navigable waters surrounding the island; but it does not follow that the proclamation of the President of April 28, 1916, was made without authority. It may be conceded further that the power to control and dispose of the territories and other property of the United States is by the Constitution vested in Congress; but it does not follow that the President may not reserve public lands and adjacent waters for useful purposes without being authorized so to do by express statute.

In United States v. Midwest Oil Co., 236 U. S. 459, 471, 35 Sup. Ct. 309, 59 L. Ed. 673, the Supreme Court had before it a reservation made by the President of public lands containing petroleum or other mineral oils, chiefly valuable therefor, which prior thereto had been declared by Congress to be free and open to occupation, exploration, and purchase by citizens of the United States. The act of Congress was passed February 11, 1897 (chapter 216, 29 Stat. 526 [Comp. St. 1913, § 4635]). The President withdrew and reserved certain of these lands by an order dated September 27, 1909. The court, in sustaining the right of the President to make such reservation without statutory authority, refers to the fact that prior to 1910 at least 252 reservations for useful, though nonstatutory, purposes had been made by the President, and cites Grisar v. McDowell, 6 Wall. 364, 381, 18 L. Ed. 863, where it was said that:

"From an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses."

The court continues:

"But notwithstanding this decision and the continuity of this practice, the absence of express statutory authority was the occasion of doubt being expressed as to the power of the President to make these orders. The matter was therefore several times referred to the law officers of the government for an opinion on the subject. One of them stated ([1889] 19 Op. Atty. Gen. 370) that the validity of such orders rested on 'a long-established and long-recognized power in the President to withhold from sale or settlement, at discretion, portions of the public domain.' Another reported that 'the power of the President was recognized by Congress and that such recognition was equivalent to a grant.' 17 Op. Atty. Gen. (1881). Again, when the claim was made that the power to withdraw did not extend to mineral land, the Attorney General gave the opinion that the power 'must be regarded as extending to any lands which belong to the public domain, and capable of being exercised with respect to such lands so long as they remain unappropriated.' 17 Op. Atty. Gen. 232 (1881).

"Similar views were expressed by officers in the Land Department. Indeed, one of the strongest assertions of the existence of the power is the frequently quoted statement of Secretary Teller made in 1881: 'That the power resides in the Executive from an early period in the history of the country to make reservations has never been denied either legislatively or judicially, but on the contrary has been recognized. It constitutes in fact a part of the Land Office law, exists ex necessitati rei, is indispensable to the public weal and in that light, by different laws enacted as herein indicated, has been referred to as an existing undisputed power too well settled ever to be disputed.' 1 L. D. 338 (1881-83)."

The court says further:

"It may be argued that while these facts and rulings prove a usage they do not establish its validity. But," says the court, "*government is a practical affair intended for practical men.*"

And upon the practice of the government officers with respect to such practical affairs, the court sustained the right of the President to make such a reservation without statutory authority, citing a number of cases in support of such action.

In the present case, there is no question about the President's reservation of Annette Island being in conflict with the preceding act of Congress. It is not; but, on the contrary, the reservation is in conformity with the purpose of the act and was designed to carry that purpose into practical effect. Section 15 of the Act of March 3, 1891, reserved that island for the use of the Metlakahtla Indians and such other Alaskan natives as might join them. What use? These Indians are not agriculturalists, and, if they were, the island is practically worthless for that purpose, since the island has very little agricultural land upon it. These Indians are fishermen and hunters, and they obtain their living by fishing and hunting, mainly by fishing in waters such as surround Annette Island. The island was then reserved for the habitation of these Indians and for their use in obtaining their food supply from the waters immediately surrounding the island. Now if, as the Supreme Court says in the Midwest Oil Case, the "government is a practical affair intended for practical men," we can think of nothing more practical, under all the circumstances, than the reservation by the President of the waters immediately surrounding Annette Island for the use and benefit of these Indians; and this was undoubtedly the practical purpose Congress had in view when it made the original reservation.

[2] But did the President's authority to reserve lands belonging to the public domain give him authority to reserve the waters surrounding Annette Island "within three thousand feet from the shore at mean low tide"? Alaska is a territory of the United States. Annette Island is in that territory. The United States is therefore the owner in fee of the island and its shores; that is to say, it is the owner of the upland on the island and all the land between the high and low water marks. It is also the owner of the soil under all the navigable waters surrounding the island, and is sovereign and has dominion over all.

In Shively v. Bowlby, 152 U. S. 1, 47, 57, 14 Sup. Ct. 548, 566 569 (38 L. Ed. 331), the Supreme Court, considering the diversity

of view disclosed by the discussion as to the scope and effect of the previous decisions of the court upon the subject of public and private rights in lands below high-water mark of navigable waters, deemed it to be a fit occasion for a full review of those decisions and the consideration of other authorities upon the subject. The court then proceeds to review the leading decisions and authorities and reaches certain conclusions; among others, that, notwithstanding the dicta contained in some of the opinions of the court to the effect that Congress had no power to grant any land below high-water mark of navigable waters in a territory of the United States, it was not strictly true, and, after a review of the authorities, concludes that:

"By the Constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition. (Citing cases.)

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory."

Then, as a final summary of its conclusions, the court says:

"Lands under tidewaters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation, and *fishery*. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

"At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States.

"Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory. * * *

"The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, *may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tidewaters*. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union."

These conclusions were reached by the court in determining conflicting rights of private parties to certain shore lands fronting on the Columbia river at the city of Astoria; one party deriving title from a donation claim acquired under an act of Congress while Oregon was a

territory, and the other party claiming under a subsequent grant from the state of Oregon, pursuant to its statutes as a state.

In the present case, we are not dealing with the rights of grantees under conflicting grants, but with the scope and purpose of a reservation by the United States. It may be said therefore that the law declared in this case is dictum as applied to the question involved in the present case; but the court, in reaching the conclusions it did, found it necessary to review the whole question of public and private rights in the lands under the navigable waters of the United States and cites authorities in support of all of its conclusions. The statement of the law by the court is therefore controlling, and we must hold that the reservation of Annette Island by the act of Congress, and of its surrounding waters by the President's proclamation, is fully sustained.

[3] It may be objected further that the law as stated by the Supreme Court is not authority for the reservation of the waters adjacent to Annette Island for the reason that the reservation is for the benefit of the Metlakahtla Indians and not for the whole people. We think that such a reservation is for the benefit of the whole people. It protects the food supply of a whole tribe of Indians and other native Indians that may join them and provides the means for their self-support. In guarding against the possibility of these Indians becoming a public charge, the measure is clearly a public concern and for the benefit of the whole people.

[4] But, as we are not limited in our conclusions to the issues thus presented, we return to the original question, namely, have the appellants the right to enter upon the waters mentioned in the complaint and erect a fish-trap at the place designated? The Metlakahtla Indians are not parties to this action, and their rights under the reservation are not involved in this controversy. The appellants have no title to the soil under the waters where they have driven the piles for the fish-trap which is the subject of this complaint, nor have the plans for the structure been approved by the Chief of Engineers, nor the structure itself authorized by the Secretary of War. The United States, the complainant in this case, is the owner of the soil. The appellants, as defendants, are mere trespassers.

The law applicable to such a case was stated by the Supreme Court in Weber v. Harbor Commissioners, 18 Wall. 57, 21 L. Ed. 798. In that case the state of California had reserved certain lands in the navigable waters of the Bay of San Francisco for the construction of wharves. The lands were situated nearly half a mile from what was the shore of the Bay of San Francisco at the time California was admitted into the Union, and over which the water at the lowest tide then flowed at a depth sufficient to float vessels of ordinary size. Weber had a wharf erected in these waters which he claimed to own under a title derived from the city of San Francisco and by possession and prescription covering a period of 13 years. The court, referring to the proposition that in several of the states, by general legislation or immemorial usage, the proprietor whose land is bounded by the shore of the sea, or of an arm of the sea, possesses the right to erect a wharf or pier in

front of his land, extending into the waters to the point where they are navigable, said:

"In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those states where the common-law obtains. By that law the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters, is, in England, in the king, and, in this country, in the state. Any erection thereon without license is therefore deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a *purpresture*, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

On the southeast coast of Massachusetts is a body of water called Buzzard's Bay, an inlet of the Atlantic Ocean. It is about 30 miles in length and 5 to 10 miles in width. Over the waters of this bay the commonwealth of Massachusetts has assumed the jurisdiction which the United States has over the waters of Alaska, and has by statute made certain reservations and regulations governing the fishing industry carried on in the waters of the bay. Among other regulations, it has provided against the use of the purse seine in taking fish anywhere in the waters of the bay. In Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159, the Supreme Court of the United States had before it the question whether these regulations would prevail to exclude the defendant from taking fish in Buzzard's Bay by using a purse seine. The defendant was a citizen of Rhode Island and was engaged in fishing for menhaden with a steamer under a license issued by the United States. In the act of fishing, the defendant used no fixed apparatus, and the bottom of the sea was not encroached upon or disturbed. This latter fact was considered an important feature of the defense, and in this particular that case is distinguished from the present one and was a much stronger case for the defendant. Another defense was that the act complained of was committed upon the high seas, the common property of the people, and it was contended there, as it is here, that proprietary rights could not be reserved in such waters; that the characteristic feature of the proprietary title in the seashore was its limitation to low-water mark. The Supreme Judicial Court of Massachusetts held the statute of Massachusetts under which the defendant was being prosecuted constitutional and valid. Commonwealth v. Manchester, 152 Mass. 230, 25 N. E. 113, 9 L. R. A. 236, 23 Am. St. Rep. 820. The Supreme Court of the United States upon writ of error affirmed the judgment of the Massachusetts court, and, in doing so, it said:

"We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war, or for the prevention of frauds on its revenue, exercise an authority beyond this limit. Gould on Waters, pt. 1, c. 1, §§ 1–17, and notes; Neill v. Duke of Devonshire, 8 App. Cas. 135; Gammell v. Commissioners, 3 Macq. 419; Mowat v. McFee, 5 Sup. Ct. of Canada, 66; The Queen v. Cubitt, 22 Q. B. D. 622; St. 46 & 47 Vict. c. 22."

In concluding the opinion, the court said:

"We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the state in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the state."

The jurisdiction exercised by the commonwealth of Massachusetts over the waters of Buzzard's Bay is the jurisdiction which the United States has over the waters of Alaska; and, under the law as declared in the case just cited and in Weber v. Harbor Commissioners, supra, the appellants have acquired no rights, vested or otherwise, to construct or maintain a fish-trap within the waters reserved by the President's proclamation.

The judgment of the District Court is affirmed.

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## NELSON v. REPUBLIC IRON & STEEL CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 22, 1917.)

No. 4674.

1. COURTS ⇐366(14)—FEDERAL COURTS—MINING LEASE—WHAT LAW GOVERNS.
A Minnesota mining lease is governed by the law of that state, and in construing such lease the federal courts must follow the decisions of the state courts.

2. MINES AND MINERALS ⇐56—MINING LEASES—CONSTRUCTION.
Under the Minnesota doctrine, a mining lease is not a sale of the ore, and the royalties reserved the purchase price; but the contract is one of lease as designated, and the amount stipulated to be paid by the lessee is rents, which is the compensation the occupier pays for the land for that species of occupation which the contract allows.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 166.]

3. MINES AND MINERALS ⇐70(2)—MINING LEASES—CONSTRUCTION.
A mining lease, having provided for payment of royalty for every ton of ore mined, declared that within one year from the completion of a railroad within four miles of the land there should be mined at least 10,000 tons of ore per annum, and, in case the lessee should fail to remove the 10,000 tons specified, the lessee should pay to the lessor the royalty on that number of tons. The contract further declared that, if the lessees desired to keep the lease in force beyond a fixed day, they should pay to the lessor $1,000, which, together with the $1,000 paid upon the execution of the lease, should apply on the first royalty due. *Held* that, in view of the provision for application of the initial payments on royalties to become due, payments of the minimum stipulated royalty where no ore was mined cannot be applied on ore subsequently removed.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 193.]

4. MINES AND MINERALS ⇐70(2)—CONTRACT—CONSTRUCTION.
Where a mining lease providing for payment of royalty on a minimum tonnage of ore, though it was not mined, made no provision for the application of such minimum royalties on ore thereafter mined, receipts signed by the owner, reciting that he had received the full royalty or rent, and others of which used the terms "royalty," "advance royalties," or "rents"

indiscriminately, do not show a practical construction by the lessor that such minimum royalties might be applied on ore subsequently mined; the question of the construction of the contract, though in the minds of the lessee preparing the receipts, not being communicated to the lessor.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 193.]

5. MINES AND MINERALS ⟸62(1)—MINING LEASES—PRACTICAL CONSTRUCTION.
A practical construction by a lessor is not binding where the mining lease construed was plain and unambiguous.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 175–180.]

6. MINES AND MINERALS ⟸70(2)—MINING LEASES—CONSTRUCTION—ESTOPPEL.
The lessor of mining property whose lease provided for the payment of royalty on a minimum number of tons regardless of the number mined, at the request of one interested in the lease, executed an instrument reciting the amount of the payments of advance royalties by the several parties in interest. There were conflicting interests among the lessees, and it was claimed that the lessor had been overpaid. The instrument which was in the form of a receipt was prepared by one of those interested in the lease who had also acted as attorney for the lessor in other matters. It appeared that lessor had executed other mining leases which provided that payment of advance royalties should be applied on ore subsequently mined. The receipt was prepared as an attempt to secure a construction by the lessor as to whether payments of minimum royalties might be applied on ore subsequently mined, but that matter was not called to his attention. *Held*, that the lessor was not estopped from denying that such payments could not be applied to ore subsequently mined; for, where the statement or conduct is not resolvable into a statement of fact, the party making it is not bound, unless he was guilty of clear moral fraud, or unless he stood in a relation of confidence towards the one to whom it was made.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 193.]

7. ESTOPPEL ⟸84—EQUITABLE ESTOPPEL—WRITTEN INSTRUMENT.
A mere statement by a mining lessor of opinion as to law governing the lease, which was not a declaration or admission of fact, will not estop him as to one subsequently acquiring the lease from taking a different position as to the true interpretation.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 219.]

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by the Republic Iron & Steel Company against Benjamin F. Nelson and others. From a judgment for plaintiff, the named defendant appeals. Reversed and remanded, with directions.

March 18, 1893, the appellant, with others, made to one Azro T. Crossley and others a mining lease on 40 acres of land in Itasca county, Minn., for the term of 50 years from and after the 1st day of April, 1893. The indenture evidencing the "contract, lease and demise" of said premises contained the following provisions which are or may be deemed pertinent in the determination of this case:

"Which premises are leased to the parties of the second part for the purposes of exploring for, mining, taking out and removing therefrom, the merchantable shipping iron ore which is, or which hereafter may be, found in or under said land, together with the right to construct all buildings, make all excavations, openings, ditches, drains, railroads, wagon roads, and other improvements upon said premises which are (—) may become necessary or suitable for the mining or removal of iron ore from said premises, with the right, during the existence of this lease, to cut and use the timber found upon the said premises for fuel, and so far also as may be necessary for the construction of build-

ings required in the operation of any mine or mines on the premises hereby leased, as also the timber necessary for drains, tramway and supports for such mine or mines.

"The party of the first part further agrees that the parties of the second part shall have the right under this agreement to contract with others to work such mine or mines, or any part thereof, or to sub-contract the same, and the use of said land, or any part thereof, for the purpose of mining for iron ore, with the same rights and privileges as are herein granted to the said parties of the second part. The parties of the second part, in consideration of the premises, hereby covenant and agree to and with the parties of the first part, that the parties of the second part will, on or before the twentieth day of April, 1894, July, 1894, October, 1894, and January, 1895, and at the same times in each year after said 1894, during the period hereinbefore stipulated, or during the period this contract continues in force, pay to the said Benjamin F. Nelson for all the iron ore mined and removed from the said land during the three months preceding the first day of the month in which payment is to be made, as aforesaid, at the rate of twenty-five (25) cents per ton, for all iron ore taken out, mined and carried away, each ton to be reckoned at twenty-two hundred and forty (2,240) pounds.

"The parties of the second part further covenant that within one (1) year from the completion of a railroad within four (4) miles of said land, there shall be mined and removed therefrom at least ten thousand (10,000) tons of iron ore, and at least ten thousand (10.000) tons shall be annually thereafter mined and removed therefrom, and in case the said parties of the second part shall not annually remove from the said land the ten thousand tons of ore as above stipulated, the parties of the second part shall pay to said B. F. Nelson a royalty of twenty-five cents per ton on ten thousand tons, which payment shall be made quarterly, as above specified.

"Provided further, that if second parties wish to keep this lease in force after October 1, 1893, they shall on that date pay to said first parties (1,000.00) one thousand and $^{00}/_{100}$ dollars, which, together with the (1,000.00) one thousand & $^{00}/_{100}$ dollars paid upon the execution of this lease shall apply on the first royalty due under it; failure to pay said (1,000.00) one thousand & $^{00}/_{100}$ dollars on October 1, 1893, shall make this lease void. And it is agreed that the date at which royalties shall commence shall not be earlier than January 1, 1894.

"It is mutually understood and agreed that upon the termination of this agreement, whether by the acts of the parties, or either of them or by limitation, the parties of the second part shall have ninety (90) days in which to remove all engines, tools, machinery, railroad tracks and structures erected or placed by said parties on said land but shall not remove or impair any supports placed in the mines, nor any timbers or frame work necessary to the use and maintenance of shafts or other approaches to the mines or tramways within the mines.

"The parties of the second part shall open, use and work the said mines in such manner only as is usual and customary in the skillful and proper mining operations of similar character when conducted by the proprietors themselves on their own lands, and so as not to do, cause or permit any unnecessary or unusual permanent injury to the same, or inconvenience or hindrance in the subsequent operating of the said mine, and in the working of said mines, the parties of the second part shall deposit all earth, rock and other useless material or rubbish at such places and in such manner as will not conflict with or embarrass the future operating of said mines."

In 1902 appellee Charles A. Smith had acquired the rights of the lessees under this lease. It appears to be conceded, as stated in appellant's brief, that at that time no ore had been removed from the land, and no payments had been made by the lessees except the two payments of $1,000 each, one when the lease was executed and one on Octobr 1, 1893; that the lessees claimed that other payments were not due because a railroad had not yet been completed to within four miles of the land; the lessor claiming that such a railroad had been built. June 2, 1902, a supplemental agreement was entered into between the lessors and Smith in which the following provision appears:

"The first parties also agree that they have not now any claim or demand for rent of said premises or for royalty and will not make any claim for rent of said premises or royalty for the period during which the second party is permitted under this agreement to explore said premises. The first parties further give the second party until July 1, 1903, in which to explore the said premises upon the terms and conditions provided for in said lease."

June 29, 1903, pursuant to the terms of the latter agreement, Mr. Smith wrote appellant as follows:

"I have so far completed the exploration thereof that I am satisfied there is a mine of merchantable iron ore on said piece or parcel of land. I respectfully notify you that I shall begin to make payments of royalties from and after July 1, 1903. * * * I further respectfully notify you that I claim as a credit upon the first royalties due under said lease from and after July 1st, 1903, the sum of two thousand dollars heretofore paid upon said lease pursuant to the terms thereof."

It appears further that on July 11, 1904, appellees Blue Ore Mining Company and Fred B. Snyder had acquired from appellee Smith an interest in said lease, and payments were then made on account of minimum royalties provided by the terms thereof. There was at that time a dispute between said Blue Ore Mining Company and Snyder as to the ownership of one-twentieth of the mine. Each claimant, to preserve his rights, for a short time paid a proportionate part of the royalty on the interest in the mine claimed by him. This resulted in overpayments.

Again, in 1906, the Paxton Mining Company, a corporation, claimed to have acquired this lease, and a dispute which had arisen between that company on the one hand, and the Blue Ore Mining Company, Smith, and Snyder on the other, over the title to the leasehold, led to litigation. While this was pending, in 1906 and 1907, all parties paid royalties according to their respective claims, and again double payments resulted, for which the proper party or parties must eventualy be entitled to refund. These disputes over the title culminated in an adjustment which was tentatively agreed upon on August 8 and 9, 1907, and consummated August 17, 1907. By this adjustment appellees Blue Ore Mining Company, Charles A. Smith, and Fred B. Snyder sublet the premises to the Paxton Mining Company, which, in turn, on August 19, 1907, assigned this sublease to the Republic Iron & Steel Company. Appellant was not a party to these proceedings, but knew generally of the negotiations pending and of their final consummation. In the sublease to the Paxton Mining Company the Blue Ore Mining Company covenanted that it had caused to be paid to the lessors, as advanced royalty, the sum of $5,000, and that under the terms of the lease it was then entitled to mine and remove, without any further payment therefor, iron ore when mined, in excess of the minimum therein provided for, to the amount of 20,000 tons by reason of such payment. Appellees Smith and Snyder made a similar covenant covering payments of $4,431.25, and the right to mine and remove 17,725 tons of iron ore without further payment therefor—all of which rights were thereby transferred to said Paxton Mining Company. The latter company had, itself, paid minimum royalties finally computed as amounting to about $3,125. Those paid by Smith and Snyder were likewise ultimately reduced to $4,375.

At the time the foregoing transaction was formulated and closed, it was understood by all the parties thereto that appellee Republic Iron & Steel Company was to purchase this leasehold from the Paxton Mining Company, and, among other considerations, was to pay the latter company a bonus of $200,000, and also repay to the respective parties who had paid the same the minimum royalties aggregating $12,500 as aforesaid.

After the assignment of the lease to it, the Republic Iron & Steel Company continued to make payments to appellant, before any iron ore was removed from the mine, at the rate of $625 per quarter, as provided by the lease, until July 1, 1909, amounting to $4,375. Thereafter, when ore was mined and removed from said land by the Republic Iron & Steel Company, that company undertook to apply a portion of the royalty theretofore paid to the payment of royalty upon the ore so mined and removed, claiming the former to be advance

royalty and subject to such application. Appellant objected thereto, and demanded that the Republic Iron & Steel Company pay royalty at the rate prescribed in the lease for all ore mined and removed in each quarter year, without making any allowance for or deduction on account of royalties already paid by that company and its predecessors in interest, and threatened that, unless payment was made to him in accordance with said demand, he would declare a forfeiture of the lease under its provisions. Accordingly, this suit was brought by the Republic Iron & Steel Company against appellant, the Paxton Mining Company, the Blue Ore Mining Company, Charles A. Smith, and Fred B. Snyder as defendants, to restrain appellant from refusing to allow the application of any royalty, paid under the minimum requirements of said lease in excess of ore mined and removed, upon ore thereafter mined and removed in any quarter year in excess of the minimum requirements of said lease, and from threatening or attempting to enforce a forfeiture of said lease by reason of any such application; further, for the recovery of all sums so paid to him in excess of that to which he is entitled under the terms of said lease, if any such be found, and further that the decree entered herein shall be binding upon the other defendants in the event of the court holding that the plaintiff is not entitled, as against appellant, to apply the sum of $12,500 repaid to him by the Republic Iron & Steel Company. All the other defendants, by their answers, made common cause with complainant, claiming that under a proper construction of the lease in question all payments, made as minimum royalties before the removal of ore, should thereafter be applied as part of the purchase price of ore actually removed. They further claim that, by the form of the receipts accepted, the defendant Nelson had made a practical construction of the lease to the same effect; that by a statement known as Exhibit V, made by appellant during the progress of the negotiations resulting in the sublease to the Paxton Mining Company and its subsequent assignment to the Republic Iron & Steel Company, appellant is estopped from asserting any absolute claim to such payments for minimum royalties, and has waived any rights which he might otherwise have had. Appellant therefore appears as the real and substantial defendant in the controversy. The court found the issues in favor of the plaintiff Republic Iron & Steel Company, holding:

"That by the true construction of said lease, as shown by the evidence in this case, and, especially, by the construction placed thereon by the parties thereto and their successors in interest until the month of October, 1909, all amounts paid by the lessees, as royalty on ore, in advance of the mining thereof, under said provision requiring the mining and removal of 10,000 tons annually, or the payment of a royalty thereon if not mined and removed, were to be treated as the payment of advanced royalty on ore thereafter to be mined, and the lessees had the right to mine and remove an amount of ore equal to that upon which such advanced royalty had been paid, without further payment therefor, in any year after the full amount of 10,000 tons had been mined and removed from the land."

And further:

"That defendant Nelson is now estopped, as to all the other parties to this action, from claiming any other construction or meaning therefor."

David F. Simpson, of Minneapolis, Minn. (William A. Lancaster and Milton D. Purdy, both of Minneapolis, Minn., on the brief), for appellant.

Oscar Mitchell, of Duluth, Minn. (J. L. Washburn, W. D. Bailey, and A. C. Gillette, all of Duluth, Minn., and O. T. Fell, of Pittsburgh, Pa., on the brief), for appellee Republic Iron & Steel Co.

Fred B. Snyder, of Minneapolis, Minn., for appellees Snyder and Smith.

Before SANBORN and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge (after stating the facts as above). The issues presented for determination are thus defined by the various parties:

As stated by appellant:

"The single question presented by this appeal is: 'Can the stipulated payments under a mining lease, made in advance of ore being removed, be applied on ore subsequently removed, in the absence of any provision for such application and contrary to the express requirements of the lease?'"

Counsel for Republic Iron & Steel Company say:

"The issue to be determined on this appeal is whether the minimum payments made, under the mining lease in question, in advance of mining ore, are to be treated as 'advance royalty', or as 'dead rent.'"

Appellee Snyder, for himself and appellee Smith, puts it thus:

"Can payments of 'royalty' made, under the terms of the Nelson indenture, in advance of ore being mined and removed, be applied on ore subsequently removed in excess of minimum requirements? If this question is answered in the affirmative, appellant's appeal must fall. If in the negative, it must be sustained unless the appellant has, as to these appellees, either: (a) Lost his rights by a practical construction of the contract; or (b) suffered an estoppel; or (c) waived his rights."

By common consent, then, we turn first to consideration of the controlling clauses of this indenture. It will be noted that they contain no language expressly authorizing or permitting payments of royalty, required to be made in advance of ore being mined and removed, to be applied on ore subsequently removed in excess of minimum requirements. If, then, the right exists, it must be by implication, and must flow from the necessary legal effect of the terms employed.

[1, 2] Appellees base their contention primarily upon the nature of the estate created by an instrument of this sort. They insist that, by the grant, the lessees were made the owners of the ore; that the lease is in reality a sale of the ore, and the royalties reserved are, in fact, the purchase price of it. It is therefore argued that the right to apply such royalties, previously paid, to ore subsequently mined and removed, results naturally and necessarily from the character of the transaction. Authorities conceived to be in support of this theory are cited; among them, Diamond Iron Mining Co. v. Buckeye Iron Mining Co., 70 Minn. 500, 73 N. W. 507; Muhlenberg v. Henning, 116 Pa. 138, 9 Atl. 144; Plummer et al. v. Hillside Coal & Iron Co., 104 Fed. 208, 43 C. C. A. 490; Wilmore Coal Co. v. Brown (C. C.) 147 Fed. 931; In re McFadden's Estate, 224 Pa. 443, 73 Atl. 927; Von Baumbach v. Sargent Land Co., 219 Fed. 31, 134 C. C. A. 649.

Appellant relies upon the doctrine announced in Minnesota, supported by decided cases in other jurisdictions, that under these mining leases the amounts stipulated to be paid by the lessees are rents and not the purchase price of mineral in place; that they are "the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows"—citing State v. Evans, 99 Minn. 220, 108 N. W. 958, 9 Ann. Cas. 520; Boeing et al. v. Owsley, 122 Minn. 190, 142 N. W. 129; State v. Royal Mineral Ass'n, 132 Minn. 232, 156 N. W. 128; Saulsberry v. Saulsberry, 162 Ky.

486, 172 S. W. 932, Ann. Cas. 1916E, 1223; Kissick et al. v. Bolton et al., 134 Iowa, 650, 112 N. W. 95; Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215; Wonsetler et al. v. Andrews et al., 58 Ohio, 551, 51 N. E. 168; Woodruff v. Gunton, 222 Pa. 384, 71 Atl. 851; Gilmore v. Ontario Iron Co., 86 N. Y. 455; Berwind-White Coal Min. Co. v. Martin, 124 Fed. 313, 60 C. C. A. 27.

Of course, in the elaborate briefs of counsel on both sides, many cases other than those above selected are deemed to bear more or less directly upon this point in issue; but the foregoing are thought to be sufficiently comprehensive fully to disclose the divergent theories. The Minnesota rule must be conceded to be as claimed by appellant. The Supreme Court of that state holds that instruments called and operating as mining leases "are leases in fact as well as in name, and the amount stipulated to be paid by the lessees are rents." This doctrine, first suggested in State v. Evans, supra, was approved in Boeing v. Owsley, and expressly confirmed in the very late case of State v. Royal Mineral Ass'n after full consideration of previous decisions in various jurisdictions, both state and federal. The court said:

"We adhere to the doctrine of the Evans and Boeing Cases, and hold these instruments leases. It follows logically that the amounts stipulated to be paid by the lessees are rents, and they were expressly held by this court to be rents in the Boeing Case, supra, a case which involved a construction of the very leases now before the court. They are 'the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows.'"

This is a Minnesota contract, and, as between private parties, it is our duty to follow the decisions of the Minnesota court of last resort establishing a rule of property in that jurisdiction. Kuhn v. Fairmont Coal Co., 215 U. S. 349–360, 30 Sup. Ct. 140, 54 L. Ed. 228; Wilmore v. Brown (C. C.) 147 Fed. 931; Polk et al. v. Mutual Reserve Fund Life Ass'n et al. (C. C.) 137 Fed. 273; Smith et al. v. Guffey et al., 202 Fed. 106, 120 C. C. A. 436. This being so, it is unnecessary to attempt a reconciliation of conflicting decisions in other jurisdictions. In Von Baumbach v. Sargent Land Co., supra, this court was construing a federal statute in a case between the government and a private corporation. Here, we have under consideration a Minnesota contract between private parties affecting property rights in that state, and in such case we are bound by the construction placed upon it by the local courts. Von Baumbach v. Sargent Land Co., 242 U. S. 503, 37 Sup. Ct. 201, 61 L. Ed. ——.

[3] It is obvious then that the claim of appellees is not sustained by the nature of the estate created by the lease in question. Are its terms susceptible of the interpretation for which they contend? We do not think so. It provides clearly and without ambiguity for a minimum annual payment within one year from the completion of a railroad within four miles of said land, irrespective of the mining and removal of ore during that year and unconditioned thereby. The fact that this annual payment is computed as royalty upon a required minimum production of 10,000 tons of iron ore does not change the nature of the transaction. The provision is for an annual minimum compensation "for that species of occupation which the contract between

them allows." Such a provision is not unusual in such leases. It is inserted to insure diligence and promptitude in mining. Diamond Iron Mining Co. v. Buckeye Iron Mining Co., 70 Minn. 500–505, 73 N. W. 507; Lehigh Valley Coal Co. v. Everhart, 206 Pa. 118–124, 55 Atl. 864; Gilmore v. Ontario Iron Co., 86 N. Y. 455.

The decided cases do not support the contention of appellees that the right of future application is implied from the nature of the transaction in the absence of provision in the lease itself authorizing or permitting such application. On the contrary, it appears from the record that in a majority of leases such authority is expressly given. As was said in Wonsetler et al. v. Andrews et al., 58 Ohio St. 551–557, 51 N. E. 168, 169, 170:

"The omission of such stipulation in the instrument under consideration would indicate that a different result was intended by the parties in this case. A stipulation of so material a character should not be supplied by construction."

It will also be noted that the lease in terms provided that the $2,000, to be paid at its execution and to keep it in force after October 1, 1893, should apply on the first royalty due under it; thereby, under ordinary rules of construction, excluding a like application of other payments in advance of mining. Furthermore, in his notification of June 29, 1903, appellee Smith claims credit for such sum upon first royalties due, but makes no similar claim for minimum royalties to be paid after July 1, 1903, although he makes express reference to the date when payment of such royalties should begin. These circumstances are not without their logical significance. We have given careful consideration to all points raised in argument and brief bearing upon the construction of this instrument, and nothing has been adduced which tends to disturb the conclusion we have reached.

[4] But it is insisted that, even though under the terms of the lease these payments in advance of ore being mined and removed cannot be applied on ore subsequently removed in excess of minimum requirements, nevertheless appellant has lost his rights by a practical construction of the contract. This contention is based upon the terms of certain receipts given by appellant at the times the minimum royalty payments were made. As stated in argument and brief, the first receipts were carefully drawn by appellee Smith. That dated July 11, 1904, stated that the payments made were for and on account of "advanced royalty or rent" due under the lease. The following clause also appears:

"With this payment I have received on account of said lease the sum of twenty-five hundred and twenty-five dollars ($2,525), being the royalty or rent in full on said lease for the year ending July 1, 1904, and twenty-five dollars ($25) additional, which said sum of $25.00 I hold in trust for whoever may be rightly entitled thereto."

Other receipts and letters used the terms "advanced royalties," and still others, "advance royalties or rent." In others, we find the terms "royalty," "royalties," "royalty on mining lease," "advance rent or royalty due on lease," and "amount due on Nelson lease." Those receipts, upon which special emphasis is placed, were drawn by the ap-

pellee Snyder; a few of the others were drawn by appellant. In the latter, the term "advanced royalties," does not appear; where it does appear, it is more often used in the disjunctive with the word "rent." Appellant himself uses the words "royalty" or "royalties" and "rent" apparently without distinction. In mining leases, these words "rent" and "royalty" are used interchangeably to convey the same meaning. Saulsberry v. Saulsberry, 162 Ky. 486, 172 S. W. 932, Ann. Cas. 1916E, 1223; 27 Cyc. 710. Taking the receipts as a whole, it is obvious that no uniformity in phraseology was attempted. Appellant states that when he signed these receipts he had not in mind any distinction between the different phrases used, and did not suppose that any of them had any effect upon the terms of the lease; that at the time they were given there was and had been no discussion as to whether royalties paid could be applied on ore subsequently taken out. We do not think these receipts, under their terms, or under the circumstances of their issuance and acceptance, make out a case of practical construction unfavorable to appellant. He gave them, as payments were made, without thought that they could operate, or were intended to operate, to change the terms of the lease. Many, perhaps most of them, could have no such effect. It is urged that appellee Snyder carefully prepared those first given for the purpose of determining whether they would meet with objection from Mr. Nelson, and therefore of eliciting from him a casual interpretation of the terms of the lease. He did not, however, in his communications, nor in the terms of the receipts themselves, frankly call attention to the question in his mind, nor use expressions which could be presumed to challenge the attention of the lessor. It devolved upon him and his associates to satisfy themselves of the legal effect of this indenture at the time they acquired their interest in it. The plain intendment of the terms of a written instrument is not lightly to be set aside through indirection and inadvertence.

[5] There is another reason why this contention of appellees must fail.

"It is only where there is doubt as to the meaning of the terms used, or the writing is silent or incomplete as to a given point, that the courts in interpreting the contract will resort to a practical construction which the parties may have put upon it." St. Paul & Duluth R. Co. v. Blackmar, 44 Minn. 514–518, 47 N. W. 172; Coal Creek, etc., Co. v. Tennessee Coal, etc., Co., 106 Tenn. 651–687, 62 S. W. 162; Twin Tree Lumber Co. v. Ensign et al., 193 Ala. 113, 69 South. 525; Tustin v. Philadelphia & R. C. & I. Co., 250 Pa. 425, 95 Atl. 595; Railroad Co. v. Trimble, 10 Wall. 367–377, 19 L. Ed. 948; Barber Asphalt Paving Co. v. City of St. Paul, 224 Fed. 842, 138 C. C. A. 558.

The contract under consideration is clear, complete, and unambiguous. In such case, the mere opinion of either party as to its meaning cannot control, nor was appellant required, before receipting for payments made under it, to guard against an inadvertent misconception of its plain and unequivocal terms.

[6] As has been heretofore stated, in the sublease to the Paxton Mining Company, appellees Blue Ore Mining Company, Smith, and Snyder covenanted that they had paid to appellant the sums therein mentioned as advance royalty under the terms of said lease, and to

that extent were entitled to mine and remove ore without further payment therefor. This right was transferred to the Paxton Company, and by it to appellee Republic Iron & Steel Company, which ultimately paid to the Blue Ore Mining Company, the Paxton Mining Company, and Smith and Snyder the amounts so paid by them as alleged advance royalties. After the instruments evidencing these transactions had been formulated and executed, but before the final transfers had been made, appellee Snyder, with his attorney Lind, who also represented appellee Smith, visited appellant for the purpose of getting a statement of all the moneys theretofore paid by the various parties in interest as minimum royalties in advance of the mining and removing of ore. This visit resulted in the execution by appellant of an instrument known as "Exhibit V," which, omitting the attached statement of amounts, reads as follows:

"This will certify, that I have received prior to this date, as advance royalties to apply on iron ore mined from the southeast quarter (S. E. ¼) of the southwest quarter (S. W. ¼) of section twenty-three (23), township fifty-seven (57), range twenty-two (22), under the lease now outstanding thereon, the several sums of money specifically set forth in the statement hereto attached, aggregating $12,500.00, of which the Paxton Iron Mining Company has paid $3,125.00, the Blue Ore Mining Company has paid $5,000, and Charles A. Smith and Fred B. Snyder jointly have paid $4,375.00. (C. A. S. $3,500.—F. B. S $875)

"Dated August 9th, 1907. B. F. Nelson.

"Checked & correct. F. B. S."

Appellees claim that this was a specific representation by appellant that the prior payments now in suit were advance royalties which they are entitled to apply on ore subsequently mined; that the sublease to the Paxton Company and the assignment thereof to the Republic Company were finally made and consummated upon the faith of this representation; and therefore that appellant is now estopped to place any different construction upon the terms of the lease.

It has alreeady been stated that because of controversies between the Blue Ore Mining Company and Smith and Snyder at one time, and between the Blue Ore Mining Company, Smith, and Snyder, and the Paxton Mining Company at another time, as to their respective interests in the lease in question, certain admitted overpayments, or rather duplicate payments, had been made to appellant. There was at all times between these parties, until the statement of amounts contained in Exhibit V, a dispute as to the precise amount which each of the above-named parties had paid. For this reason, it was desirable that an exact statement of these amounts should be procured from appellant. Appellant and his bookkeeper say that this was the only subject-matter in mind when this statement was applied for by Snyder and Lind. The latter say that their object was to get from appellant an expression of his construction of the terms of the lease on the right of application of these payments to ore subsequently mined; that they told him that the Republic Company was about to become a purchaser and to repay these sums on the theory that these rights existed. The testimony of Lind and Snyder does not satisfactorily reveal that such a purpose was disclosed to appellant. The terms of the lease were

not referred to in these discussions, nor was it brought home to appellant that a construction of those terms on his part was sought. He says he read the statement contained in Exhibit V and was aware of the import of its language, but that he owned at least one other lease, in the making of which appellee Snyder had acted as his attorney, and in which the right of future application of previous payments had been expressly reserved. No examination of any lease was made at the time this statement was indorsed as checked by appellee Snyder, in whom he had confidence, and he took it for granted that it followed the provisions of the lease then under consideration. Under these circumstances, this transaction is altogether analogous to those heretofore considered, involving a claimed practical construction by implication from the language of receipts. Not satisfied with the legal effect of the receipts theretofore given, appellees again sought, through Exhibit V, to obtain from appellant another expression of opinion as to the meaning of the written instrument. In our judgment, the effort must fail for practically the same reasons heretofore assigned.

"Where the statement or conduct is not resolvable into a statement of fact, as distinguished from a statement of opinion or of law, and does not amount to a contract, the party making it is not bound, unless he was guilty of clear moral fraud, or unless he stood in a relation of confidence towards him to whom it was made." Michie's Encyclopedia of U. S. Sup. Ct. Rep. vol. 5, p. 948; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Mutual Life Ins. Co. v. Phinney, 178 U. S. 327–342, 20 Sup. Ct. 906, 44 L. Ed. 1088.

Especially is this true where the parties have the written contracts before them, and are presumed, as a matter of law, to know their legal effect and operation. In these negotiations all the appellees were represented by lawyers of exceptional ability, especially conversant with mining leases; all were admittedly familiar with the lease in question and keenly alive to the provisions concerning royalty payments. They were presumed to know the legal effect of those provisions; that they did know it is evidenced by the activity displayed in seeking to elicit from appellant an expression of opinion or construction favorable to them. Their opportunity for full and complete understanding of the law and facts involved was certainly equal to, if not greater than, that of appellant. They were not deceived nor induced to rely upon admissions or representations concerning unfamiliar matters. Appellant was a layman of complex business affairs. His conduct discloses no suggestion of moral fraud. He may very well have labored under a misapprehension of the terms of this particular lease, to which his attention was in no wise especially directed. At the most, his statement amounted to a mere expression of opinion as to the legal effect of clauses which appellees and their counsel knew as well as or better than he did. The essential elements of estoppel are not present. The appellant clearly had no intention of relinquishing any of his substantive rights, nor did his acts, under the circumstances disclosed by the record, have that legal effect. The foregoing considerations dispose of the claim of waiver as well as that of estoppel.

[7] All the appellees, except the Republic Iron & Steel Company, find themselves in no worse position than that originally occupied by

them. The latter company is conceded to have its remedy against its grantors for payments made to them. As to subsequent payments to appellant made by the latter company, it could not, in any event, rely upon a mere statement of opinion as to the law of a contract, not a declaration or admission of fact, to such extent as to estop appellant from subsequently taking a different position as to the true interpretation of the written instrument. Sturm v. Boker, and Mutual Life Ins. Co. v. Phinney, supra.

Inasmuch as all the parties in interest are in court, and their several rights and obligations have been made clearly to appear, the finding should be for the defendants Benjamin F. Nelson and Mary Nelson, and the plaintiff should have and recover from the other defendants such sums as may be found due upon the record under the issues framed. Costs will be taxed under the principles, rules, and practice in equity.

The decree of the court below will be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion. It is so ordered.

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## KEYSTONE WOOD CO. v. SUSQUEHANNA BOOM CO.

(Circuit Court of Appeals, Third Circuit. March 8, 1917.)

No. 2174.

1. NAVIGABLE WATERS ⟸22(1)—OBSTRUCTION—DAMS.
The franchise or privilege of damming back the waters of a navigable stream can be granted only by the state.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 100–102, 108–113, 115.]

2. EVIDENCE ⟸29—JUDICIAL NOTICE—LEGISLATIVE ACTS OF STATES.
The federal court will take judicial notice of state legislative action making a river within the state a public navigable stream and authorizing the damming of one of its branches.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 36, 37, 39, 43–46, 48.]

3. CORPORATIONS ⟸613(1)—FORFEITURE OF FRANCHISE BY NONUSER—COLLATERAL INQUIRY.
A boom company, incorporated under Act Pa. March 26, 1846 (P. L. 190), constructed a dam across a navigable river under the authority of the supplemental act of December 11, 1866 (P. L. 1867, p. 1535). The latter act required the filing of a bond conditioned to indemnify riparian owners for the flooding of their lands. Long after the construction of the dam, the boom company ceased to conduct the business for which it was incorporated; the company being incorporated to facilitate the rafting of logs from lands reached by the river on which its dam was located. While the timber of the district was largely exhausted, reforesting was in process. A riparian owner sued for damages for the flooding of his land; the state having refused to institute proceedings for the forfeiture of the company's franchise. *Held* that, as it must be presumed that riparian owners were indemnified for the flooding of their lands, no recovery could be had, for it could only be based on a theory of the for-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

feiture of the boom company's franchise, which question could not be collaterally raised by private individuals.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2431–2434.]

4. COURTS ⟸365—FEDERAL COURTS—PRECEDENCE.

While the federal court having jurisdiction in a particular state is an independent forum, and distinct from that of the state, yet it administers no different law than that administered by the state courts, and in a question involving state public policy should defer to the decisions of the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971.]

In Error to the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Action by the Keystone Wood Company against the Susquehanna Boom Company. There was a judgment for defendant on demurrer to plaintiff's statement (235 Fed. 800), and plaintiff brings error. Affirmed.

Certiorari denied by Supreme Court.

Mortimer C. Rhone, John G. Reading, and H. T. Ames, all of Williamsport, Pa., for plaintiff in error.

Max L. Mitchell and N. M. Edwards, both of Williamsport, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case the Keystone Wood Company, a corporation of New Jersey, brought suit against the Susquehanna Boom Company, a corporation of Pennsylvania, to recover damages in excess of $3,000 suffered by the alleged illegal flooding of its land by a dam which the Boom Company maintained. The defendant, justifying its right to maintain such dam under certain statutory authority of the state, submitted that legal question to the court below in an affidavit of defense which in substance was a demurrer. The court, after hearing, filed an opinion reported in 235 Fed. 800, which sustained the Boom Company's contention, and in pursuance thereof entered judgment in favor of defendant, whereon plaintiff took this writ.

[1-3] While in form what is here involved is a claim for damages for flooding certain land, the real issue is the further existence of a dam across the West branch of the Susquehanna river near the city of Williamsport, Pa. The pool formed by this dam extends upwards of 9 miles on the stream. A recovery in this case would be the forerunner of cases by other owners, and the dam in question would have to be abandoned. It is therefore apparent that the real thing here involved is the existence of the dam, since recovery by this plaintiff virtually means its destruction.

The defendant's right involved in this case is not the physical dam itself, but a property right which was vested before the dam was built, namely, the franchise or privilege of damming back the waters of

a large stream. Power to obstruct a stream like the Susquehanna river could be granted only by the state. If for its own purposes the state sees fit to grant such right, it would seem to follow that the state and it alone should determine how long its grant should continue, and whether and when it should be withdrawn, and that no mere private interest should, in a private suit, and without a notice to the state, put an end to a power which the state had called into being.

Turning, then, to the action of the state of Pennsylvania, we take judicial note that by due legislative action the state has made this part of the Susquehanna river a public navigable stream; and that the West branch of that stream was the main artery for marketing the great timber field of the Central Pennsylvania watershed. To further the marketing of its timber, the state by the act of assembly of March 26, 1846 (P. L. 190), incorporated the Susquehanna Boom Company, and authorized it to construct booms on the West branch and to charge certain rates for all timber handled. By the supplemental act of December 11, 1866 (P. L. 1867, p. 1535), the same company was given the franchise to erect and maintain a dam across the river at Williamsport, and in pursuance thereof this dam was built and is now maintained. This supplemental act provided that before building the dam the Boom Company should file a bond in $150,000, conditioned to indemnify riparian owners against damages for flooding their lands.

As the land here involved has been flooded by the dam pool for upwards of 50 years, and as there is no assertion of any protest or objection by its successive owners, we are warranted in assuming that due compensation was made by the Boom Company for the exercise of its easement of flooding said land, by virtue of a proceeding under the bond or by adjustment and conveyance between the parties. The franchise to erect the dam being then conferred on the Boom Company without time limitation by the state, and the easement to flood the locus in quo having been duly paid for and acquired from the predecessor in title of the plaintiff, the burden of showing that such franchise has been in some lawful manner terminated rests on the latter. It was stated at bar that at the instance of the present plaintiff a proceeding had been begun by the state of Pennsylvania at the instance of the Attorney General to vacate and forfeit this franchise. It was also stated that this proceeding was subsequently withdrawn by the state.

The case therefore resolves itself into the question whether, when the state had refused to vacate or annul a franchise it has granted, can such franchise be vacated or annulled at the instance of a private person, in a suit or proceeding to which the state is not a party? The plaintiff claims such right, and sets up as a ground of forfeiture a nonuser or abandonment of its franchise by the Boom Company. In that regard the allegation in the statement of claim is that about July 1, 1910, the Boom Company "ceased to do business as a boom company, the purpose for which it was chartered, and abandoned said dam for the use and purpose for which it was authorized to erect it."

Assuming for present purposes, as thus alleged, the nonuser of its

dam by the Boom Company for boom purposes, has the defendant the right in this suit to have the franchise vacated and annulled, for that, as we have seen, would be the practical effect of a judgment in its favor if the plaintiff recovers. We are of opinion the plaintiff has no such right, and the reason and spirit of the decisions of the highest court of Pennsylvania are to that effect.

From an examination of the legislation of Pennsylvania it will be seen that the chartering of this Boom Company and the subsequent legislation applying thereto constituted an important part in the development of the resources and industries of the state, and that the operation of this company was a subject of widespread interest, and such as peculiarly called for the exercise of the sovereign power of the state. The great watershed of which this branch of the Susquehanna was the only outlet was heavily timbered, and along it and the main river, clear to tidewater, timber was floated. While we may, for present purposes, assume the Boom Company has stopped booming logs, yet we can well take judicial notice of the fact that some timber is still carried to market down this branch; that the dam pool, with some 9 miles of slackwater, affords a safe harbor in transit for lumbering operations; that, as provided in the act of 1866, such dam has "a proper and suitable chute, not less than sixty feet in width, for the safe running of rafts," etc.; that a great reforesting and conservation work is now being carried on in the state in this watershed, which may hereafter call for the use of this dam in marketing such timber; that riparian owners, abutting 18 miles of this slackwater pool, have no doubt in the past 50 years of the dam's existence adjusted themselves to the pool as a permanent condition; and all these facts and considerations may possibly constitute grounds sufficient to warrant the state in refusing to vacate this franchise and abate this dam.

At any rate, it is apparent that this matter is one of such widespread interest that it should be treated as one of broad public concern and action, and should therefore be under permanent public control, rather than one that could be controlled at the instance of a private suitor and according to the views of a particular court and a particular jury. We note these facts, not to justify the public control of the state of Pennsylvania over the corporate creatures of its own creation and their franchise, but as showing the situation is such that it is reasonable to expect the courts would, when such question arose, naturally and properly hold that the state, and the state alone, should, in the nature of things, have exclusive control of the franchises it has granted. Indeed, seeing that the justification of a franchise grant by a state is that it is to the interest of the state that such grant of a public sovereignty should, for the time being, be exercised by private parties, it logically follows that the state should, for the same reasons, keep within its control the right of determining how long the public good warranted that public right should be continued.

[4] The question, then, being one of state policy, the case is peculiarly one in which the federal courts, exercising jurisdiction in such state, should ascertain what the highest courts of the state have

held as to such policy, for as said by this court, speaking by Judge Gray in Snare v. Friedman, 169 Fed. 11, 94 C. C. A. 379, 40 L. R. A. (N. S.) 367:

"Though a United States Circuit Court, having jurisdiction in a given state, is an independent forum, and distinct from that of the state, it administers no new or different law from that administered in the state court."

Turning to the state decisions, we find in Irvine v. Lumberman's Bank, 2 Watts & S. (Pa.) 190 (1841), the earliest reference to this policy of Pennsylvania. This was a suit by the Lumberman's Bank on a note given to it by the defendants. To sustain its case, the bank gave in evidence its charter which specified certain things, failing to do which the charter was absolutely null and void, and from thenceforth the bank should be taken as dissolved, unlawful, and unincorporated. To an attempt of the defendants to set up the bank's noncompliance with these conditions, and a consequent alleged forfeiture of its charter, the Supreme Court made answer as follows:

"These prohibitions and restrictions are very positive, and expressed in strong language; and if the bank had omitted or neglected to comply with them, and the proper steps had been taken, the charter would have been declared by the proper authority null and void. But the difficulty which meets the defendants is that we cannot judicially know, nor can we now investigate, the truth of these allegations; for, if there be anything settled beyond all cavil and controversy, it is that the violation of a charter of incorporation cannot be made the subject of judicial investigation in a collateral suit. The only evidence competent to prove the forfeiture of a charter, is the judgment of a court directly on the point; and no inferior evidence can be admitted for that purpose, unless it is otherwise directed by the Legislature in express and positive terms."

It will thus be observed that this case in substance holds that authority to forfeit a charter arises only by express legislative enactment. A study of the subsequent decisions of the state fails to disclose any recession from this early decision. On the contrary, we find it constantly cited, followed, and approved. In Dyer v. Walker, 40 Pa. 160 (1861), the Supreme Court so followed, saying:

"On the trial of this action of assumpsit, a plea involving the forfeiture or invalidity of the charter of the Turnpike Road Company, for some want of performance by the company, or agents of the state, was demurrable, or might have been treated as a nullity by the court. The validity of charters cannot be tried in this collateral way. Irvine v. Lumbermen's Bank, 2 Watts & S. (Pa.) 204. Consequently the court was right in refusing to affirm the plaintiff's point."

Western Pennsylvania R. R. Co.'s Appeal, 104 Pa. 406, involved the right of the parties to that suit to question certain charter powers granted under a special act of assembly not here involved. But in deciding that case the Supreme Court cited and followed Irvine v. Lumberman's Bank, supra, and called attention to the fact that the contract relation between the state and corporation precluded third parties from setting up a breach of such contract relations, when the state had not seen fit to raise such question. In that regard it was said:

"But the appellant, by its counsel, insists that the act of 1871 warrants a much wider investigation into causes of forfeiture than those which may ap-

pear merely from the conditions and limitations of a charter. In other words, the position of the commonwealth, as in a writ of quo warranto, may be assumed, and the mere nonuser of the franchise proved, in order to establish a forfeiture of the defendant's right to act under its charter. But to this we cannot agree. We are inclined to think that a forfeiture for such reason as this rests wholly with the state, and that to this extent, at least, the doctrine as stated in the cases of Irvine v. Lumbermen's Bank, 2 Watts & S. (Pa.) 204, and Dyer & Co. v. Walker, 40 Pa. 157, still prevails. The act of 1871 contemplates nothing more than that it shall be made to appear from the charter that the corporation has the power to do the particular act in controversy, and which involves some right of the contestant; but, when we get beyond this, we assume something with which we have no business in a collateral proceeding. We assume to assert the rights of a third party, the commonwealth, who may or may not, at her own option, insist upon the observance of those rights. The commonwealth and the Greenwood Railroad Company are like any other contracting parties. A contract may be forfeited by the laches of one of the parties to it; but, if the other does not choose to insist upon that forfeiture, no one else can take advantage thereof. The appellant alleges that the appellee has omitted to do something that it ought to have done under its contract with the state, and in consequence of which the state may move to have that contract annulled. Well, let it so be that the commonwealth may move for a rescission of this contract, yet by what warrant does the Western Pennsylvania Company assume to control the will of the commonwealth and to use the rights of the state for its own purposes? The commonwealth has put no limit, in the way of time, upon the exercise of the franchise granted to the defendant, and it is but an assumption on part of the appellant to suppose that, for the promotion of its own welfare, it can impose such a limit."

Following this was Philadelphia and Merion's Appeal, 187 Pa. 126, 40 Atl. 967 (1898), where the charter of a turnpike company gave it the franchise to construct and operate a street railway on its roadbed. This franchise it had never exercised. It was there contended the turnpike company had lost such franchise by its failure, for 38 years, to exercise the same. The Supreme Court, however, held:

"The right claimed by the appellee is a corporate franchise which has been granted by the commonwealth. Whether it has been forfeited by nonexercise or otherwise is a question between the commonwealth and her grantee. If the commonwealth does not choose to exercise her right to assert the forfeiture, the decisions, as we understand them, do not confer that right upon a private litigant. The appellant is such a litigant claiming a result only for its private advantage."

In Olyphant Water Company v. Olyphant Borough, 196 Pa. 556, 46 Atl. 897, the court after saying:

"We have uniformly held that the validity of a charter for a public purpose cannot be determined in a collateral proceeding by a private suitor. It can be done only in a direct proceeding to which the commonwealth is a party"

—referred to its late case of Downingtown v. Downingtown, 193 Pa. 255, 44 Atl. 282, wherein it is said:

"That the forfeiture of the plaintiff's charter cannot be inquired into or considered in this collateral proceeding is so thoroughly established by numerous and familiar decisions that even a reference to them is not necessary."

The plaintiff, however, while not denying that under these decisions a charter cannot be invalidated by a third person in a collateral pro-

ceeding, still contends that the principle of those decisions does not apply, but that the facts of the present case bring it under the principle of Jessup v. Loucks, 55 Pa. 360. Now, while it is true that literally and formally the plaintiff does not here seek to annul the defendant's charter, nevertheless it actually does seek to put an end to a franchise on the use of which the defendant's continued corporate life depends. But apart from this, a study of the cases cited by plaintiff's counsel shows they were decided on their own particular facts, and involved no general principle applicable to the case before us. For example, the case of Jessup v. Loucks, supra, was not one seeking to annul a charter or invalidate a franchise, and therefore we find it is never referred to in the cases we have cited on the annulling and invalidating of the franchise or charter of a corporation. On the contrary, the crucial point in Jessup v. Loucks was the existence of an alleged prescriptive right of the plaintiff, which it was alleged to have acquired from a certain chartered company which was not a party to the suit. As in that case, such company had abandoned the dam itself, and the plaintiff had built a new one, it was held first that:

"The works being abandoned, the authority of the company over them ceased with the user, and the easement acquired (in that case the right to flood defendant's land) reverted to the owners of the property from whom taken; * * *" and "secondly, the grant itself (in that case being 'the free, full, and uninterrupted use of all the water that shall not be wanted to carry on the purposes of said navigation,' etc.) being of an incident connected with or arising out of the principal object in granting the charter to the company, must necessarily expire with the principal, and cease when that ceases."

It will thus be seen the case was wholly different from the present. There the original company was not concerned. Twenty years before, as stated in the opinion, it "had ceased to maintain their works as a public highway, and permitted them to go out of repair and to fall into entire disuse." The fact of the abandonment of the dam itself was the ratio decidendi in Jessup v. Loucks, for as there said by the court:

"The fact of the abandonment by the corporation of its works was all the plaintiff had to concern himself about in this case. It is that fact which gives rise to the principle that abandoned easements [in that case, the easement of flooding the plaintiff's land] return or revive to the original owners. This position, therefore, does not present the case of a collateral impeachment of the existence of the corporation, as contended for by the defendants in error."

It will thus be seen that case fundamentally differs from the present. There the dam itself had been abandoned and the company did not assert its franchise to erect one. Here the dam is not abandoned, and the company asserts the franchise of the state to continue to maintain its dam. If in that case the Codorus Navigation Company had been maintaining its dam, as is the Susquehanna Boom Company in this case, it would seem the decision would have been other than it was. In view of the fact that this most relied on case cited by the plaintiff has no controlling pertinence to the present question, we refrain from discussing the other cases cited by counsel.

The judgment below is affirmed.

## STANDARD TRUST CO. OF NEW YORK et al. v. COMMERCIAL NAT. BANK et al.

(Circuit Court of Appeals, Fourth Circuit. March 8, 1917.)

No. 1466.

1. BANKS AND BANKING ⟸281—NATIONAL BANK—LIQUIDATION—EFFECT.
Liquidation by a national bank under Rev. St. §§ 5220, 5221 (Comp. St. 1913, §§ 9806, 9808), does not terminate the existence of the bank as a legal entity which can sue and be sued, and therefore an action against it is not barred within three years after liquidation by Revisal N. C. 1905, § 1200, limiting the right to sue a corporation to three years after its dissolution.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1075–1079.]

2. BILLS AND NOTES ⟸356—HOLDERS FOR VALUE—DEPOSIT—NATURE—RIGHT OF BANK.
A bank credited to the account of its depositor a check drawn on another bank and permitted the depositor to draw out the full amount thereof. The check was dishonored by the drawee bank for want of funds and returned to the first bank, which charged the amount against its depositor's account. At that time the account according to the books of the bank was sufficient to meet the check, but it in fact consisted only of credits given for the deposit of other checks which thereafter proved not to be good. *Held*, that the bank was not merely a holder for collection, but a holder for value, so that it could sue thereon under Revisal N. C. 1905, § 2206, free from defenses available to prior parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 908.]

3. BANKS AND BANKING ⟸175(4)—PAYMENT OF CHECKS—BREACH OF DUTY—LIABILITY.
In an action against a bank for damages caused by its breach of duty as agent to collect a check drawn upon it which there were sufficient funds to meet, prima facie proof that the check reached the town in which the bank was located on Friday evening justifies an inference that it came into the hands of the bank next morning so as to be entitled to payment in preference to other checks presented and paid on Monday and which the bank claimed were presented before the check in controversy, and it was error to direct a verdict for defendant at the close of plaintiff's evidence.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 599, 647, 648.]

4. TRIAL ⟸139(1)—TAKING CASE FROM JURY—AVERMENTS IN PLEADINGS.
Where plaintiff's evidence creates a presumption entitling it to recover, an averment in the answer denying the presumed facts does not justify taking the case from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341.]

5. BANKS AND BANKING ⟸156, 175(3)—LIABILITY OF BANK—ACCEPTANCE FOR COLLECTION.
Where a bank to which a check drawn against it had been sent dishonored the check and had it protested, there was sufficient evidence that it had accepted the check for collection, and the bank cannot deny that it had thereby made itself the holder's agent.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 539–546, 640–646.]

6. TRIAL ⊂⊃143—DIRECTED VERDICT—PRESUMPTION.

Where plaintiff's evidence warranted a presumption which entitled it to recover, evidence by defendant contradicting the presumption does not entitle defendant to a directed verdict, but merely raises an issue for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343.]

7. BANKS AND BANKING ⊂⊃175(4)—ACTIONS—FAILURE TO PAY CHECK—QUESTION FOR JURY.

In an action against a bank for its breach of duty as an agent to collect a check drawn upon it, where the bank answered that it had first paid other checks which exhausted the account, the circumstances attending the payment might raise a question for the jury as to whether the bank had discharged its duty toward the holder of the check in suit, even if the other checks were presented at the same time or even before the check in suit, so that it was error to direct a verdict for defendants at the close of plaintiffs' evidence.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 599, 647, 648.]

8. LIMITATION OF ACTIONS ⊂⊃28(1)—THREE-YEAR STATUTE—BREACH OF BANK'S DUTY.

An action against a bank for breach of its duty to collect a check and against another bank which took over the assets of the former is barred as against the latter bank by the North Carolina three-year statute of limitations (Revisal 1905, § 395), where not commenced until five years after the transaction and four years after the transfer of the assets.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 134, 142.]

In Error to the District Court of the United States for the Western District of North Carolina, at Salisbury; James E. Boyd, Judge.

Action by the Standard Trust Company of New York and another against the Commercial National Bank and another. Judgment for the defendants, and plaintiffs bring error. Reversed and remanded, with instructions to grant a new trial.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

W. M. Hendren, of Winston-Salem, N. C., and Thomas S. Beall, of Greensboro, N. C., for plaintiffs in error.

O. L. Sapp, of Greensboro, N. C. (Brooks, Sapp & Williams, of Greensboro, N. C., on the brief), for defendants in error.

KNAPP, Circuit Judge. In the court below a verdict was directed for the defendants, and plaintiffs bring the case here on writ of error. The transactions which gave rise to the suit are, briefly, these: On October 4, 1910, Sol N. Cone, of Greensboro, N. C., drew his check for $5,000 on the Commercial National Bank of that place, in which he was a depositor, in favor of Latham, Alexander & Co. of the city of New York, and mailed the same that day to the payees. They received the check the next day and at once deposited it in the Standard Trust Company, with which they did business. It was received and placed to their credit as a cash item, and almost immediately they drew checks against the deposit to its full amount, as they were authorized to do. Though regarded by the bank as in good standing at the time, for all such deposits by them were treated as cash and allowed to be checked

out, it appears that they were actually insolvent and soon afterwards went into bankruptcy. On the day this check was deposited, the Standard Trust Company sent it by mail to the Gerard Trust Company of Philadelphia, which received the same the following morning and sent it that day to the Central National Bank of Philadelphia, and this bank the same afternoon mailed the check for collection and remittance to the Commercial National Bank of Greensboro, on which it was drawn, with the indorsement:

"Pay to the order of any bank, banker, or trust company, prior indorsements guaranteed, October 6, 1910, Central Nat. Bank, Philadelphia, William Post, Cashier."

The evidence tended to show that in due course of mail the check arrived in Greensboro on the evening of the 7th of October and was received by the bank to which it was sent on the morning of the 8th, which was Saturday. Throughout that day, Cone, the drawer of the check, had a balance to his credit of $19,432.52, and this amount was still to his credit when the bank opened the following Monday. He was owing the bank at this time the sum of $10,000, represented by a note not yet due.

Early in the morning of Saturday, Cone attempted to commit suicide, and this led to an investigation which disclosed his insolvency. The bank thereupon charged its note to Cone's account, and on Monday, the 10th, protested the check in question for insufficient funds and returned it to the Philadelphia bank from which it had been received.

In October, 1911, a suit was begun, in a state court of North Carolina, by the Standard Trust Company and the Central National Bank of Philadelphia—the Guaranty Trust Company later coming in as a party plaintiff—against the Commercial National Bank of Greensboro, for the same cause of action as is set up in this suit. In August, 1915, the plaintiffs in that action took a voluntary nonsuit, and early in the following month, nearly five years after the protest of Cone's check, this suit was commenced.

In the meantime, the Standard Trust Company had been taken over by and merged into the Guaranty Trust Company, and the Commercial National Bank had likewise been taken over by and merged into the American Exchange National Bank. The nature of the latter merger, and its effect upon the legal rights of the parties, will be presently considered.

[1] As already stated, the trial resulted in a directed verdict for the defendants. The reasons assigned for this ruling do not appear, and we must therefore examine the several grounds relied upon to defeat the plaintiffs' action. It is insisted, in the first place, that the suit cannot be maintained against the Commercial National Bank because it had ceased, prior to December 11, 1911, to have any corporate existence, and was therefore incapable of being sued or made a party defendant. Upon this assumption it is also argued that the action is barred by section 1200 of the Revisal of North Carolina, which in effect limits the right to sue a corporation to three years after its dissolution. For the purposes of this case it may be conceded that, if the Commercial National Bank was actually "dissolved" in 1911, the lapse

of more than three years would serve as a complete defense to the action. But it seems clear to us that this bank has not been dissolved Indeed, the defendants allege in their answer:

"That on the 15th day of September, 1911, the Commercial National Bank went into voluntary liquidation in consequence of having sold its assets to the American Exchange Bank, a corporation doing a banking business under and by virtue of the laws of the state of North Carolina; that some time thereafter, to wit, on December 11, 1911, the American Exchange National Bank was organized under the national banking laws, and as such took over the assets of the American Exchange Bank and such of the assets of the Commercial National Bank as had been taken over by the American Exchange Bank."

And in another paragraph is the averment "that it went into voluntary liquidation as of that date," November 15, 1911, and "that it complied with the United States statutes regulating the liquidation of banks," which plainly means, and the defendants do not deny, that proceedings were taken under sections 5220 and 5221 of the Revised Statutes of the United States (Comp. St. 1913, §§ 9806, 9808). The status of this bank, therefore, is not that of a dissolved corporation under the laws of North Carolina, but that of a national bank which has gone into voluntary liquidation under the provisions of the national banking act. But a bank so liquidated has not terminated its existence or ceased to be a corporate entity. True, it may not longer engage in the banking business or otherwise exercise its customary functions, but it remains nevertheless a corporation capable of suing and being sued. So the Supreme Court distinctly held in National Bank v. Insurance Company, 104 U. S. 54, 73, 74, 26 L. Ed. 693, from which we quote the following:

"It is to be observed that the sections (5220 and 5221) under which the proceedings took place which, it is claimed, put an end to the corporate existence of the bank, do not refer, in terms, to a dissolution of the corporation, and there is nothing in the language which suggests it, in the technical sense in which it is used here as a defense. The association goes into liquidation and is closed. It is required to give notice that it is closing up its affairs, and in order to do so completely and effectually, to notify its creditors to present their claims for payment. * * *

" 'If there are claims made which the directors of the association are not willing to acknowledge as just debts, there is nothing in the statute which is inconsistent with the right of the claimant to obtain a judicial determination of the controversy by process against the association, nor with that of the association to collect by suit debts due to it. It is clearly, we think, the intention of the law that it should continue to exist, as a person in law, capable of suing and being sued, until its affairs and business are completely settled. The proceeding prescribed by the law seems to resemble, not the technical dissolution of a corporation, without any saving as to the common-law consequences, but rather that of the dissolution of a copartnership which, nevertheless, continues to subsist for the purpose of liquidation and winding up its business."

In the light of this authority, it must be held that the three years' statute of North Carolina here referred to has no application to this case, because it is not the case of a dissolved corporation, and that the Commercial National Bank was still "a person in law," which could sue and be sued, when this action was commenced. Nor are we able to perceive that the plaintiffs' cause of action, if otherwise made out,

was taken away or adversely affected by the fact that a suit was previously brought for the same cause of action in the state court, but discontinued less than a year before the present suit was begun. We find no bar to the maintenance of the action against the Commercial National Bank.

[2] It is next argued that the suit must fail because plaintiffs are not the owners of the check in question, and therefore not such real parties in interest as are necessary to maintain the action. When the payees deposited this check, it was accepted as the equivalent of cash. They were allowed to draw upon it the same as though they had made a deposit of so much money, and in point of fact they did check it all out on the same day. Shortly afterwards, they went into bankruptcy, and the testimony shows that no dividend will be paid to their creditors. Had this been the only transaction, we think it could not be doubted that the bank became the bona fide owner of the check for full value. The legal effect in that case would be the purchase or discount of a negotiable instrument. But because the bank charged the check to the payees' account, when it came back dishonored on the 13th of October, as the bank had the right to do, and as was the usual course of dealing, and because on that day or about that time the payees had an apparent balance to their credit exceeding the amount of the check, it is contended that as matter of law the check must be regarded as received merely for collection. The basis of this contention disappears when the facts are examined. That the books of the bank, when the check was returned, showed a balance greater than its amount, is unquestioned; but that balance, for the most part if not altogether, was made up by credits of other checks or similar deposits which were accepted and treated as cash, but which afterwards turned out not to be good. In short, the proof seems convincing that at no time after the payees had drawn out the amount of this check did they have any substantial sum of actual money in the bank, and when their account was closed at a later date they were overdrawn several hundred dollars in addition to the check in question. The practical result therefore was, whatever the form of bookkeeping, that the bank gave $5,000 for this check and never has or could get back any part of it from the payees. This being so, we deem it not doubtful that the effect of the transactions under review was to make the bank the owner of this check for value, and to clothe it as such owner with all the rights of a holder in due course of a negotiable instrument. Armstrong v. Bank, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; Burton v. United States, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482; Manufacturing Co. v. Tierney, 133 N. C. 630, 45 S. E. 1026. And this is the opinion of the Supreme Court of North Carolina, which has passed upon the identical facts here of record and said (Standard Trust Co. v. Commercial National Bank, 166 N. C. 112, 117, 81 S. E. 1074, 1076):

"Plaintiff asserts ownership of the check by reason of its dealings with Latham, Alexander & Co., and, without discussing this phase of the case, we merely state that the facts, as now presented, sustain the contention."

The rights of "a holder in due course" are defined in section 2206 of the Revisal of North Carolina as follows:

"A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

We are therefore of opinion, as the case is now presented, that the Standard Trust Company became the beneficial owner of the check for value and without notice, and that it or its successor in title, the Guaranty Trust Company, can maintain this action "free from defenses available to prior parties."

[3-7] We come then to the defense on the merits, which is, in a word, that nothing was shown at the trial which would warrant a jury in charging the defendants with liability. With reference to this contention, it is to be observed that the present suit is not brought upon the check as such, but for damages, measured by its amount, for breach of duty on the part of the Commercial National Bank in failing to collect the check when it was received, and when the drawer, as is alleged, had an ample balance for its payment. As above stated, the proofs make a prima facie case that the check got to Greensboro on the evening of the 7th, and this would justify the inference that it came to the hands of the officers of the bank not later than the following morning. True, the answer avers, though not in the most positive and unqualified terms, that the check was not received until Monday. Such an averment, however, would not of itself overcome the contrary presumption; it would still remain a question for the jury. Davidson S. S. Co. v. U. S., 142 Fed. 315, 73 C. C. A. 425. But whatever the truth in that regard, it is conceded that during the whole of Saturday, the 8th, and at the opening of the bank on Monday, Cone had upwards of $19,000 to his credit. Even if it be assumed—and it is not now necessary to decide the point—that the bank had the right as against plaintiffs to pay itself the $10,000 debt that Cone owed it, as it did, there was still a balance in his favor of $9,432.52, which was apparently available for the payment of this check. And we say this because careful scrutiny of the pleadings and evidence fails to disclose any proof that other checks were paid before the check in question was protested. The allegations of the complaint are to the effect that $10,000 of Cone's balance was applied to the payment of the bank's debt against him, and $6,000 to the payment of two of his checks that came in on Monday, two days after the plaintiffs' check was received. The answer alleges that these other checks were paid before plaintiffs' check was presented, but the defendants offered no evidence, and the fact they assert in this regard is not supported by proof. On the face of it, therefore, as the record now stands, a jury could hardly fail to find that the Commercial Bank might have collected this check if it had acted in good faith and with reasonable promptness. For the fact that the check was protested at the instance of the bank is sufficient evidence that it had been accepted for collection, and the bank cannot be heard to deny that it had thereby made itself the holder's agent. Burton v. United States, 202 U. S. 378, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392. Even if the defendants had introduced evidence to sustain their claim,

there would still be the presumption, arising from the facts above stated, that the check was actually received on Saturday, and this would leave an issue for the jury to determine. Indeed, we go further and hold that if all the checks were received together, or if the others, which concededly did not get to the bank till some time on Monday, were first presented, nevertheless there might be circumstances which would raise a question for the jury as to whether the bank had properly discharged its duty to the plaintiffs. So, from whatever angle the situation is examined, we are led to the conclusion that a case was made for submission to the jury, and it was therefore error to direct a verdict for the defendants.

Upon precisely the same facts, the Supreme Court of North Carolina reached the same conclusion (Standard Trust Co. v. Commercial National Bank, supra), and we quote with approval the following excerpt from its opinion:

"Was the defendant therefore, as agent and drawee, acting in good faith with the plaintiff in handling its check? As the evidence is now to be considered by us, the jury might well have found, if the case had been submitted to them, that it was not, and, if the facts are not as a jury could find them to be upon this evidence, it is defendant's misfortune that the case stopped short of full proof on both sides."

[8] As against the American Exchange National Bank, it is sufficient to say, without discussion, that the action is barred by section 395 of the Revisal of North Carolina, and for that reason the verdict in its favor was properly directed.

The judgment will be reversed, and the cause remanded, with instructions to grant a new trial.

Reversed.

## In re VALECIA CONDENSED MILK CO. In re FOOTVILLE CONDENSED MILK CO. MYRLAND v. WARNER et al.

(Circuit Court of Appeals, Seventh Circuit. February 6, 1917.)

No. 2387.

1. WITNESSES ⟸216—PRIVILEGE—PRODUCTION OF DOCUMENTS—TAX STATEMENTS—VALIDITY OF STATUTES.

The federal and state governments have power to provide that returns made to their officers to be used in assessing and collecting revenue and taxes shall not be revealed by the officers, and such provisions protect the officers against commitment for contempt for refusal to produce such returns on subpœna by a court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 779.]

2. WITNESSES ⟸216—PRIVILEGE—PRODUCTION OF DOCUMENTS—TAX STATEMENTS—CONSTRUCTION OF STATUTES.

In St. Wis. 1915, § 1087m24, providing that no commissioner, clerk, or agent shall divulge in any manner, except as provided by law, any information obtained in the discharge of his official duties, or permit any income return to be seen or examined, except as provided by law, the exception does not permit the production of papers whenever required through the processes of law, which would deny their inspection only by those whose motives were idle curiosity, and would violate the plain public policy of the statute to protect such returns, in order that they may be freely made, but the exception refers only to the production of papers before other bodies or in other proceedings relating to the assessment of the tax.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 779.]

3. WITNESSES ⟸216—PRIVILEGE—PRODUCTION OF DOCUMENTS—BANKRUPTCY ACT.

Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, does not require the rules of evidence in proceedings thereunder to be different from such as generally prevail, and does not deprive a witness of his privilege under a state statute to withhold income tax returns by the bankrupt.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 779.]

Petition to review and revise an order of the District Court of the United States for the Western District of Wisconsin.

In the matter of the bankruptcy proceedings of the Valecia Condensed Milk Company and of the Footville Condensed Milk Company. Petition by A. J. Myrland against Paul S. Warner, as trustee, and others, to review an order of the District Court committing petitioner for contempt for refusing to produce certain documents in response to a subpœna duces tecum. Order reversed, and rule against petitioner to show cause discharged.

In the bankruptcy proceedings of two bankrupt corporations, petitioner, the secretary of the Wisconsin tax commission, was served with a subpœna to appear before the referee to testify, and there to produce all reports, correspondence, certificates, and documents in possession of the commission relating to the bankrupts, and of another corporation, also a bankrupt. He appeared and testified that the only papers of the kind mentioned in the subpœna in the possession of the commission were the income tax returns of such respective corporations, as were made and returned to the state tax commission in pursuance of the statute of the state, and that the statute prohibited him from permitting such income tax returns to be examined by any

person, and he refused to produce them. Thereupon his refusal was reported to the court, and a rule was entered requiring him to show cause why he should not be held in contempt. In his answer to the rule he again set up the inhibition of the Wisconsin statutes against producing such income returns, and asked to be excused from producing same. The court held him guilty of contempt, and ordered him committed until he should produce the returns. The petition to review and revise the order of the District Court raises the question whether the court has power to compel the production of such income returns.

The Wisconsin statute (section 1087m1 et seq.) requires corporations annually to make out and present to the tax commission a return under oath, answering all questions propounded by the commission with reference to the corporate affairs for the year preceding, for the purpose of enabling the commission to assess the annual income tax which the corporation is by statute required to pay. The act[1] (set out in the margin), under which the particular question here arises, provides that no commissioner or clerk or agent shall divulge or make known to any person "in any manner except as provided by law" any information obtained in the discharge of official duties, or permit any income return to be seen or examined "except as provided by law;" and that any such officer, etc., violating such provision shall be fined from $100 to $500, or imprisoned not exceeding 2 years, and shall forfeit his employment, and for 3 years thereafter be incapable of holding public office.

E. E. Brossard, of Columbus, Wis., for petitioner.
John B. Sanborn, of Madison, Wis., for respondent.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] 1. It will be well first to consider how such provisions against the production of papers have generally been considered by the courts. We have been referred to no adjudication, and we find none wherein this statute, or any income tax statute, has been considered with reference to the question here involved. But decisions under federal revenue law, other than the income tax law, respecting the production of papers and the revealing of information received in the course of official duty by revenue officers, are closely analogous.

Section 3167, Rev. Stat. (Comp. St. 1913, § 5887), was directed against divulging or making known in any manner not provided by law "the operation, style or work of apparatus of any manufacturer or producer visited by" an official in discharge of his official duties; and

[1] "Penalty for divulging information (section 1087m24):

"1. No commissioner, assessor of incomes, deputy, member of a county board of review, or any other officer, agent, clerk or employé shall divulge or make known to any person in any manner except as provided by law any information whatsoever obtained directly or indirectly by him in the discharge of his duties or permit any income return or copy thereof or any paper or book so obtained to be seen or examined by any person except as provided by law.

"2. Any officer, agent, clerk or employé violating any of the provisions of this section shall upon conviction thereof be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than one month nor more than six months, or by imprisonment in the state prison for not more than two years, at the discretion of the court.

"3. Such officer, agent, clerk or employé upon such conviction shall also forfeit his office or employment and shall be incapable of holding any public office in this state for a period of three years thereafter."

in 1894 this section was amended to include in the inhibition, income returns under the federal income tax act which was passed at that time. But returns and other papers as to special taxes, apart from the income tax, were not included in the terms of the statute.

The revenue act provided that the Secretary of the Treasury was authorized to prescribe regulations not inconsistent with law, for the government of his department, and the custody, use and preservation of its records and papers. Rev. St. § 161 (U. S. Comp. St. 1916, § 235). On the subject of producing such papers in court it does not appear that prior to 1898 any general order or regulation was made by the Secretary of the Treasury, but prior to that year letters had been written by the Commissioner of Internal Revenue to two internal revenue collectors stating that any and all such papers and information in their possession were not to be revealed or produced in any court or elsewhere.

In re Weeks (D. C.) 82 Fed. 729, was a proceeding by habeas corpus in the district court to obtain the discharge of a collector of internal revenue from commitment for contempt of the state court, for refusing to obey a subpœna requiring him to produce in that court certain records of his office. The refusal to produce was justified by one of the letters above referred to wherein the Commissioner of Internal Revenue had instructed him not to produce papers or give information concerning matters in his office. The court held that such evidence was in control of the federal government, and that the instruction to the collector by his superior officer protected him in his refusal and he was ordered discharged.

In re Huttman (D. C.) 70 Fed. 699, the circumstances were similar to those in the Weeks Case. The petitioner for habeas corpus there stated that he had been instructed by the head of his department to decline to make the requested revelation of facts which came to him in his official capacity as collector of internal revenue. The fact of such instruction was uncontroverted. The petitioner there, who stood committed by the state court for his refusal to make such revelation, was discharged.

The case mainly relied upon in support of the action of the District Court is In re Hirsch (C. C. 1896) 74 Fed. 928. There it was undertaken in a proceeding in a state court to compel the production under subpœna duces tecum of an application or return to an internal revenue collector, whose deputy in charge of the papers was committed for refusing production. On habeas corpus the District Court dismissed the writ, holding that the federal court was without jurisdiction, as the refusal to produce was not under a statute of the United States, but under an alleged regulation claimed to have the force of law. The court concluded that the two letters of the commissioner of internal revenue to revenue collectors of other revenue districts, instructing them to refuse production of any such papers, did not amount to a regulation, and that there was in fact no regulation of the department preventing the production of such papers. The Circuit Court of Appeals, Second Circuit, affirmed the judgment, but rendered no opinion beyond a statement per curiam of concurrence in the opinion of the

District Court, and that they did not intend to decide that a writ of habeas corpus is the proper remedy to review a judgment of state court committing a witness for disobedience of its subpœna. 87 Fed. 1005, 31 C. C. A. 350.

It seems that in 1898 a general regulation was promulgated by the Department forbidding the production of any such documents, and giving out any such information; and presumably, had there been such general regulation when In re Hirsch was decided, that case would have been otherwise determined, for it is there said:

"It is probable that a statute could declare that communications of taxpayers to a board of assessors or officers of a similar character should be privileged, and that no returns can be examined by any one, or be reached for examination by legal process."

Since the regulation was promulgated the right to compel internal revenue officers to produce official papers in their custody, under subpœna from court, or to give testimony of what so came to their official knowledge, has been uniformly denied. In re Lamberton (D. C.) 124 Fed. 446; Stegall v. Thurman (D. C.) 175 Fed. 813; In re Comingore (D. C.) 96 Fed. 552; Boske v. Comingore, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846.

In re Comingore involved a habeas corpus in the District Court to release a collector of internal revenue in custody in the state court for refusing to produce certified copies of distillers' reports made to his office pursuant to the revenue laws of the United States, such copies to be used as evidence in a proceeding pending in a court of the state. The court held that such reports are executive documents, which the United States in its sovereign capacity required for administering its governmental affairs, and that no one can acquire control over or right in them in any manner except by its authority. The collector being discharged from custody, appeal was taken, and under the title "Boske v. Comingore" the case is reported in 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846. In affirming, the Supreme Court said:

"The papers in question, copies of which were sought from the appellee, were the property of the United States, and were in his official custody under a regulation forbidding him to permit their use except for purposes relating to the collection of the revenues of the United States. Reasons of public policy may well have suggested the necessity, in the interest of the government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded."

The rule is the same in Wisconsin In a suit involving a fire loss on cigars and tobacco, one of the parties sought to compel a revenue officer to testify as to contents of books of the federal internal revenue collector, showing entries which might have bearing on the question there at issue. The officer testified it was contrary to his instructions to supply such information, and the Supreme Court said:

"A litigant has no right to use such record upon any other basis than such as may be fixed by the United States or under its authority. Under the laws of the United States and the rules and regulations made in pursuance thereof,

the officers of the departments could not be compelled to produce the books in evidence or disclose their contents, and they were not admissible, except in the manner provided by the department." Meyer v. Home Ins. Co., 127 Wis. 293, 304, 106 N. W. 1087, 1090.

A case quite analogous, in that it arose out of an attempt to compel a tax officer to reveal to the bankrupt court information which came to him officially, is In re Reid (D. C.) 155 Fed. 933. It appears that the president of the board of assessors of the city of Detroit was called as a witness, and was asked to produce a certain tax statement filed by the bankrupt. He refused, on the ground that the statutes of Michigan provided that no such statement shall be used for any other purpose, except the making of the assessment for taxes. The bankrupt gave his consent to the production. The question of the right to compel the production was certified to the District Court, which, deciding against the right to compel the production, said:

"The purpose of the provisions of section 3846 is plainly to promote the collection from each taxpayer of his just share of state, county, and municipal taxes, and to that end to require from each property owner the full disclosure of all his taxable property under the state's pledge that the statement shall be kept inviolate, save to the officials for whose information and guidance it was made. To permit that information to become public would defeat the plain purpose of the statute by deterring the taxpayer from revealing what frequently could not be learned from any other source. * * * To sanction the violation of that pledge by denying the taxpayer the protection of the statute would invite refusals to obey the law, evasions, and perjury, often injuriously affect the interests of the taxpayer, would obstruct the collection of taxes, and diminish the revenues of the state. The power of the Legislature to prevent these consequences is unquestionable. The wisdom and policy of the act must be conclusively assumed. Its meaning is unequivocal, and needs no construction."

[2] 2. But the contention is made that the words "except as provided by law" in section 1087m24, must be construed as excluding from the inhibition of the act the production of such returns when required through the processes of the law. In other words, that "provided by law" means when required by subpœna duces tecum, replevin, order to produce, or other manner or means whereby a court or any other authorized tribunal or functionary may require and compel the production of papers. The very statement of the proposition induces rather the conclusion that against this the inhibition was in the main directed.

It is scarcely presumable that inspection was thus intended to be denied to those only who seek it out of idle curiosity; or that it was the intention to permit such papers to be made public only at the behest of litigants, and not of nonlitigants, who may be not less interested in seeing them, but not being in litigation, may not invoke legal processes to compel their production.

Without in any degree trenching upon the essential and full power of courts to compel the production of papers, we must recognize also the generally declared public policy against revealing such returns—made, as they are, under compulsion of law, for the particular purpose of taxation; a public policy repeatedly recognized by the courts. With an enactment such as the one in question, directed against the

production of these returns, it is not lightly to be presumed that the public policy manifested by such statute was intended to be practically neutralized by the excepting words.

In order to reach the conclusion that the words do not have reference to subpœnas and other processes of law for compelling production of papers, it is not necessary that it be pointed out to what they do refer. However, the Income Tax Act itself contains provisions apparently well within the purview of the exception. Section 1087m10 (1) provides that the income assessment of individuals be made by assessors of income who are constituted by the tax commission, and that of corporations, by the commission itself. Section 1087m17 provides that persons aggrieved by the assessment of the income assessor may have the assessment reviewed by the county board of review, and section 1087m19, that any person dissatisfied with the decision of this board may appeal to the state tax commission. Section 1087m13 makes provision for appeal by corporations from their income tax assessments made by the commission. Section 1087m29 authorizes the state tax commission to employ clerks and specialists necessary to make effective the act. Without the exception the letter of the section would prevent any one into whose hands the returns first came from showing or delivering them to these others who are by the law charged with duties which require the presence of the returns or information of what they contain; and it is reasonable to conclude that the exception was intended to include such delivery or revelation only as is thus made necessary in the administration of the income tax law.

[3] 3. Respondents contend that the Bankruptcy Act unqualifiedly provides for the production of papers and the giving of testimony, and that act is paramount to any limitations or restrictions imposed by the state, and the bankruptcy courts cannot be hampered thereby. We find nothing in the bankruptcy act or in its administration requiring the rules of evidence applicable to proceedings thereunder to be different from such as generally prevail. No such distinction was recognized in Re Reid, supra.

It follows, and the order of this court is, that the order of the District Court adjudging petitioner to be in contempt be reversed, and the rule against petitioner to show cause be discharged.

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## MINNEAPOLIS, ST. P. & S. S. M. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1917.)

No. 4712.

MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE—"PERMIT."

Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1913, § 8678), declares that it shall be unlawful for any common carrier, its officers or agents, subject to the act, to require or permit any employé subject to the act to be or remain on duty for a longer period than 16 consecutive hours, while section 3 (Comp. St. 1913, § 8679) provides that in all prosecutions under this act the common carrier shall be deemed to

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

have had knowledge of all the acts of its officers and agents. The legislative history of the act showed that Congress defeated proposed amendments to insert the word "knowingly" before "permit," and in the provision that the common carrier should be deemed to have knowledge of all the acts of its officers and agents inserted the words "officers and" in lieu of the words "duly authorized," which on the first draft preceded "agents." An engineer and fireman whose train had broken in two and who took the first part of the train into a station, from whence another engineer and fireman with another engine were sent to bring in the remaining part of the train, delayed for several hours in placing their engine in the roundhouse and going off duty, although their duties were at an end and the rules of the railroad company required them to see that they did not exceed the hours of service prescribed. Had such engineer and fireman promptly placed their engine in the roundhouse and gone off duty, they would not have been on duty more than 16 hours. *Held* that, in view of the history of the passage of the act and the fact that the railroad company was charged with the knowledge of the engineer and fireman who neglected to place their engine in the roundhouse and go off duty, the railroad company must be deemed to have violated the Hours of Service Act by permitting such employés to remain on duty beyond the time prescribed; the word "permit," while ordinarily implying knowledge and consent, being also synonymous with "suffer" or "allow" (citing Words and Phrases, First and Second Series, Permit).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by the United States of America against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Alfred H. Bright, of Minneapolis, Minn., for plaintiff in error.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (Alfred Jaques, U. S. Atty., of St. Paul, Minn., on the brief), for the United States.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. This action was brought by the United States against the plaintiff in error for an alleged violation of the hours of service act (34 Stats. 1415). It was alleged in the two counts of the complaint that the company was engaged in interstate commerce and permitted its engineer J. L. Gasow, and its fireman S. Steen, each to be and remain on duty from 6 o'clock p. m. of February 2, 1915, to 11 o'clock a. m. on February 3, 1915. The company made answer that said engineer and fireman went to work at Thief River Falls at 6 p. m. on February 2d; that an accident happened about four miles out of Glenwood by which the train they were pulling was so broken in two that it could not be recoupled; the engineer and fireman and the rest of the crew took the head end of the train on to Glenwood, arriving there at 9 a. m. of February 3d, having been on duty 15 hours; that another engineer and fireman went with another engine to bring in the remaining part of the train; that said engineer, Gasow, and fireman, Steen, had no other duty to perform and in fact performed none and were at liberty at the hour of 9 o'clock to place the engine in the roundhouse and go off duty; in-

stead of doing this, they carelessly, and of their own volition, exceeded the hours of service, not putting up the engine until 11 o'clock; that under the rules and regulations of the defendant company said engineer and fireman were bound to see to it that they did not exceed the hours of service under conditions within their control, and that said defendant had recently enforced said rule by suspending an engineer and fireman for similar acts; that under the rule aforesaid said engineer and fireman were required to notify the train dispatcher of the near expiration of the 16-hour period, which in this case the said Gasow and Steen failed to do; that had they made a report to the train dispatcher as they were required to do they would have been given directions to roundhouse their engine and go off duty, which they should have done without any orders. The United States moved for judgment on the pleadings. This motion was sustained, and judgment was rendered for the government and two penalties of $50 each were imposed, and the railroad company sued out a writ of error.

The sole question is: Did the company set up a defense in its answer?

Of course, the answer pleaded the matters by way of defense and not in mitigation of damages; but, as the court only imposed a penalty of $50 where under the statute it might lawfully have imposed one of $500, it doubtless considered the matter set up in the answer in mitigation. The statute in question provides:

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours." 34 Stats. 1416.

It is strenuously insisted that under the circumstances shown in the answer the company neither required nor permitted the work by the engineer and fireman beyond 16 hours. It may be conceded that it did not require such service, and the only question is: Did it permit it in the meaning of this act?

The word "permit" ordinarily implies knowledge and consent. Words and Phrases, vol. 6, p. 5317; Second Series, Id. 972. But this rule is not without its exceptions. After giving numerous definitions, Webster's New International Dictionary defines the term "permit" to be synonymous with "suffer," "allow." The term "permit" has often been used as synonymous with "suffer," so that it may be said that one who suffers the doing of a thing which he might have prevented permits it. Conner v. Fogg, 75 N. J. Law, 245, 67 Atl. 338. It therefore becomes important to consider the legislative record of the passage of this bill for the purpose of ascertaining, if possible, what Congress meant by the use of the word "permit."

It shows that on March 15, 1906, Sen. La Follette introduced in the Senate the bill which, as subsequently amended, became chapter 2939 of the Acts of the Fifty-Ninth Congress. On the same day the bill was referred to the Committee on Education and Labor. On June 9, 1906, Sen. Dolliver reported the bill from the Committee on Education and Labor with an amendment in the nature of a substitute. On June 26, 1906, the bill was taken up for debate in the Sen-

ate and continued to be debated periodically for five days, when by unanimous consent it went over to January 10, 1907. On that day the bill was further debated. The substitute contained the language substantially of the present law:

"That it shall be unlawful for any common carrier * * * to require or permit any employé * * * to remain on duty more than sixteen consecutive hours."

Sen. Brandegee offered a substitute which in section 2 provided for the punishment of any such common carrier knowingly violating the provisions of the act.

This was voted down, 45 to 23. Sen. La Follette then offered a substitute for the committee substitute which provided:

"That it shall be unlawful for * * * any common carrier engaged in interstate or foreign commerce by railroad, or any of its officers or agents, to require or permit any employé engaged in or connected with the movement of any train carrying interstate or foreign freight or passengers to remain on duty more than sixteen consecutive hours."

This substitute was agreed to 36 to 32, and the bill then passed 70 to 1. The bill as thus passed did not contain the provision now in the third section of the act that, "In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents," nor any similar provision. The bill reached the House on January 11th and was referred to the Committee on Interstate and Foreign Commerce. On February 16, 1907, Mr. Esch, who had a similar bill of his own pending which had been favorably reported by the committee, reported the bill back from the Committee on Interstate and Foreign Commerce recommending a substitute. This substitute provided in section 2:

"That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or *knowingly* permit any employé subject to this act, to be or remain on duty for a longer period than sixteen consecutive hours."

In the third section this substitute provided for a recovery of not to exceed $500 for each violation from any common carrier requiring or *knowingly* permitting any employé to go, be, or remain on duty in violation of the second section. Having thus expressly provided that the carrier's permission must be with knowledge, it then provided in section 3:

"In all prosecutions under this act the common carrier shall be deemed to have had *knowledge* of all acts of its *duly authorized* agents."

There was no provision of the substitute expressly requiring knowledge except in the two instances italicized. On February 18, 1907, a motion was made to suspend the rules and pass this substitute. The writer voted for that motion, but it was defeated.

On February 23, 1907, the Committee on Rules of the House reported a resolution that the amendment in the nature of a substitute reported by the Committee on Interstate and Foreign Commerce be agreed to with certain amendments. The first of these amendments struck out the word "knowingly" in both places where it appeared as modifying

the word "permit." This was agreed to by a vote of 281 to nothing, and the bill then went to conference. The Senate conferees filed their report on March 1, 1907, to strike from the sentence "in all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of its duly authorized agents" the words "duly authorized," and insert in lieu thereof the words "officers and." It is true this first report of the conferees was rejected, but solely upon some changes made in the House provision as to telegraphers which have not been referred to because not material here. Subsequently, the conferees agreed upon a report identical with their former report, except as to telegraphers, and their report was agreed to by both houses.

In view of this history of the defeat of the Brandegee substitute in the Senate which required knowledge to make the company liable and the defeat of the substitute of the Committee on Interstate and Foreign Commerce upon the same ground in the House, we should ordinarily have no hesitancy in saying that the word "knowingly" was not implied from the use of the word "permit," as it has meanings which do not imply knowledge and that would end this controversy; but what of the provision that the common carrier shall be deemed to have had knowledge of all acts of all of its officers and agents? As this was doubtless inserted in its original form on account of the introduction of the word "knowingly," we would conclude that it was left in through inadvertence but for the fact that it was amended in conference after the word "knowingly" had been struck out. When we come to examine, however, the amendment made in conference, the question of whether knowledge is essential or not becomes immaterial. When the language was used "in all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of its duly authorized agents," and the words "duly authorized" were stricken out and the words "officers and" inserted, so that the statute as enacted reads that the "common carrier shall be deemed to have had knowledge of all acts of all its officers and agents" whether they were authorized to act in the matter under consideration or not, we see no reason why the court can place any restriction on the class of agents and exclude employés therefrom. The engineer and fireman each knew that both were exceeding the authorized hours, and this knowledge of theirs was by the clear language of the statute notice to the company.

This was held, not only by the District Court in this case, but by the District Court of Oregon in United States v. Oregon-Washington R. & Nav. Co. (D. C.) 218 Fed. 925, the District Court of Idaho in United States v. Oregon Short Line R. Co. (D. C.) 228 Fed. 561; and by the Court of Appeals of the Ninth Circuit in the last-named case in Oregon Short Line R. Co. v. United States, 234 Fed. 584, 148 C. C. A. 350.

An interesting and quite exhaustive opinion on the subject of when a party may be held guilty even in the absence of knowledge upon his part that the act in question was illegal is Feeley v. United States, 236 Fed. 903, — C. C. A. —.

This case is not as if the word "knowingly" had always been omitted from the statute, but the solemn act of Congress in striking out the

word "knowingly" aids in the interpretation and construction of the word "permit."

It was undoubtedly the duty of the engineer and fireman to deliver the engine at the roundhouse. It is claimed that they loitered after they reached the same town where the roundhouse was situated, how far from the roundhouse is not alleged, but there can be no distinction drawn between the points at which employés loiter. If this loitering was 10 miles or 15 miles from the roundhouse, no one would think of claiming that the time should be deducted, and it can make no difference whether it was 10 miles or but a few blocks from the roundhouse. It is not claimed that the engineer and fireman had any right to abandon the engine at any place but at the roundhouse, and the fact that they loitered before getting the engine to the roundhouse will not avail the defendant. If every case is to be made to turn upon the question as to whether the employés could with reasonable diligence have reached the end of their route within the 16 hours, the whole law becomes a dead letter. That these two men served over 16 hours is beyond dispute. That this in the contemplation of Congress unfitted them for work the next day is also beyond dispute, and this statute cannot lawfully be converted into a mere law providing that in the absence of diligence upon the part of the employés the company shall not be liable.

The court was right in its conclusion, and its judgment is affirmed.

HOOK, Circuit Judge, concurs in the result.

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## GREER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1917.)

No. 4719.

1. CRIMINAL LAW ⟸1170½(2)—APPEAL—HARMLESS ERROR.
   In prosecution for carrying liquor into what was formerly the Indian Territory, in violation of Act March 1, 1895, c. 145, 28 Stat. 693, defendant, who testified that he was running a drug store therein and admitted without objection that he had been convicted of selling whisky, was not, in view of his denial, prejudiced by questions as to whether he had not been selling whisky at his drug store from the time it was started and whether he was not in the whisky business; the prosecution not attempting to rebut his denial.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3130.]

2. CRIMINAL LAW ⟸695(4)—TRIAL—OBJECTIONS—SUFFICIENCY.
   An objection to a question is properly overruled, when no ground is specified, or when the ground mentioned is so general as to be insufficient to direct attention to the particular defect or the objectionable feature relied upon.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1636.]

3. WITNESSES ⟸277(1)—CROSS-EXAMINATION OF ACCUSED.
   As the rules of evidence are the same in civil and criminal cases, a defendant who takes the stand may be cross-examined upon his evidence in chief.
   [Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 979.]

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4. INDIANS ⟸38(1)—INTOXICATING LIQUORS—INDIAN COUNTRY—EVIDENCE.
In a prosecution under Act March 1, 1895, for carrying into what was formerly Indian Territory intoxicating liquors, evidence *held* sufficient to go to the jury.
[Ed. Note.—For other cases, see Indians, Cent. Dig. § 66.]

5. CRIMINAL LAW ⟸776(1)—TRIAL—INSTRUCTIONS.
In a criminal prosecution, the denial of a requested instruction that defendant is presumed to be a person of good character is not error.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838, 1844.]

Smith, Circuit Judge, dissenting in part.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

J. Knox Greer was convicted of carrying liquors into what was formerly Indian Territory from without the state of Oklahoma, in violation of Act March 1, 1895, and he brings error. Affirmed.

James C. Denton and Frank Lee, both of Muskogee, Okl., for plaintiff in error.

C. W. Miller, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., and W. P. McGinnis, Sp. Asst. U. S. Atty., both of Muskogee, Okl., on the brief), for the United States.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. The plaintiff in error was indicted charged with carrying liquors into what was formerly Indian Territory from without the state of Oklahoma in violation of the Act of Congress of March 1, 1895, 28 Stats. 693, 697. He was tried, convicted, and sentenced, and sued out a writ of error. He files three specifications of error:

"(1) Error of the court in permitting counsel representing the prosecution to propound to plaintiff in error the questions and answers set forth in assignments 3, 4, and 5.

"(2) Error of the court in overruling motion made by counsel for the plaintiff in error to instruct the jury to return a verdict of not guilty, which motion was made and so overruled after all the testimony on behalf of the government and the defendant had been introduced.

"(3) Error of the court in refusing to give in charge to the jury the instructions as requested in assignment of errors 7, 8, 9, 10, and 11."

[1] The defendant was a witness in his own behalf, and testified that at the time of the trial he was in the bus and baggage business in Oklahoma City, but at about the time of his arrest for this alleged crime he was in the drug business at Allen, Okl. On his cross-examination the following took place:

"Q. Did you have any business at Oilton? A. At Oilton; yes, sir. Q. What business were you engaged in up there? A. I have a house there—built a house there this summer. Q. The principal business you are engaged in up there is selling whisky, isn't it? A. No, sir.

"Mr. Lee: We object to that, and we take exception to the question.

"Mr. Linebaugh: I think counsel went into that, if the court please.

"The Court: He has answered it."

The third assignment of error is to the propounding of this question:

"The principal business you are engaged in up there is selling whisky, isn't it?"

The cross-examination continued:

"Q. Now, you have been in the whisky business at Allen ever since you have been there, haven't you, Greer? A. No, sir. Q. Have you been convicted in the courts of Pontotoc county for whisky—selling whisky? A. Yes, sir. Q. Charges pending against you there now for selling whisky?

"Mr. Denton: Wait. We object, if the court please, as to any charges.

"The Court: Sustained.

"Q. You have been selling whisky at that drug store from the time you started it up to the present time?

"Mr. Denton: Wait.

"A. No, sir.

"Mr. Denton: Wait a minute. We object as incompetent, irrelevant, and immaterial, and not proper cross-examination.

"The Court: Overruled.

"Mr. Denton: The defendant excepts."

The fourth and fifth assignments of error are based upon the propounding of the question:

"You have been selling whisky at that drug store from the time you started it up to the present time?"

It would seem that when a defendant says he was running a drug store, and admits upon being questioned without objection that he had been convicted of selling whisky, he was not prejudiced by these questions, especially in view of the fact that he wholly denied the charge impliedly made by them, and no effort was made to rebut his testimony on that subject.

[2] There is no merit in the third assignment of error, because there was no proper objection. In Davidson S. S. Co. v. United States, 142 Fed. 315, 73 C. C. A. 425, this court said:

"It has been held by this court many times that a trial court is justified in overruling an objection to a question, or to the evidence sought to be elicited thereby, when no ground is specified, or when the ground mentioned is so general in form as to be insufficient to direct attention to the particular defect or objectionable feature relied on."

Judge Hook then cited numerous authorities to that effect from this court, but to have cited all the authorities to the same effect in other federal and in the state courts would have been impossible, for they are innumerable. This case went to the Supreme Court (Davidson S. S. Co. v. United States, 205 U. S. 187, 27 Sup. Ct. 480, 51 L. Ed. 764), but in that court this question was not even raised. Having answered this question without legal objection, it would follow that there was no merit in the fourth and fifth assignments.

[3] The defendant, claiming he was in a wholly legitimate business, that of handling a bus and baggage, practically admitted and apparently from the undisputed evidence had been in the drug business at Allen. The drug business is as legitimate as any known, but it is notorious that in the prohibited territory it is often conducted in connec-

tion with the illicit business in intoxicating liquors. He was charged with carrying liquor into Allen from without the state. If he was in fact selling whisky in his drug store, that made it necessary for him to receive it from some source. True, he might have bought it in what was formerly Indian Territory; but that would have been in violation of the constitutional provision of Oklahoma, enacted pursuant to the provisions of subdivision 2 of section 3 of the Enabling Act of Oklahoma (Act June 16, 1906, c. 3335, 34 Stats. 267, 269). The defendant had not only bought liquors in Indian Territory in violation of law, or had bought them without the state of Oklahoma and carried them into Indian Territory in violation of law, but had sold them and been convicted upon a plea of guilty. He claimed he had bought 17 quarts of whisky for his own consumption, and so testified in chief. On cross-examination this was sought to be shaken by showing that he had been selling liquors constantly in his store. In view of this thought he was on cross-examination asked the question as to whether he had been so selling them, and the court overruled a sufficiently specific objection. Before the objection could be made he answered the question, "No, sir." It is gravely doubtful whether under these circumstances the question was not admissible. He answered the question favorably to himself, and there was no effort to rebut his testimony. If this were a civil case, and the witness not a party, it is conceded the party in whose favor he answered it could not successfully assign the ruling as error. Short v. United States, 221 Fed. 248, 137 C. C. A. 104. In general, the rules of evidence in criminal and civil cases are the same. United States v. Gooding, 12 Wheat. 460, 467, 6 L. Ed. 693; Thompson v. Bowie, 4 Wall. 463, 472, 18 L. Ed. 423; Nudd v. Burrows' Assignee, 91 U. S. 426, 438, 23 L. Ed. 286. In Thompson v. Bowie, supra, the court quoted from Abbott, Justice, with approval:

"There is no difference * * * as to the rules of evidence between criminal and civil cases; what may be received in the one may be received in the other, and what is rejected in the one ought to be rejected in the other."

In Fitzpatrick v. United States, 178 U. S. 304, 315, 20 Sup. Ct. 944, 948 (44 L. Ed. 1078), the court said:

"Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf, and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. * * * Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are."

In Sawyer v. United States, 202 U. S. 150, 165, 26 Sup. Ct. 575, 579 (50 L. Ed. 972, 6 Ann. Cas. 269), the Supreme Court said:

"It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the

same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime."

See Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. —.

It is manifest that there is nothing in these assignments, in view of the clear and specific answers of the defendant of "No, sir."

In argument the plaintiff in error seems to rely upon the repetition of these questions as misconduct upon the part of the government's counsel. We shall not hesitate in a proper case to direct a new trial upon misconduct of the character suggested; but no objection on this ground was made in the court below, and it cannot be raised here for the first time, and especially in view of the doubt as to whether the evidence was not admissible, and of the answer of the defendant to the questions objected to and the failure to offer to rebut his answer, and the subject will not be further considered here.

[4] Passing, now, to the second specification of errors, which is based upon the overruling of the motion to instruct the jury to return a verdict of not guilty, the evidence showed that on the day in question the defendant got upon the train of the Missouri, Oklahoma & Gulf Railroad at Denison, Tex., ticketed to Allen, Okl.; that he carried a couple of suit cases; that he got off the train at Allen and was immediately arrested; the suit cases were taken to his store at Allen and opened; that one contained 12 quarts of whisky and the other 10 pints of whisky. It is true the defendant testified that the two suit cases with which he got on the train at Denison were not the same two with which he got off at Allen; that one of those he put on the train at Denison he put on for an unnamed lady and left it in her custody; that he bought this whisky at Tupelo, on the way from Denison to Allen, of a man named "Red," whose surname he understood was Phillips, with whom he had an arrangement to deliver the whisky through an intermediary of unknown name. This explanation by the defendant was for the jury to consider, and it evidently determined that it was not true. In the absence of this evidence, there was certainly abundance of evidence to justify a verdict for the United States, and we are satisfied the court had no right to assume that the defendant's evidence so overcame the evidence of the United States as to justify a directed verdict.

[5] Turning, now, to the last specification of error, we shall consider only the fourth instruction asked:

"You are instructed that the defendant is presumed to be a person of good character."

In Chambliss v. United States, 218 Fed. 154, 132 C. C. A. 112, the writer of this opinion said in effect that this instruction should have been given. The same court that sat in Chambliss v. United States sat in the case of Price v. United States, 218 Fed. 149, 132 C. C. A. 1, L. R. A. 1915D, 1070. The latter case was decided three days after the Chambliss Case, and the majority of the court held that there is no presumption that the character of the defendant in a criminal case is good. The writer, in concurring in the Price Case, said:

"My views of the subject considered in the foregoing opinion are quite fully expressed in Chambliss v. United States of America, infra [218 Fed. 154], 132 C. C. A. 112, and I simply concur in the result in the foregoing opinion."

This amounted to a dissent from the opinion in the Price Case, and to that dissent I still adhere, with all possible respect to my associates on the court. I think this case should therefore be reversed upon this question, but the majority of the court are still of the opinion that the case of Price v. United States, 218 Fed. 149, 132 C. C. A. 1, L. R. A. 1915D, 1070, correctly announces the law, and this point will therefore have to be overruled.

The case is affirmed.

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## In re LASSEROT.

(Circuit Court of Appeals, Ninth Circuit. March 12, 1917.)

No. 2934.

1. COURTS ⊜493(3)—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.
Where plaintiff had first instituted a suit in the state court in which judgment had been given to defendant, but findings had not yet been filed or judgment entered, the trial of a subsequent suit in the federal court for the same relief was properly postponed until after the judgment should be entered in the state court, and mandamus will not issue to compel the lower federal court to proceed to trial in that suit; since, where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1349–1352.]

2. COURTS ⊜493(3)—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION —EFFECT OF PENDING SUIT.
The pendency of a prior suit in another jurisdiction is not a bar to a suit for the same cause of action in a federal court, but its pendency is pleadable in abatement, to a second action, if the actions are in courts of the same state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1349–1352.]

3. COURTS ⊜500—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION— —APPOINTMENT OF RECEIVER.
Where the state court in a suit to quiet title had appointed a receiver who was in possession of the property, the validity of that appointment cannot be collaterally attacked, and the possession of the property vests in the state court jurisdiction to determine the issues relating thereto, and prevents the exercise of like jurisdiction by the federal court in a subsequent suit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1407, 1408.]

Petition by Genevieve Lasserot for writ of mandamus directed to the Honorable William G. Van Fleet, Judge of the United States District Court for the Northern District of California. Petition dismissed.

On November 8, 1912, Genevieve Lasserot commenced in the superior court of Contra Costa county, Cal., a suit against the People's Water Company to quiet her title to certain real estate from which she alleged she had been wrongfully ejected, and to enjoin the defendant from enforcing a certain

judgment which had been rendered against her in a prior action of ejectment, but in which she alleged she had not been served with process. On February 4, 1913, the defendant answered denying the plaintiff's title and asserting title in itself. On May 22, 1914, the case came on for trial, and on that day was partly tried, and the trial was continued until May 25th. On May 25th a receiver of the real estate was appointed by consent of the parties with authority to take possession of the real estate and to collect the rentals, who thereafter qualified and took possession. On the same day the plaintiff filed an amended complaint. On August 5, 1914, the defendant filed an answer and a cross-complaint. On November 12, 1915, the court set the cause for trial on certain issues in the cause reserving to the plaintiff the right to a jury trial as to other issues. The cause was thereupon tried and submitted. On January 21, 1916, the court filed an opinion finding in favor of the defendant on the issues submitted, and judgment was entered accordingly. On November 21, 1916, the trial was resumed before the court on the remaining issues, and at the conclusion the court rendered an oral decision that judgment be entered for the defendant; but no findings were filed, and the judgment was not entered. In the meantime, on May 12, 1916, the plaintiff commenced in the District Court of the United States for the Northern District of California a similar suit against the same defendant seeking the same relief as in the first suit. On June 21, 1916, the defendant answered as before, and also pleaded the pendency of the prior action in the state court. On November 22, 1916, the defendant filed in the federal court a motion to postpone the trial therein until the final judgment in the state court should be entered. On December 18, 1916, that motion was allowed. The plaintiff in those actions thereafter filed in this court her petition for mandamus to the judge of the District Court of the United States for the Northern District of California to require him to proceed with all convenient speed to hear and determine the suit in that court.

John L. Taugher, of San Francisco, Cal., for petitioner.

M. R. Jones, of San Francisco, Cal., for respondent.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1] In brief, the case presented by the petitioner is this: The petitioner began her suit in the state court, and that court by its receiver took possession of the property in controversy. The cause proceeded to trial, and judgment was given to the defendant; but findings were not filed nor judgment entered. The petitioner now asks for mandamus to the District Court of the United States to compel it to go to trial on the same cause of suit between the same parties in an action commenced in that court, after the state court had appointed its receiver and decided some of the issues of the case.

The petition for mandamus must be denied. It is the general rule that, when suits are brought in courts of concurrent jurisdiction involving the same controversy and between the same parties, the court in which the suit was first instituted is entitled to the exclusive jurisdiction to determine the controversy. In Smith v. McIver, 9 Wheat 532, 6 L. Ed. 152, Chief Justice Marshall said:

"We think the cause must be decided by the tribunal which first obtains possession of it, and that each court must respect the judgment or decree of the other."

In Taylor v. Taintor, 16 Wall. 366, 370, 21 L. Ed. 287, the court said:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted."

In Harkrader v. Wadley, 172 U. S. 148, 164, 19 Sup. Ct. 119, 43 L. Ed. 399, the court reaffirmed the rule so expressed in Taylor v. Taintor. To the same effect are Westfeldt v. North Carolina Mining Co., 166 Fed. 706, 92 C. C. A. 378; Jackson v. Parkersburg & O. V. Ry. Co. (D. C.) 233 Fed. 784; Wolf v. District Court, 235 Fed. 69, — C. C. A. —. We find nothing in McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762, cited and relied upon by the petitioner, which modifies the rule so expressed in the cases above cited. The court in that case said:

"The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction, for both the state and federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case."

This was said in view of the record, which, so far as it disclosed the facts, indicated that the federal court had acquired jurisdiction and the issues had been made up before the beginning of the proceeding in the state court, and the Supreme Court held that the federal court could not abandon this jurisdiction already properly obtained and turn the cause over for adjudication in the state court.

[2] But the expressions of the court in the cases above cited do not mean that the pendency of a prior suit in another jurisdiction is a bar to a suit for the same cause of action in a federal court. That it is not a bar was decided in Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983; Bryar v. Campbell, 177 U. S. 649, 20 Sup. Ct. 794, 44 L. Ed. 926; Hunt v. N. Y. Cotton Exchange, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821. It is held, however, that the pendency of a former action between the same parties for the same cause is pleadable in abatement to a second action provided the actions be in courts in the same state. Insurance Co. v. Brune's Assignee, 96 U. S. 588, 24 L. Ed. 737; Shelby v. Bacon, 10 How. 56, 13 L. Ed. 326; Foley v. Hartley (C. C.) 72 Fed. 570. And while it is true that if a prior suit does not deal with specific property, but is strictly in personam, with nothing more in view than a personal judgment, a subsequent action may be brought in another jurisdiction between the same parties and upon the same issues, and judgment may be obtained in either, the suits here under consideration are not in personam, but are quasi in rem. Black's Law Dictionary, 608; Freeman v. Alderson, 119 U. S. 187, 7 Sup. Ct. 165, 30 L. Ed. 372; Hill v. Henry, 66 N. J. Eq. 150, 57 Atl. 554.

[3] Again: The state court appointed a receiver to take possession of the property and collect the rents thereof. The validity of that appointment so made by a court which had jurisdiction of the parties and the subject-matter cannot be collaterally attacked. Mercantile Trust Co. v. Pittsburgh & W. R. Co. (C. C.) 29 Fed. 732; Gunby v.

Armstrong, 133 Fed. 417, 66 C. C. A. 627. Where one court has taken possession of property by its process, a suit in a co-ordinate jurisdiction to affect the same property, while it should not be dismissed, its prosecution should be stayed until the proceedings in the court which first secured jurisdiction of the property are concluded or until ample time for their conclusion shall have elapsed. The possession of the res vests in the court which first acquires jurisdiction power to hear and determine the controversies relating thereto, and prevents the exercise of a like power by a court of co-ordinate jurisdiction. In Palmer v. Texas, 212 U. S. 118, 125, 29 Sup. Ct. 230, 232 [53 L. Ed. 435], the court said:

"The federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty. If a court of competent jurisdiction, federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty."

Similar decisions are Wabash Railroad v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379; Farmers' Loan, etc., Co. v. Lake St. R. Co., 177 U. S. 57, 61, 20 Sup. Ct. 564, 44 L. Ed. 667; Merritt v. American Steel-Barge Co., 79 Fed. 228, 24 C. C. A. 530.

The petition is dismissed.

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## FENTRESS COAL & COKE CO. v. ELMORE.

(Circuit Court of Appeals, Sixth Circuit. February 16, 1917. On Motion for Rehearing, April 13, 1917.)

No. 2873.

1. MASTER AND SERVANT ⟸276(3)—INJURIES TO SERVANT—QUESTION FOR JURY—PROXIMATE CAUSE OF ACCIDENT.

In an action for injuries to a mine employé, caused by a collision between the car on which he was riding and a car which had become uncoupled from it and derailed, evidence *held* sufficient to warrant the jury in finding that the uncoupling of the car was the proximate cause of the derailment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959.]

2. MASTER AND SERVANT ⟸278(10)—INJURIES TO SERVANT—EVIDENCE—NEGLIGENCE—DEFECTIVE APPLIANCES.

In an action for injuries to a mine employé, evidence *held* sufficient to warrant the jury in finding that the coupling hook on a car was defective, and had been so long enough to raise a duty on the part of the employer to repair it, though there was no direct evidence of such defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 964.]

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3. MASTER AND SERVANT ⊂=289(22)—INJURIES TO SERVANT—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a mine employé, working as brakeman on the mine cars, evidence *held* not to show as a matter of law that plaintiff was contributorily negligent in failing to discover a defective coupling hook on one of the cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1113.]

On Motion for Rehearing.

4. COURTS ⊂=280—JURISDICTION—PROOF—ADMITTED ALLEGATIONS.

Where the allegations of the declaration, not put in issue by answer, are sufficient to show jurisdiction of the federal court, no proof to establish such jurisdiction is necessary.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818.]

5. REMOVAL OF CAUSES ⊂=86(3)—DIVERSITY OF CITIZENSHIP—PETITION—CITIZENSHIP OF CORPORATION.

An allegation that defendant corporation was a citizen of a state other than the state of plaintiff's citizenship, residing in that state, with no allegation that it was organized under the laws of that state, is insufficient to sustain the federal court's jurisdiction after removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 171.]

6. REMOVAL OF CAUSES ⊂=103 — REMAND — AMENDMENT — AMENDMENT BY PLAINTIFF.

Where an action against a corporation was removed to the federal court by defendant, but the petition was defective for failing to allege that the corporation was organized under the laws of the state of which it claimed to be a citizen, which objection was raised by defendant after judgment for plaintiff had been rendered, the defect may be cured by amendment, and the judgment, but not the verdict, will be reversed, and the cause remanded, with directions to re-enter the judgment, if the plaintiff amends his declaration and establishes the organization of the corporation.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 221.]

In Error to the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Action by Beecher Elmore against the Fentress Coal & Coke Company. Judgment for the plaintiff, and defendant brings error. Affirmed, but on motion for rehearing, affirmance set aside, judgment, but not verdict, reversed, and cause remanded for determination as to jurisdiction.

W. B. Miller, of Chattanooga, Tenn., for plaintiff in error.

J. F. McNutt, of Rockwood, Tenn., and J. T. Wheeler, of Jamestown, Tenn., for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

DENISON, Circuit Judge. In the court below Elmore recovered a judgment for personal injuries received while employed in defendant's mine. The case comes here upon the claims that there was nothing tending to show defendant's proximate negligence and that contributory negligence conclusively appeared.

The record indicates that the case came into the court below through removal from the state court, but the removal proceedings are not

included in the transcript, and the transcript as filed in this court does not show federal jurisdiction. Since less than the whole record is here, and since all parties have assumed—and still do—that there was jurisdiction, we feel justified in concluding that the omitted proceedings sufficiently disclosed a diverse citizenship.

The question of negligence arises in this way: Elmore was doing, with reference to mine cars, the work done by brakemen and switchmen upon a surface road. The mine cars were small and short, and were coupled together by a hook on one of them engaging with an eye or link, carried by a chain, on the other. Two styles of hooks were in use: The later style, intended for the newer and heavier type of cars, was heavy and strong and made of cast iron or steel; the older style (in process of being supplanted, but still in considerable use) was of wrought iron, and of much lighter construction. In this style the normal hook was strong enough, and was sufficiently recurved, so that it would hold the link upon the hook in the exigencies of use; but as the hook became worn and weaker it tended, in use, to pull out straighter, so as to have merely a single, right-angled bend, in which condition it was unsafe, because so easily disengaged from the link by the shocks it naturally received.

While Elmore was lawfully riding on the tenth car of a train of such mining cars, which was coasting downgrade in the mine, the car on which he was riding became uncoupled from the one ahead, and the cut of nine cars ahead ran on uncontrolled; the last one of the cut was derailed, his car ran into it, and he was thrown off and hurt. Plaintiff's theory of negligence is that the uncoupling happened because the hook was worn and straightened.

[1] It is first urged that a defective hook could not have caused the injury herein, because the uncoupling of the hook and link on the rear of the ninth car would have no tendency to derail that car. This would seem to be true on an ordinary train, but not so as to a train of very short cars running away downhill, on a rough track. In such a situation the rear car, deprived of the steadying influence of a coupled-up following car, would be distinctly likely to be snapped off the track, like the cracker of a whip. It cannot be denied that it was within the province of the jury to find that the uncoupling, if it occurred, was the proximate cause of the derailment.

[2] It is next said that there is no evidence sufficiently tending to show that the uncoupling happened because of a defective hook, or that this particular hook was defective. There is no direct testimony to this effect; so the question is whether all the facts and circumstances are enough to justify a jury in concluding, as this jury did, that this hook was defective. When these facts and circumstances are collated, it is seen that the defendant was customarily using these hooks, which customarily became defective; that the cars of this type were continually being sent to the repair shop to have the hooks repaired and rebent; that one of these hooks, so straightened that its use in that form was conceded to be negligent, was found upon one of the cars two or three days after the accident; that shortly before the accident an employé represented to the superintendent that a group

of these cars had their hooks in such condition that they ought to go to the shop for repairs, and that the superintendent gave instructions to use them a few trips more before so doing; and that no other reasonably probable cause for the uncoupling is suggested by the record. Taking all these things together, we think they furnish legal justification for a finding of the jury that the hook on this car was sufficiently defective, and had been so long enough, to have raised on the part of defendant the duty of such repair as was necessary to make it safe. We classify this case with our previous holdings in such cases as Felton v. Newport, 105 Fed. 332, 44 C. C. A. 530, and Pittsburgh Co. v. Scherer, 205 Fed. 356, 123 C. C. A. 484, rather than with such cases as Smith v. I. C. R. R., 200 Fed. 553, 119 C. C. A. 33, and Richards v. Mulford, 236 Fed. 677, — C. C. A. —.

[3] There remains the question of contributory negligence, which in Tennessee is still a bar to recovery by plaintiff.

It is said that Elmore's duties were such that upon him rested the primary duty of inspection, that the company would know of the unsafe condition of such hooks only through reports made by Elmore, and that his negligence in not reporting the defect, but in continuing to use the car, directly contributed to the result. On the other hand, it is said that he had no duty of inspection to such an extent as to supplant the employer's primary duty, and that his whole work with the mine cars was underground and in the dark, so that he would not naturally have discovered this defective hook, but would have learned of it only by chance. In this connection a controversy has arisen whether Elmore's work was or was not wholly underground, and whether, when he says that he gathered these cars together and helped make up this train "about two miles from the mouth of the mine," he means two miles inside the mouth or two miles outside the mouth. On this subject the record brought to this court is uncertain and confusing. The question of contributory negligence was submitted to the jury under a charge to which neither party excepted. We have examined the record with special reference to this phase of the case; and when we give due effect to the fact that the superintendent in authority over Elmore regarded the cars which were in bad condition in this respect as still safe for further use, and to the uncertainty as to what knowledge Elmore would naturally have acquired, and pay respect to the rule that the burden is on defendant to establish this defense, we cannot say that his negligence in continuing to work around and with this car conclusively appears. Tennessee Co. v. Gaddy (C. C. A. 6) 207 Fed. 297, 299, 125 C. C. A. 41.

It follows that the judgment must be affirmed.

On Motion for Rehearing.

The opinion was erroneous in stating that all parties continued to assume that there was jurisdiction, and that the removal proceedings were not included in the transcript. It overlooked the fact that the removal proceedings had been added by a supplemental transcript, and that plaintiff in error's brief challenged the jurisdiction of the court below. That subject must therefore be considered.

Plaintiff's declaration in the state court said nothing on the subject of the residence or citizenship of either party; it did allege that defendant was "a body politic and corporate." Defendant's removal petition alleged that, both at the time of commencing suit and filing of removal petition, the plaintiff was a citizen of Tennessee, and the defendant was "a citizen of the state of Pennsylvania and of no other state, residing in the city of Philadelphia, in said state."

The answer, later filed, tendered no issue upon the claim of the declaration that defendant was a body politic and corporate; and, indeed, the form of the petition for removal is an implied admission of defendant's corporate character.

[4] If the facts thus established by the pleadings, and not requiring proof, were sufficient to show jurisdiction, it would not be material that there was no proof. See note 2, Chicago Ry. Co. v. Stephens (C. C. A. 6) 218 Fed. 535, 539, 134 C. C. A. 263.

[5] However, the pleadings contain no allegation, and the record brought to this court contains no proof, that the defendant corporation was organized under the laws of Pennsylvania, and this has been held to be a fatal defect. Lafayette Co. v. French, 59 U. S. (18 How.) 404, 405, 15 L. Ed. 451; Chicago Ry. Co. v. Stephens, supra, 218 Fed. at page 539, 134 C. C. A. 263.

This case is like La Belle Co. v. Stricklin (C. C. A. 6) 218 Fed. 529, 533, 134 C. C. A. 257, 261, in that the defect pointed out is of a highly artificial character, and (for it is not to be supposed that defendant intended a trick) consists in an accidental omission or mistake by defendant in its petition for removal. Except that in the La Belle Case plaintiff would have lost three years, if the case had been sent back to the state court, while in the present case in that event plaintiff will lose six years, the following quotation from what is said in the La Belle Case is applicable here:

"That, for such defect, the judgment which has been recovered should be reversed and the case remanded to the state court, must always be unfortunate; but that, in the present case, Stricklin, after commencing his suit in the proper court, after having been taken against his will into the federal court, spent a year in reaching trial, gone through the trial, and recovered a judgment for an amount which was certainly not excessive, if his story was true, and then having lost two years more in getting the case to its present position—that after all this, and after continual acquiescence in the jurisdiction of the federal court, and without any affirmative reason to doubt that the facts existed which gave the jurisdiction, he should be sent back to begin over again, because the other side made an imperfect allegation, is a result not to be reached, unless imperatively required by settled rules."

There are several matters, which perhaps might serve to distinguish the present case from the strict rule of Lafayette v. French. We observe that the petition for removal in the present case alleges not only that defendant is a citizen of Pennsylvania, but that it is not a citizen of any other state, thus removing the contingency that it might have been organized also under the laws of Tennessee. We observe further that while the present bill of exceptions states that it contains all the evidence, yet since the present practice requires the testimony to be in narrative form, and forbids the insertion in the

bill of exceptions of any evidence not bearing upon the assignments of error, which must be presented to the District Judge when he settles the bill, and since the present assignments of error made no mention of this subject, the parties and the District Judge might well have omitted from the bill of exceptions all proof given on the trial pertaining to the subject of diverse citizenship; and there would be distinctly better ground than there used to be for presuming that the necessary proof was in fact given.

[6] However, we think it not necessary to pass upon these possible distinctions, but regard it as the better practice to follow the rule which was approved by this court in Toledo Traction Co. v. Cameron, 137 Fed. 48, 54, 69 C. C. A. 28, and applied in Chicago Ry. Co. v. Stephens, supra, 218 Fed. 547, 134 C. C. A. 263, and practically approved by the Supreme Court in Mexican Ry. v. Duthie, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. Ed. 715. See, also, McEldowney v. Card (D. C.) 193 Fed. 475, 483. The defect in the record is capable of being cured by amendment, in spite of the fact that the case came into the court below by removal from a state court. La Belle Co. v. Stricklin, supra, 218 Fed. 533, 534, 134 C. C. A. 257; Rife v. Lumber Underwriters (C. C. A. 6) 204 Fed. 34, 36, 122 C. C. A. 346.

The application for rehearing also points out that the opinion inaccurately stated certain details of the injury; but we find no error material to the result.

On its merits the application is denied. The order of affirmance will be set aside, and the judgment below, but not the verdict, is reversed, without costs of this court to either party; and the case will be remanded for determining the question of jurisdiction. If, in manner to be determined by the court below, plaintiff shall properly amend his declaration and establish the necessary diverse citizenship existing when the suit was commenced and when the removal was made the judgment will be re-entered; if jurisdiction be not thus shown the case will be remanded to the state court.[1]

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## HAIR et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. February 6, 1917.)

No. 2281.

1. POST OFFICE ⊜49—OFFENSES—SCHEMES TO DEFRAUD—EVIDENCE—ADMISSIBILITY.

An indictment charging defendants with using the mails in the execution of an alleged scheme and artifice to defraud, after alleging their establishment of agencies for the sale of fire extinguishers, averred the falsity of defendants' representations that the fire extinguisher tubes were worth the $2 paid for them by agents and would readily sell at an advance, as well as representations that the extinguishers would easily put out all kinds of fires. The article was made by a secret process. *Held* that, in such case, the efficiency of the extinguisher was in issue, independent of its bearing on its value and salability, though obviously affect-

[1] This case had been removed from the state court before the passage of the Act of March 3, 1915 (section 274c, Judicial Code [Comp. St. 1916, § 1251c]). In view of the conclusions reached by the opinion, it is unnecessary to consider whether that statute reaches this case.

ing those questions; hence evidence that the extinguisher was practicable and put out fires was admissible.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86.]

2. POST OFFICE ⊂⊃49—OFFENSES—SCHEMES TO DEFRAUD—EVIDENCE—ADMISSIBILITY.

In such case, as the essence of the criminal scheme was the intent to defraud, letters to defendants stating the efficacy of the extinguisher were properly admissible on the question of good faith.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86.]

3. POST OFFICE ⊂⊃49—TRIAL—EVIDENCE.

In such case, where the government introduced expert testimony that the extinguishers would only once in a while put out a fire well started, such letters cannot be excluded on the ground that the government conceded the extinguishers were efficacious for putting out incipient fires.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86.]

4. CRIMINAL LAW ⊂⊃1170(1)—APPEAL—HARMLESS ERROR.

In such case, where the court informed defendants' counsel that the concession of the government was something that he could comment on in his reply to the jury, and the government's attorney in conceding that the extinguishers were efficacious as to incipient fires compared them to a bucket of water, the exclusion of evidence of such letters was prejudicial; the entire record not so plainly establishing defendants' guilt that it must be assumed they would have been convicted though the evidence was received.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145, 3149–3152.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Josiah T. Hair and another were convicted for use of the mails in the execution of a scheme and artifice to defraud, and they bring error. Reversed and remanded.

Defendants (plaintiffs in error) were each sentenced to three months' imprisonment and to pay a fine of $2,500 upon conviction for use of the mails in execution of an alleged scheme and artifice to defraud. They were the owners and managers of a corporation known as Liberty Association, having its principal office at Chicago, engaged in making and selling fire extinguishing appliances, mainly dry chemical fire extinguishers. Defendant Josiah T. Hair, about 1899, devised a dry chemical fire extinguisher, and began its manufacture and sale. About 1903 defendant Burchard Hair, his son, became interested with him. They produced a dry chemical compound in powder form, about three pounds of which, placed in a long metal tube, constituted the dry extinguisher, to be hung or placed at convenient places in buildings, and in case of fire to be used by pulling the cap from the tube and throwing the powder as nearly as possible at the seat of the fire. The product had merit not only for putting out the fires, but in preserving indefinitely its powder form —caking or solidifying in the tube manifestly destroying its further usefulness. Making and selling such product, and handling other fire extinguishing appliances, continued to be the business of the corporation, the sale of the product being made mainly through canvassers and agents.

In 1909 defendants conceived the plan of marketing the product through establishing agencies; the agent to purchase and pay for an agreed quantity of the tubes at $2 per tube, and to sell them at $3. Advertisements were inserted in newspapers stating in substance that agents were wanted in an established business to handle an easy selling article, and that a good salary would be paid, together with commissions and expenses, and stating that the applicant would have to invest from $500 to $1,000. In this manner, and

through solicitors who were sent out to place agencies, during the years 1909, and 1910, about 80 of such agents were secured, most of whom paid to the company sums from $100 to $1,000 each, receiving goods to represent the amount so paid at agreed prices, and entering into contracts in writing with the defendants' company like those set out in the indictment and shown in evidence, the salient provisions of which are that the corporation engages the general sales agent to conduct the business of the corporation in the prescribed locality for the time fixed, at a stated monthly salary and 5 per cent. commission on sales in consideration of the agent's performance and fulfillment of his part of the agreement; the corporation to pay for rent of office, stationery, circulars, and the like; to instruct the agent in the merits and use of the dry extinguisher, and other materials and apparatus the corporation manufactures or deals in; to sell to agent the dry extinguishers at $24, cash per doz. and at expiration of term and fulfillment of the agreement to repurchase from agent at price charged, such as remain on his hands; the agent to devote all his time and efforts to the business, and to carry a stock of the extinguishers of not less than a stipulated amount at said price; to make weekly and monthly reports to the corporation; to make sales of an average stated monthly amount as the minimum of business to fulfill the agent's contract; corporation reserves right to cancel contract at end of six months if sales are below the minimum, and, in case of such cancellation, to repurchase stock on hand at prices charged; at end of each month agent shall deduct from money collected his own remuneration, commission, and authorized expenses, and remit balance to company, which shall replace stock sold by agent, and, in case the minimum business required shall not be sufficient to pay the expenses of the office and cost of replacing stock, the corporation will each month make good the deficiency. In the procurement of the contracts, and the payment of the money which was paid by the agents to the company, the mails were employed as stated in the indictment.

The alleged false and fraudulent representations of defendants are, briefly, that the corporation would employ the agent at a salary of from $75 to $150 per month and commissions and expenses; would make the intended victim sales manager for a specified territory; that the corporation would at any time repurchase from the agent any stock at the price he paid for same; that the extinguishers would readily sell at $3 each; and that at such price the agent could make the minimum sales required; that the agent would be paid by the company the agreed salary and expenses regardless of the amount of his sales; that the extinguishers would instantly destroy all kinds of fires, and were approved by the National Board of Fire Underwriters and chiefs—whereas, in fact, none of such representations were true. Further facts are stated in the opinion.

Amos W. Marston, of Chicago, Ill., for plaintiffs in error.

Charles F. Clyne and H. R. Harris, Jr., both of Chicago, Ill., for the United States.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). Various of the numerous assignments of error involve rulings of the court excluding from the evidence testimony of certain witnesses, and many admittedly genuine letters, all tending to establish the merit and the efficiency of these dry chemical extinguishers, and their capability of extinguishing fires of various kinds, and bearing on the state of mind of defendants in making the alleged fraudulent representations.

[1] The defendants were charged with falsely representing that the product was worth what the agents paid for it, viz. $2 per tube, and that it would readily sell at $3, and that it would easily extinguish all

kinds of fires however fierce and savage, when in fact the indictment charges the product was not worth to exceed $1 per tube and would not readily sell at $3 and would not put out fierce or savage fires. The article was made by a secret process, and even if the evidence revealed its ingredients, which it does not, its commercial value would not be determinable alone from the actual cost of such ingredients plus cost of manufacture. Its utility would be an important element bearing on its money value as a manufactured article. If useless and ineffective, it would doubtless be worth commercially less than the cost of the ingredients, since by thus compounding them into a useless product the original value of the ingredients would be impaired, if not wholly lost. If, on the other hand, the product was highly efficient, this fact would tend strongly to have an opposite effect on its money value. Evidence of efficiency was competent as bearing on the value, desirability, and salability of the product. Under this charge of fraudulently representing the product to be capable of instantly extinguishing all kinds of fires, however fierce and savage, at least one of the government's witnesses (Zieman) testified that in his experiments only once in a while could he put out a fire, and that he had complained that the powder would not work. The efficiency of the product to put out fires was an issue, independent of its bearing on the value and salability, on which evidence of witnesses as to their experience with it, and as to the character and kind of fires which it would extinguish, was clearly admissible.

[2, 3] Of the essence of any such alleged criminal scheme or artifice is the intent to defraud. If this be wanting, there is no such scheme or artifice, and no crime. Letters of the nature of those which were excluded, coming to the attention of the defendants before the time of the alleged offense, and reasonably capable of inducing or confirming or strengthening faith in the excellence and efficiency of the product, are admissible under such charge, on the question whether the representations charged and proved were made in good faith or with intent to defraud. Hibbard v. United States, 172 Fed. 66, 96 C. C. A. 554, 18 Ann. Cas. 1040; Harrison v. United States, 200 Fed. 662, 119 C. C. A. 78; Gould et al. v. United States, 209 Fed. 730, 126 C. C. A. 454; Patterson v. United States, 222 Fed. 599, 138 C. C. A. 123. Indeed, the admissibility of evidence such as that excluded is not seriously controverted on behalf of the government, but it is earnestly insisted that on the trial the government conceded that these dry extinguishers were efficient to put out fires, and that therefore there was no error in ruling out this evidence; and that in any event in view of such concession by the government, together with the fact that some evidence was admitted to like effect as that which was excluded, no possible harm came to defendants through the exclusion.

Charged with willfully and fraudulently misrepresenting the efficiency and the value and salability of the product, and at least one witness for the government having testified in support of that charge, it was the right of the defendants to have their evidence in exculpation fully adduced before the jury, and they should not have been required

in lieu of such right to accept the concession of the district attorney on a proposition so material and important to the defense.

[4] This is particularly true in view of the fact that the concession of the government does not appear to be as broad as the charge or the evidence thereunder. The indictment alleged a deliberate and fraudulent misrepresentation as to efficiency and value and salability, and charged that the product "would not instantly destroy by scientifically smothering all kinds of fires no matter how fierce or savage, and that the said fire extinguishers were not capable of extinguishing fierce and savage fires." The concession of the government was not formal, but appeared in various colloquies between counsel themselves or with the court, occurring at different times during the long trial. In most instances the concession is qualified by the word "incipient," and thus limited the conceded efficiency of the extinguisher to putting out incipient fires. The concession did not go to the extent of its putting out "all kinds of fires no matter how fierce or savage." On the argument to the jury counsel for the government undertook to minimize the concession by saying "the government admits that these extinguishers are good for incipient fires just as a bucket of water would be to smother flames," and on objection by defendants' counsel the court said:

"This is merely something that you can comment on in your reply. * * * It has been admitted by the government that this is a perfectly efficient powder for putting out incipient fires, and I have already instructed the jury."

If the concession was such that counsel could properly argue that the extinguisher had no greater merit than a bucket of water in putting out fires, evidence of capability far beyond that was proper and material, and its exclusion erroneous. This indefiniteness and uncertainty of the extent of the concession but emphasizes the impropriety of excluding the offered evidence.

Nor can we conclude that through the exclusion of the evidence no substantial harm came to defendants. Where from examination of the entire record the guilt of the accused is so plainly apparent that, even with the rejected evidence admitted, the result could not have been otherwise, the error in rejecting the evidence might be considered harmless, and not sufficient ground for reversal. But such examination of the record here does not satisfy us that the guilt of the defendants is so plainly apparent that, had the improperly excluded evidence been before the jury, a different result might not have been reached.

For the error indicated, the judgment is reversed, and the cause remanded, with direction to grant a new trial.

## In re VALECIA CONDENSED MILK CO.

## NATIONAL BANK OF LA CROSSE v. WARNER.

(Circuit Court of Appeals, Seventh Circuit. February 8, 1917.)

No. 2409.

1. CORPORATIONS ⊜474—BONDS—CONSIDERATION—PLEDGE FOR LOAN.
Bonds of a corporation, pledged by it as collateral security for a loan equal to the par value of the bonds, are issued for more than 75 per cent. of their face value, so as not to be void under St. Wis. 1915, § 1753, providing that no corporation shall issue any bonds, except for money or labor or property, estimated at its true money value, equal to 75 per cent. of the par value thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1854.]

2. CORPORATIONS ⊜474—BONDS—CONSIDERATION—PLEDGE—POWER OF SALE.
The fact that a pledge of corporate bonds to a bank as security for a loan to the corporation equal to the face value of the bonds authorized the bank to sell the bonds, without expressly stipulating that they should not be sold for less than 75 per cent. of their face value, does not make the bonds void under St. Wis. 1915, § 1753, forbidding a corporation to issue bonds for less than 75 per cent. of the par value thereof, though none of the bonds were returned when payments were made on the loan, where the bank made no attempt to take advantage of its possession of the bonds before the bankruptcy of the corporation, and thereafter offered to return to the trustee all except an amount which at 75 per cent. of their par value equaled the amount still due on the loan, since it will not be presumed that the bank intended to violate the law, and an agreement to deal with the bonds in a legal manner will be implied.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1854.]

Appeals from the District Court of the United States for the Western District of Wisconsin; Ferdinand A. Geiger, Judge.

In the matter of the Valecia Condensed Milk Company, bankrupt. From a judgment of the District Court (233 Fed. 173), holding, on petition of Paul S. Warner, as trustee, that certain bonds issued by the bankrupt and held by National Bank of La Crosse were void, the Bank Appeals. Reversed, with directions.

See, also, 237 Fed. 136.

The above cause is brought here both by appeal and by petition to review and revise, and is submitted upon the record on appeal, from which it appears that the bankrupt, the Valecia Condensed Milk Company, being desirous of securing a loan of $15,000 from the National Bank of La Crosse, termed appellant herein, made application to said bank through one Montague, a director of the bank, to that end, offering as security its two promissory notes, for $7,500 each, together with $15,000 par value of bonds, and to assign invoices of milk sufficient to take care of the notes by maturity. The bank, having required and received the indorsement of Montague on said notes in addition to the security tendered, made the loan. As security for one of said notes, indorsed by said Montague as aforesaid, said bonds to the amount of $10,000 par value, secured upon the bankrupt's Reedsburg plant, were delivered to the bank, together with certain invoices of milk, which latter when paid were to be credited thereon. The transfer of the bonds as collateral was accompanied by the usual instrument in writing, authorizing sale in case of failure to pay the note at maturity, without any expressed provision that the bonds be not sold for less than 75 per cent. of their face value. As security for the other $7,500 note so indorsed, there was in like manner delivered to said bank $5,000 in

par value of said bonds, together with certain milk invoices, with like unqualified power of sale.

The transactions thereafter were such that the first described note was fully paid out of the proceeds of the milk invoices, and the other note reduced to $5,032.45 and interest at the time of the trial, from the balance of the available milk invoices. The bonds were not turned back pro rata, but held by the bank, without any request for their return having been made by the bankrupt. The notes aforesaid were executed and delivered on December 28, 1914. The Valecia Condensed Milk Company was declared a bankrupt on April 16, 1915, upon petition filed March 27, 1915. On January 21, 1916, the appellant filed its petition with the trustee in bankruptcy, setting out the amount of its claim against the bankrupt, the possession by it of $16,000 of said Reedsburg bonds, the balance of $5,758.38 remaining due on said loan, the fact that said bonds were issued and tranferred to it for more than 75 per cent. of their par value, that said bonds were a valid prior lien upon said Reedsburg property, that they should be so treated at any sale of said plant, and giving the numbers and denominations thereof.

Thereafter the trustee in bankruptcy, on January 21, 1916, answered said petition, denying the validity of the said bonds and the lien thereof, and charging that the same were issued in violation of section 1753 of the Wisconsin Statutes, and charging that the same were void. On the same day the appellant filed its amended petition, tendering the bonds it held in excess of a sufficient amount at 75 per cent. of their par value to cover the balance of the bankrupt's indebtedness on said remaining note, and charging that said bonds were originally issued to it at their full par value, and that it became the bona fide holder thereof, without any notice of any unauthorized or irregular issue, or invalidity thereof. By Exhibit A to said amended petition, being a copy of a statement delivered to appellee on about September 23, 1915, appellant sets up its willingness to accept said bonds at not less than 75 per cent. of their face value in payment of the amount remaining due upon said note, viz., $5,080.75, and delivered to the trustee, appellee herein, the balance thereof, and asserts that it never has attempted and never will attempt to sell or deal with said bonds at less than 75 per cent. of their par value. This statement, as well as the tender of the surplus of said bonds, was renewed on the trial. It appears from the record that each of said notes contained provision that the collateral aforesaid stood as or was security "for this or any other liabilities" of the bankrupt to the bank.

On October 15, 1915, the referee on petition of the trustee entered an order requiring appellant to show cause why the said bonds should not be declared void and why the same should not be delivered to the trustee. On January 21, 1916, appellant filed its answer to said rule, denying that said bonds were issued for less than 75 per cent. of their par value, or that the same are now so held. The answer also states that the said $15,000 so loaned to bankrupt by appellant was used by the bankrupt in paying its obligations, and makes its said amended petition a part of its answer. The referee held that the said bonds were void, as issued contrary to the statute, and that they be surrendered to the trustee, and that the same be canceled as existing obligations of the bankrupt. On review the District Court affirmed the judgment of the referee.

For error, it is assigned, in substance: (1) That the court held that said bonds were issued contrary to the provisions of the Wisconsin Statutes. (2) That the court held that said bonds were void, notwithstanding the subsequent offer to release all of said bonds save so much as would at 75 per cent. of their face value constitute security equal to the balance of the claim remaining unpaid. (3) That the court held that section 1753 of the Wisconsin Statutes had not been repealed by the Negotiable Instrument Law (Laws Wis. 1899, c. 356) so called. (4) That the court erred in declaring said bonds void without requiring payment of the sum for which they were pledged.

Frank Winter, of La Crosse, Wis., for appellant.
John B. Sanborn, of Madison, Wis., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] Section 1753 of the Wisconsin Statutes reads as follows, viz.:

"No corporation shall issue any stock or certificate of stock except in consideration of money or labor or property estimated at its true money value, actually received by it, equal to the par value thereof, nor any bonds or other evidences of indebtedness except for money or for labor or property estimated at its true money value, actually received by it, equal to seventy-five per cent. of the par value thereof, and all stocks and bonds issued contrary to the provisions of law and all fictitious increase of the capital stock of any corporation shall be void."

If the bonds in question were issued at all, it must have been at the time they were delivered to appellant as security for the $15,000 loan. It was held by the court in Pfister v. Ry. Co., 83 Wis. 86, 53 N. W. 27, that "when a corporation puts its bonds beyond its control by hypothecating them as security for loans, or for any other purpose, or in any other manner, it issues them, within the meaning and intention of the statute." That case further holds that if the bonds are so hypothecated, without stipulating "that they shall be accounted for at not less than seventy-five cents on the dollar of their par value, it violates the statute, and the bonds thus issued are void." That the bonds in question were issued in the statutory sense seems to have been conceded in the present case. That being so, and $15,000 of bonds having been hypothecated as security for the payment of the $15,000 loan, there seems to be little room for the proposition that the bonds were issued for a consideration less than 75 per cent. of their face.

[2] The basic contention here seems to be that there was at the time of the issue and delivery of the bonds, no stipulation requiring the appellant to account for the same at not less than 75 per cent. of their face value. It is manifest that the bonds were not taken with any intention of defeating the rights of the bankrupt under section 1753. The president of appellant refused to make the loan on the strength of the bonds, and required the director who was negotiating the loan to guarantee the same, which the latter, having full confidence in the bonds, readily did. Again, the bonds were hypothecated at their par value. This action serves to strengthen the claim that the bonds were hypothecated with the requirement of the statute in view. The appellant was a banker engaged in the making of loans, and as such must be presumed to have been familiar with what was necessary in protecting itself in such a situation. The statute had been before the courts on numerous prior occasions so prominently that to presume ignorance or willful conduct on the part of the bank challenges one's credulity. The statute says nothing about the taking of a stipulation from the pledgee or purchaser agreeing to account for the collateral bonds at not less than 75 per cent. of their par value. Nor does the Wisconsin court require that a stipulation of that character be reduced to writing or specifically declared. In our judgment the facts suffice to raise the implication of an agreement that the bonds should be so dealt with as would make them valid securities; that is, that if sold they must be accounted for at not less than 75 per cent. of their face value. This construction was placed by us on a similar state of facts in First Savings & Trust Co. v. Waukesha Canning Co., 211 Fed. 927, 128 C. C. A. 305;

and by the Circuit Court of Appeals for the Second Circuit in In re Waterloo Organ Company, 134 Fed. 345, 67 C. C. A. 327. It is but confirmed by the fact that the bank never parted with or tried to dispose of any part of said bonds contrary to the statute; that, so far as the record discloses, it gave no thought to its possession of the bonds until after bankruptcy was instituted; that the bankrupt does not appear to have made any inquiry as to the surplus of bonds the bank held; and that even after the note was due, when the bankrupt failed to place milk invoices with it as agreed on, there seems to have been no suggestion that the bonds would be resorted to. The whole situation seems to indicate a condition of friendliness for the bankrupt which precludes any suspicion of an intention to take any advantage of its possession of the bonds.

We therefore hold that the bonds in question were issued in full compliance with the terms of said section 1753 and are valid in the hands of the bank, at least to the amount of the balance due upon said $15,000 loan, estimated at not less than 75 per cent. of their par value. This being so, it becomes unnecessary to pass upon the other matters raised in the record and briefs of counsel.

The judgment of the District Court is reversed, with direction to proceed further in accordance herewith.

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## CHIN HUNG v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. February 8, 1917.)

Nos. 2427-2430.

1. ALIENS ⟸32(12)—EXCLUSION OF CHINESE—DEPORTATION PROCEEDINGS—EVIDENCE.

In proceedings for the deportation of Chinese persons, under Chinese Exclusion Act May 5, 1892, c. 60, § 3, 27 Stat. 25 (Comp. St. 1913, § 4317), providing that Chinese persons arrested under the act must establish their right to remain in the country by affirmative proof to the satisfaction of the justice, judge, or commissioner, judgment of the commissioner and of the District Court, ordering deportation, *held* not so clearly against the evidence adduced by the Chinese as to their right to remain as to warrant reversal thereof.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95.]

2. ALIENS ⟸32(12)—EXCLUSION OF CHINESE—DEPORTATION PROCEEDINGS—REVIEW—FINDINGS BY COMMISSIONER AND COURT.

Where the commissioner, who heard the testimony and saw the witnesses, and the District Court, were both dissatisfied with the testimony of the Chinese person, whose right to remain in the country was questioned, and of his Chinese witnesses, their judgments for deportation will not be reversed on appeal, though the facts testified to established a right to remain.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95.]

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Four separate deportation proceedings by the United States against Chin Hung, against Young Sing Hong, against Yuen Yuen, and against

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Young Toy. From orders of the District Court for deportation of the defendants, they appeal. Affirmed.

Benjamin C. Bachrach, of Chicago, Ill., for appellants.

Charles F. Clyne and Benjamin P. Epstein, both of Chicago, Ill., for the United States.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge. These are four separate appeals from orders of deportation. Only one question is presented to us in the four cases, viz.: Were the judgments of the commissioner and the district court, ordering the appellants, Chinese laborers, to be deported, clearly against the evidence adduced by them to show that they were entitled to remain in this country?

Section 3 of the Chinese Exclusion Act (27 Stat. 25, Comp. St. 1901, p. 1320) provides that Chinese persons arrested under the provisions of the act must establish their right to remain in the United States by affirmative proof, to the satisfaction of a justice, judge, or commissioner.

[1] The appellant Chin Hung, according to the testimony produced by him, was born in China and came to the United States when he was 5 years old. He did not register under the Act Nov. 3, 1893, c. 14, 28 Stat. 7. He was about 15 years of age when by said act all Chinese laborers lawfully in the United States were required to register. He bases his right to remain here upon his claimed status as the minor son of a regularly domiciled Chinese merchant in San Francisco at the time fixed for registration under said act. Whether his father resided in the United States at that time seems to be a question of considerable doubt. In his examination by an immigrant inspector upon his arrest, appellant gave the time of his father's permanent return to China as of a date 3 or 4 years prior to the time for registration. He seems to have been positive of the date of his father's departure, since he repeated it three times in the course of his examination. Before the commissioner, however, where he was represented by counsel, he repudiated his former statements in that respect and claimed that his father returned to China several years after the time for registration. He produced two Chinese witnesses to corroborate his testimony. Neither of them was in San Francisco during the period of registration. One was living in Philadelphia and the other in Chicago. One of them testified that he went to San Francisco in the year following the period of registration and saw appellant's father there, and the other testified that he went to San Francisco 2 or 3 years later and the father was then in China.

The other three appellants, Young Sing Hong, Yuen Yuen, and Young Toy, claim to have been born in the United States.

Young Sing Hong testified that he did not know where he was born, whether in China or the United States; that his father died when appellant was 10 years old; that he remembered none of the incidents of his life up to the time he was 12 years old; that after his arrest he met two friends who told him that they knew him and had known his father. They were produced as witnesses at the hearing before the

commissioner. They testified that they had known appellant's father in Portland, Or., and that appellant was born there.

Appellant Yuen Yuen on his arrest and examination by an immigrant inspector answered all questions as to his age, place of birth, names of parents, etc., by "I don't know," or "I don't remember." At the hearing before the commissioner he stated that he refused to give information to the inspector, upon the advice of a friend. He then testified that he was 19 years old and that he was born in San Francisco, at 28 Washington alley; that his father returned to China shortly after the San Francisco earthquake; that his father died a few months after the earthquake; that he, appellant, lived in Oakland, Cal., for 3 or 4 months after the earthquake and then his father sent him, at the age of 9 years, to Chicago with an uncle in order that he might find work, and that he has lived in Chicago ever since.

Two Chinese witnesses appeared in appellant Yuen's behalf. Lee Bong testified that he conducted a boarding house in San Francisco up until the time of the earthquake and purchased provisions from the store of appellant's father; that "his father told me about the boy"; that he attended the "birth feast"; that he saw appellant frequently in San Francisco until he was 8 or 9 years old; that he next saw him in Chicago at the age of 19 years; that he did not recognize appellant until the latter first recognized witness and that he was able to say that appellant was the same boy he knew at San Francisco; that witness had been in Chicago only about 6 months at the time of the trial; that he had been looking around for a place in which to open a restaurant during this time and had not worked at anything else nor found a suitable place for a restaurant; that he knew nothing concerning appellant's occupation, place of residence, etc., in Chicago, but was familiar with the details of his life in San Francisco—the street number where he was born, etc., but was unable to give the street on which was located the cigar store in which he himself had worked for 10 years. He further testified that he had lived in San Francisco continuously from the time he arrived there until he came to Chicago. In the certificate of registration produced by him his occupation was given as that of a farmer, and his residence San Jose. He then stated that he had worked on a farm for about a year.

Yee See testified that he worked in a laundry in San Francisco and bought provisions from the store of appellant's father; that he saw the father carrying appellant in his arms when a baby and the father told witness it was his boy; that he saw appellant frequently in his father's store until 7 or 8 years of age; that 8 or 9 years later when witness came to Chicago appellant met him and recognized him and called him by name and that he then recognized appellant.

Appellant Young Toy testified before an immigrant inspector that he was 28 years old and was born in San Francisco; that his mother died there when he was 2 years old, his father a year later; that he never went to school at San Francisco; that he was cared for by relatives until 14 years of age when he left, after the San Francisco fire, and came to Chicago where he has been living ever since; that he could not remember any of the streets where he lived in San Francisco;

that before giving any further testimony he wanted to see Frank Moy. When his counsel examined him at the hearing before the commissioner he testified that he came to Chicago at the age of 14 years, with his father; that he began working in a laundry as soon as he came to Chicago. On cross-examination he stated that he made a mistake in telling the immigration inspector that his father was dead; that on arriving in Chicago with his father he stayed in the laundry where his father worked, for 5 years, but he did not himself work; that he was able to give the names of a number of streets in San Francisco, which he did.

Witness George Wing testified that he was born in San Francisco and went to school there with appellant, who was a little older than witness; that he last saw appellant in San Francisco 3 or 4 years before the earthquake, and that appellant left there before the earthquake, and then saw him again in 1914 in Chicago.

Witness Lai Kai testified that he was a Chinese actor by occupation; that he had known appellant for more than 20 years; knew him when he lived at 726 Jackson street, San Francisco, with his parents; that he was in San Francisco when appellant was born, and attended the "birth feast," and remembered the names of others who were at that celebration, giving their names; that he saw appellant frequently in San Francisco until he was 10 years old, and then saw him again at Chicago, 13 or 14 years later. On cross-examination he stated that he had been in Chicago 6 months looking for a place as an actor in Chinese theaters; that there are no Chinese theaters in Chicago but he intended to organize one, and that although he had not yet found a suitable location for a theater his friends were looking about for a place; that appellant was not in San Francisco at the time of the earthquake; that he did not remember the year when appellant left San Francisco, but that it was when he was 13 or 14 years old.

[2] The decisions applicable to the several cases above stated are voluminous and emphatic.

In United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; and in Chin Bak Kan v. United States, 186 U. S. 200, 22 Sup. Ct. 891, 46 L. Ed. 1121, it was held that a child born in the United States of parents of Chinese descent, who, at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States and are there carrying on business and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States.

In Yee Yet v. United States, 175 Fed. 565, 99 C. C. A. 187, the Circuit Court of Appeals for the second circuit in a per curiam opinion holds that where the right of persons of the Chinese race, who entered the United States surreptitiously, to remain, depends entirely on the question of fact whether they were natives of this country, the decision of the District Court, which heard the witnesses testify, will not be reversed on appeal.

Chew Hing v. United States, 133 Fed. 227, 66 C. C. A. 281, upholds the judgment of the District Court affirming an order of a commission-

er for the deportation of a Chinese person against his claim that he was born in the United States, which was supported by the testimony of himself and two other Chinese witnesses, but was contradicted by a prior admission of defendant.

In Eng Choy v. United States, 175 Fed. 566, 99 C. C. A. 188, the Circuit Court of Appeals for the Eighth Circuit held that the finding of the commissioner and District Judge in a deportation case is presumptively correct; and the appellate court after an examination of the evidence finds the judgments below to be based on fact.

In Yee King v. United States, 179 Fed. 368, 102 C. C. A. 646, Circuit Judge Coxe says:

"We do not pause to point out the inconsistencies and improbabilities of the testimony offered for the defendants; it is sufficient that the commissioner and the judge do not believe the defendants' contention that they were born in the United States. The question here is not what this court would have found had the testimony been originally taken before us. The question is: Was the finding of the commissioner and the judge so clearly against the weight of evidence as to justify us in disregarding it? The rule that this court will not reverse, in such circumstances, has been so frequently followed that we do deem it necessary to do more than cite the more recent decisions on the subject. Hong Yon v. U. S., 164 Fed. 330 [90 C. C. A. 542]; Yee Yet v. U. S., 175 Fed. 565 [99 C. C. A. 187]."

In Lee Sing Far v. United States, 94 Fed. 834, 35 C. C. A. 327 (C. C. A. 9th Cir.), the court says:

"The question which we are called upon to decide is not whether there was any evidence tending to establish the fact that appellant was born in the United States, but is whether the evidence is so clear and satisfactory upon that point as to authorize this court to say that the court erred in refusing her to land, and in entering judgment that she be remanded. * * * It does not necessarily follow that, because four witnesses have testified positively that she was born in San Francisco, there being no witness to the contrary, their statements * * * must be accepted as true. If such a rule were adopted and followed, there would be no more Chinese remanded in such cases. It is safe to say that the United States is powerless to make any proof in any case as to the place of birth of Chinese children. * * * If, from the whole testimony, the court is not satisfied that the witnesses have told the truth, it has the right to exclude their testimony, and remand the petitioner, because the evidence * * * is insufficient to convince the mind of the court that the petitioner is entitled to land in the United States."

The District Court in United States v. Chu King Foon (D. C.) 179 Fed. 995, held that the commissioner in a Chinese deportation proceeding need not believe a Chinese witness when he sees him and has opportunity to judge of his credibility. And in United States v. Lee Huen (D. C.) 118 Fed. 442, it is said:

"The defendant is not required to satisfy the prejudiced, the capricious, the unreasonable, or the arbitrary mind; but he must satisfy the judgment of a reasonable man, acting honestly and with good judgment, and without prejudice or bias. The commissioner may not arbitrarily or capriciously, or against reasonable, unimpeached and credible evidence, containing no element of inherent improbability, and which is uncontradicted in its material points, and susceptible of but one fair construction, refuse to be satisfied. When clearly, from the evidence, the judicial mind ought to be satisfied, in the eye of the law it is satisfied."

"By 'satisfactory evidence,' which is sometimes called 'sufficient evidence,'" says Greenleaf (1 Greenl. Ev. § 2), "is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt."

This court, in Moy Guey Lum v. United States, 211 Fed. 91, 127 C. C. A. 515, said:

"The decisions are numerous to the effect that in this class of cases, where the facts have been already determined by two judgments below, the appellate court cannot properly re-examine them. This language is used by the United States Supreme Court in Chin Bak Kan v. United States, supra. Where the question is one of fact as to whether the respondent is a native of this country, it has been held in some of the federal courts that the decision of the District Court will not be reversed on appeal"—citing cases.

In Wong Keow v. United States, 215 Fed. 95, 131 C. C. A. 403, we affirmed the order of deportation below where the commissioner and the District Court were dissatisfied with the hazy, contradictory, and improbable testimony of the appellant Chinese person and his Chinese witnesses.

In the case of each of these appellants the commissioner was not satisfied that the proof offered was of such an affirmative character as to entitle appellants to remain in this country. Taking into consideration the fact that he saw and heard the witnesses testify and was therefore able to judge of their credibility, and also the inconsistencies and improbabilities in the testimony shown in the record, we are not able to say that the commissioner's action in any of said cases was arbitrarily exercised. The evidence in the record does not convince us that the judgments of the commissioner and the District Court were unwarranted.

The judgment in each case is therefore affirmed.

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## VAN PELT v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. March 7, 1917.)

No. 1462.

1. PROSTITUTION ⟸4—WHITE SLAVE ACT—EVIDENCE—PROCURING TRANSPORTATION.

Where a girl, who had become pregnant by defendant, requested him to procure a place where she could go and await confinement, and he made arrangements for her to go to a place in another state, and gave her more than enough money for her ticket, and thereafter met her on the train and accompanied her to her destination, purchasing her ticket from Washington to her destination, though she had purchased her own ticket to Washington, the jury could find that defendant procured her transportation, within White Slave Act June 25, 1910, c. 395, 36 Stat. 825.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4.]

2. PROSTITUTION ⟸1—INTERSTATE TRANSPORTATION—"DEBAUCHERY."

In the White Slave Act, making it an offense to procure the interstate transportation of a girl for the purpose of prostitution and debauchery, "debauchery" is not limited to the meaning of seduction, which would require proof that defendant procured the transportation in order that he might more surely, more readily, or more safely induce her to yield to his wishes, but includes a purpose to expose her to such influence as will naturally and inevitably so corrupt her character as to lead her to acts of sexual immorality, or, if she is already a sexually corrupt woman, a pur-

pose that she shall engage or continue more or less habitually in sexually immoral practices.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2.

For other definitions, see Words and Phrases, First and Second Series, Debauch.]

3. CRIMINAL LAW ⟸1159(2)—REVIEW—VERDICT OF JURY.

An appellate court cannot, at the instance of a convicted person, substitute its judgment for that of the jury, when there is anything in the evidence upon which a rational mind might arrive at the conclusion the jury did.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075.]

4. PROSTITUTION ⟸1—TRANSPORTATION—PURPOSE.

A man who procured the interstate transportation of a girl, with whom he had had intercourse whenever he sought it during the past three years, for the purpose of procuring a place where she could remain until after her confinement, cannot be convicted under the White Slave Act, though he accompanied her and anticipated that he would have intercourse with her after she left the state, if such anticipation played no part in inducing him to procure the transportation.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2.]

Woods, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Virginia, at Charlottesville; Henry Clay McDowell, Judge.

Rinker M. Van Pelt was convicted of violating the White Slave Act, and he brings error. Reversed.

S. D. Timberlake, Jr., of Staunton, Va. (Timberlake & Nelson, of Staunton, Va., on the brief), for plaintiff in error.

R. E. Byrd, U. S. Atty., of Richmond, Va. (Joseph H. Chitwood, Asst. U. S. Atty., of Roanoke, Va., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. The appellant was convicted of a violation of the White Slave Act. He says the court below should have granted his motion for an instructed verdict of not guilty. The evidence in the view most unfavorable to him may be briefly summarized: He and the prosecuting witness were residents of Augusta county, Va. Improper sexual relations between them began when she was 14 and he 35. He had been married, but was divorced before he met the prosecutrix. Their intimacy became habitual and continued for some 3 years; he having intercourse with her whenever he sought it, which was on the average about twice a week. The relations between them were not known to the community in which they lived. In October, 1913, she realized that she was pregnant. She asked the defendant to secure a place to which, before her condition became such as would arouse suspicion, she could go to await confinement. He made arrangements with a midwife in Baltimore to receive her. In the latter part of January, 1914, she told him that she would like to go. They agreed that she should leave home on the 30th of the month. By

arrangement he met her on the train. They spent that night at a Washington hotel, and the next at one in Baltimore. The jury could have found that these stops at the hotels were to afford opportunity for the sexual intercourse which in point of fact took place on each occasion. She bought her own ticket from her home to Washington; he from Washington to Baltimore. He gave and sent her money much in excess of the sum she paid for her ticket. She remained at the midwife's until after their child was born.

It appears that the learned judge below delivered a written opinion, explaining why he denied a motion for a new trial, which was made upon the same grounds now urged in support of the contention that the judgment should be reversed. We regret that, as it was omitted from the record, we have not had the light it might throw on the question at issue.

[1] Defendant's part in bringing her to Baltimore justified the jury in finding that he procured her transportation from Virginia to Maryland. The facts in this respect are clearly distinguishable from those in Welsch v. United States, 220 Fed. 764, 136 C. C. A. 370.

[2] Nevertheless, before defendant could be properly convicted, the evidence must show that he took a hand in procuring the transportation for the particular unlawful purpose charged in the indictment. The indictment says she was transported for the purpose of prostitution and debauchery. Clearly there was no intent that she should engage in prostitution. "Debauch" in one sense is a synonym for "seduce." In this case the seduction had taken place years before. We are not prepared to say that the mere fact that a woman had once or many times fallen from virtue renders a new debauching or seduction of her by an old or new lover legally impossible; but obviously, to sustain a conviction upon the assumption that to debauch means to seduce, there must be evidence that the defendant procured the transportation in order that he might more surely, more readily, or more safely induce her to yield to his wishes. The evidence does not suggest that defendant's relations with the prosecutrix had been interrupted, or that they would not have continued, had not the trip been taken. The word "debauchery," as used in the statute is not limited, however, to the meaning above mentioned. Athanasaw v. United States, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911; Suslak v. United States, 213 Fed. 913, 130 C. C. A. 391.

The statute is violated, if the intent is to expose the woman to such influences as will naturally and inevitably so corrupt her mind and character as to lead her to acts of sexual immorality, or if the purpose of the interstate transportation is that an already sexually corrupt woman shall, at the place to which she is taken or induced to go, engage or continue more or less habitually in sexually immoral practices. There is no evidence that the defendant had any purpose of debauching the prosecuting witness, within any one of the meanings of the word.

It so happens, however, that both in the court below and at this bar counsel on both sides understood that the words "purpose of debauchery" meant the same thing as would the words "immoral purpose, to wit, the purpose of having illegitimate sexual intercourse with

him." Under such circumstances, we should hesitate to disturb the judgment below, if there was any evidence that the defendant's purpose in procuring the transportation of the prosecutrix to Baltimore was in whole or in part that which the parties understood the indictment to charge.

[3] The jury are the triers of the facts. An appellate court has no right, at the instance of a convicted prisoner or of any one else, to substitute its judgment for theirs in any case in which there is anything in the evidence upon which a rational mind might arrive at the conclusion the jury did. Sometimes, although to our apprehension much less frequently than is perhaps generally supposed, jurors do miss altogether the issue they are to try. They are not altogether unlikely to do so, if it appears that there is no question that the defendant has done something, whether charged in the indictment or not, for which he richly deserves condign punishment. Among decent men there could not be two opinions of any man of mature years who under any circumstances whatever has illegitimate sexual intercourse with a girl of 15 or under. But that was not the question to be passed upon.

[4] Before the defendant could properly be convicted, there must be evidence that the purpose, or one of the purposes, of the defendant, if he had more than one, in bringing the prosecutrix to Baltimore, was that he might have sexual intercourse with her. No possible reason is suggested by the record why he should have gone to the trouble and expense of having her make such a trip, and making it with her, merely in order that he might twice more exercise a liberty which he had taken hundreds of times before, and could just as well have taken an indefinite number of times more, if she had remained at home. Had he been himself removing to Baltimore, and had he induced the girl to join him there, so that their relations might continue, a very different issue would have been presented, as it would have been, had one of his purposes been to employ her as his stenographer or his housekeeper, if he also intended that she should be his mistress as well. But, upon the undisputed evidence in this case, there can be no doubt that the girl was brought to Baltimore in order that she might go into seclusion during the later months of her pregnancy and have care during her confinement. The defendant may have anticipated that while on the journey he would gratify his desire, as he doubtless would have done, had the trip never been taken; but there is no evidence from which it can reasonably be held that such anticipation played any part whatever in inducing him to arrange for her coming to Baltimore.

The judgment below must be reversed, and the case remanded for a new trial.

Reversed.

WOODS, Circuit Judge (dissenting). I dissent, on the ground that the evidence warranted the conclusion that the defendant procured the transportation of the prosecuting witness from Virginia to Maryland, not only to provide for her in confinement, but also for the purpose and with the intent of continuing in Washington and Baltimore the debauchery begun in Virginia.

## PAKAS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 6, 1917.)

No. 168.

1. POST OFFICE ⟸4, 44—ORDER OF DEPARTMENT—PRIVATE BOXES—CRIMINAL OFFENSE.

Criminal Code (Act March 4, 1909, c. 321, § 194, 35 Stat. 1125 [Comp. St. 1913, § 10364]), imposes a punishment on any one who buys or receives any article, knowing it to have been taken from a letter stolen from an authorized depository for mail matter. Rev. St. § 161 (Comp. St. 1913, § 235), authorizes the head of each department to prescribe requirements not inconsistent with law for the government of his department, and the preservation of the records, papers, and property appertaining to it. An order of the Post Office Department provides that any letter box or other receptacle intended for the receipt or delivery of mail matter on any delivery route is designated a letter box for the receipt or delivery of mail matter, within the meaning of the Criminal Code. *Held*, that the order was within the authority given the Postmaster General, and was not invalid as an attempt to enact a criminal law, so that a person may be convicted for receiving checks, knowing them to have been taken from letters stolen from private boxes attached to residences and apartment houses for the receipt of mail.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 3, 60, 61.]

2. POST OFFICE ⟸19—MAIL—RIGHTS OF UNITED STATES—"PROPERTY."

Mail is "property" within Rev. St. § 161 (Comp. St. 1913, § 235), authorizing the head of each department to prescribe regulations for the preservation of the property appertaining to the department, and belongs for certain purposes to the United States.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 25.

For other definitions, see Words and Phrases, First and Second Series, Property.]

3. POST OFFICE ⟸1—MAIL—POWERS OF CONGRESS.

Congress has full power to legislate concerning the mail, under its constitutional power to establish post offices and post roads.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 1.]

4. WITNESSES ⟸48(1)—COMPETENCY—PREVIOUS CONVICTION.

In a prosecution in the federal courts for crime, one who had been previously convicted in the state court of an infamous crime is a competent witness, though he would not have been at common law, and there is no act of Congress changing that rule.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 109, 110, 113.]

In Error to the District Court of the United States for the Eastern District of New York.

Victor Pakas was convicted of knowingly receiving property stolen from the mails, and he brings error. Affirmed.

Olcott, Gruber, Bonynge & McManus, of New York City (Terence J. McManus and Harold Riegelman, both of New York City, of counsel), for plaintiff in error.

Melville J. France, U. S. Atty., and Henry Ward Beer, Asst. U. S. Atty., both of Brooklyn, N. Y.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff in error, hereinafter called defendant, has been convicted under an indictment charging him and one Samuel Broder at various times between August 30, 1915, and September 30, 1915, with knowingly, willfully, unlawfully, and feloniously buying and receiving certain specified checks taken from certain mail matter which had been previously stolen from mail which had been deposited in the mail of the United States. Broder pleaded guilty to the indictment and became a witness for the government.

It appears that the defendant in September, 1915, was in desperate need of money, as a mortgage upon his home was about to be foreclosed. He was in conversation about the matter with a friend of his, one Wagner, and was informed by the latter of depredations upon the mails of the United States that Broder was committing for him. The suggestion was made that Broder could help him out, and Broder agreed to steal the checks to help defendant pay off the mortgage, and was to receive in return $100 and an overcoat and suit of clothes. Broder in accordance with this agreement stole from letter boxes the mail, opened the same in defendant's presence, took a number of checks, and forged the indorsements in the presence of the defendant, to whom he gave them. The defendant was shown to have paid over checks so received for the purpose of paying off a second mortgage on the house in which he lived, and to have passed off forged checks to other parties which were shown to have been taken by Broder from private letter boxes in the city of New York.

[1] Section 194 of the Criminal Code (Act March 4, 1909 [Comp. St. 1913, § 10364]), provides as follows:

"Whoever shall steal, take, or abstract, or by fraud or deception obtain, from or out of any mail, post-office, or station thereof, or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or shall abstract or remove from any such letter, package, bag or mail, any article or thing contained therein, or shall secrete, embezzle, or destroy any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or whoever shall buy, receive, or conceal, or aid in buying, receiving, or concealing, or shall unlawfully have in his possession, any letter, postal card, package, bag or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled or abstracted, as herein described, knowing the same to have been so stolen, taken, embezzled, or abstracted; or whoever shall take any letter, postal card, or package, out of any post-office or station thereof, or out of any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or station thereof, or other authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it has been directed, with a design to obstruct the correspondence, or to pry into the business or secrets of another, or shall open, secrete, embezzle or destroy the same, shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both."

By virtue of the above provision it is clear that if defendant had in his possession checks which had been stolen from mail out of "any authorized depository," knowing the same to have been stolen, he has committed the crime with which he is charged and is subject to the punishment prescribed by the act.

It is claimed, however, that the District Court was without jurisdiction, as the box from which the mail is alleged to have been taken is

a private depository, and not within the terms of the Criminal Code. We are urged to hold that boxes privately owned and controlled, and placed in buildings for the reception of mail matter from carriers, and for the convenience of the persons to whom the mail is addressed, cannot be regarded as "authorized depositories."

Order No. 8571 of the Post Office Department, issued January 7, 1915, provides as follows:

"Any letter box or other receptacle intended or used for the receipt or delivery of mail matter on any said delivery route, rural delivery route, star routes or other mail route is hereby designated a letter box for the receipt or delivery of mail matter within the meaning of the act of March 4, 1909."

But it is said that the above order is without effect upon the character of receiving boxes privately owned, as such boxes are beyond the scope of departmental authority. And our attention is called to section 161 of the Revised Statutes (U. S. Comp. St. 1901, p. 80 [Comp. St. 1913, § 235]) which provides as follows:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution * * * of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

It is said that the power of the Postmaster General is ministerial in its character, and that he cannot by an executive order extend the application of a penal law, and make that a crime which was no crime before.

This is very interesting, and would be unanswerable, if the Postmaster General was undertaking on his own authority to enact a criminal law. We do not think he has done so. What he has done is to determine what shall be regarded as a depository for mail; and when he did that the depository so designated became an "authorized depository," a depository authorized by the Post Office Department as a receptacle for the receipt or delivery of mail matter. Mail matter, while continuing as such, is "property" appertaining to the Post Office Department, and the Postmaster General is authorized by the statute to prescribe requirements not inconsistent with law for its custody and preservation. This he has done, and nothing more.

[2] It cannot be denied that the mail is "property," and that it belongs for certain purposes to the United States. Every common carrier has a special property in what he carries. And in Searight v. Stokes, 3 How. 151, 169, 11 L. Ed. 537 (1845), the Supreme Court, speaking through Chief Justice Taney, said:

"The United States have unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road, especially during the session of Congress, consists of communications to or from the officers of the executive department, or members of the Legislature, on public service or in relation to matter of public concern."

In that case the court, construing the acts of Congress ceding to Pennsylvania the part of the Cumberland road which is within that state, and the acts of Pennsylvania accepting the surrender, decided

that a carriage, whenever it is carrying the mail, must be held to be laden with the property of the United States, and consequently exempted from the payment of tolls.

In United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563 (1910), the defendants were indicted for grazing sheep on the Sierra forest reserve without having obtained the permission required by the regulations prescribed by the Secretary of Agriculture. They demurred on the ground that the Forest Reserve Act of 1897 (Act June 4, 1897, c. 2, 30 Stat. 11), was unconstitutional, in that it delegated to the Secretary of Agriculture power to establish regulations concerning the use of such forest reservations and made a violation thereof a penal offense. The Supreme Court reversed the lower court, and held the demurrers should have been overruled. It admitted that Congress could not delegate legislative power, but held that authority to make administrative rules was not a delegation of legislative power, and that such rules were not raised from an administrative to a legislative character because the violation thereof was punished as a public offense.

[3] Congress has full power to legislate concerning the mail. In Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877 (1877), the court, speaking through Mr. Justice Field, said:

"The power vested in Congress 'to establish post offices and post roads' has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents."

And that statement of the law was repeated in Re Rapier, 143 U. S. 110, 133, 12 Sup. Ct. 374, 36 L. Ed. 93 (1892).

Section 161 of the Revised Statutes (U. S. Comp. St. 1901, p. 80 [Comp. St. 1913, § 235]) came under review in the Circuit Court of Appeals in the Eighth Circuit in Lewis Publishing Company v. Wyman, 182 Fed. 13, 104 C. C. A. 453 (1910). The court held that under that section the Postmaster General was authorized to limit the number of sample copies a publisher could send out at a certain rate of postage under Act March 3, 1885, c. 342, 23 Stat. 385. That act did not specifically limit the number of sample copies that might be sent out at the pound rate, and it was claimed that, as the act did not do so, the department could not do so. The court speaking through Judge Hook said:

"We think that, under the authority conferred by Congress * * * upon the head of the department to prescribe regulations not inconsistent with law for the performance of its business, the Postmaster General may lawfully impose such a limitation. The act of Congress does not purport to grant an unlimited privilege as to sample copies, and its very generality and indefiniteness invites a supplementary regulation. It is not necessary to the validity of a departmental regulation that specific statutory authority for it be discovered. It would be impracticable to set forth in the statutes all the rules for the conduct of the business of the great executive departments of the government, and Congress has wisely confined itself to marking general outlines and imposing general limitations, leaving the subordinate and supplemental details

suggested by practical experience to be prescribed by the heads of the departments. A departmental regulation must not be inconsistent with the statutes, but it may be by way of execution or supplement."

It is of the utmost importance that the immense and valuable correspondence intrusted to the government should be most carefully and scrupulously guarded during the whole period which must elapse from the time it leaves the possession of the senders until it reaches the hands of those who are entitled to receive it. That the government has full power to protect it by its laws is not to be doubted. If it had not done so, it would not have performed its duty to the country. If it is important that mail deposited in public mail boxes owned by the government should be safeguarded against thieves, it is equally important that mail deposited in private boxes attached to residences or to apartment houses or along roadsides in rural sections of the country should be protected by the federal authority; and it is our opinion that mail placed in such depositories is protected by the law which Congress has enacted.

These authorized depositories of mail are provided for the convenience of the carriers. The Post Office Department even imposes it as a duty upon the recipients of mail in those sections of the country where there is a free rural delivery to provide along the highway private boxes for the receipt of the mail. In section 824 of the Postal Laws and Regulations it is prescribed that:

"Persons desiring rural delivery service shall provide and erect at their own expense boxes conforming to official specifications and requirements."

It is not to be supposed that the government, having made it compulsory to furnish such depositories, is without the power to protect the mail when it is deposited therein, or that it has failed to exercise its right to protect it against the depredations of the criminal classes. To require the mail to be deposited in such places, and then leave it there unprotected, would convert these depositories into mere provocatives to plunder.

[4] On the trial of the case Broder, who had pleaded guilty to the offense charged in the indictment, was called as a witness by the prosecution. It appeared that he had been sentenced on January 28, 1914, for more than one year's imprisonment in the Elmira State Reformatory upon a conviction for burglary in the second degree. The record of that conviction was produced in open court, and counsel for defendant objected to his testifying on the ground that he had been convicted of an infamous crime. The common law excluded the testimony of a person who had been convicted of such a crime; and as Congress has passed no act changing the rule of the common law as to the competency of witnesses in criminal cases in the courts of the United States, except in special instances not including or material to the class of cases to which this belongs, it is urged that the admission of Broder's testimony was plainly error for which the conviction should be set aside. It is too late to raise that question in this court. We passed upon the question in Rosen v. United States, 237 Fed. 810, —— C. C. A. ——, decided at this term. In its facts it is similar to this. In that case Judge Coxe said:

"The tendency of modern thought is towards the abolition of the archaic rules which undertook to declare, arbitrarily, who were and who were not entitled to credence as witnesses and who should be absolutely debarred from taking the stand. All this is changed and now in most enlightened and progressive jurisdictions the tendency is to receive all the testimony bearing upon the issue, irrespective of the character of the witness who gives it. Proof of the commission of a crime discredits a witness, but it does not absolutely exclude him from the witness stand."

To that decision we adhere. In Brown v. United States, 233 Fed. 353, 147 C. C. A. 289 (1915), the question came before the Circuit Court of Appeals in the Sixth Circuit, and that court held that, as the federal courts are courts of an entirely different sovereignty and are wholly independent of the states, a conviction of an infamous crime in the state court rendering the person incompetent to testify in the state court does not render him incompetent to testify in the federal courts, any more than it would in the courts of a foreign jurisdiction, for the federal courts, while following the state laws, do not give effect to a conviction by a state court. We are in full accord with that decision, and hold that no error was committed in the admission of the testimony of Broder.

Judgment affirmed.

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## BORDER NAT. BANK v. COUPLAND.

### In re DE BONA'S ESTATE.

(Circuit Court of Appeals, Fifth Circuit. March 9, 1917.)

No. 2978.

1. BANKRUPTCY ⟸165(4)—RIGHTS OF TRUSTEE—LIEN—PRE-EXISTING MORTGAGE.

Under Bankr. Act July 1, 1898, c. 541, § 47a, cl. 2, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), the trustee in bankruptcy takes the status of a lien creditor as of the time the petition in bankruptcy is filed, and his lien is not superior to that of the mortgagee under a pre-existing oral chattel mortgage which by the laws of the state was valid between the parties and as against purchasers with notice and creditors other than lien creditors, and for which was substituted a written mortgage less than four months before bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 266.]

2. BANKRUPTCY ⟸303(2)—PREFERENCE—EVIDENCE.

On a petition for a secured claim against the trustee in bankruptcy, evidence that, when the bankrupt purchased the property covered by a chattel mortgage executed less than four months before bankruptcy, he borrowed from the petitioner the money to pay therefor and orally agreed to give the petitioner a lien on the property, is admissible to prove that the chattel mortgage was not given to secure a previously unsecured debt, so that it did not operate as a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 460, 461.]

3. CHATTEL MORTGAGES ⟸41—VALIDITY—ORAL MORTGAGE—STATUTE.

Rev. St. Tex. 1911, art. 3970, providing that every mortgage given by the owner of a stock of goods daily exposed to sale in parcels in the regu-

lar course of business, and contemplating a continuance of the possession of the goods and a control of said business by the sale of the goods by the owner, shall be deemed fraudulent and void, does not apply where the property covered by the oral mortgage to a bank was automobiles, which the bank permitted the owner to keep on display and to demonstrate, but which he could not sell without authority from the bank for each particular sale, since such sales were not in the regular course of business.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 84.]

Appeal from the District Court of the United States for the Western District of Texas; William B. Sheppard, Judge.

In the matter of the estate of Joseph De Bona, bankrupt. From a decree of the District Court, sustaining an order of the referee which denied the claim of the Border National Bank against C. C. Coupland, as trustee, for a secured claim, the claimant appeals. Decree reversed.

The petition to have Joseph De Bona adjudged a bankrupt was filed April 1, 1916. The Border National Bank (which will be called the Bank) presented, and prayed to have allowed as a secured claim, a mortgage, dated and executed February 17, 1916, and recorded the next day, by De Bona to it of seven described automobiles, which was given to secure a note of the same date for $5,500 and interest, payable May 17, 1916. The averments of the petition presenting the claim and the evidence in support thereof showed that the $5,500 for which the note and mortgage were given was the balance then owing on an indebtedness of De Bona to the Bank, created in the following manner: On October 12, 1915, De Bona borrowed from the Bank $3,000, giving as security a mortgage on four automobiles. This mortgage was duly recorded. In November, 1915, one of the mortgaged automobiles was sold for $695, and that amount was applied as a credit on the secured note, reducing that indebtedness to $2,305. On December 1, 1915, four automobiles were shipped to De Bona, and a draft with a bill of lading attached for their price, $3,095.16, was sent to the Bank for collection. To secure the money to pay the draft, so that he could get the bill of lading and the cars, De Bona borrowed the amount of the draft from the Bank, giving his note due in 60 days, and agreeing that the four cars called for by the bill of lading and also the three unsold cars covered by the mortgage of October 12, 1915, stand as security, and that a lien exist thereon for the indebtedness created October 12th and that created December 1st. One of the automobiles so acquired on December 1st was sold on December 6, 1915, and the amount received for it was applied on the last-mentioned note. There was a similar transaction between De Bona and the Bank on January 4, 1916, when another automobile was shipped to De Bona, and a draft for its price with bill of lading attached was drawn on him.

The trustee excepted to so much of the Bank's petition as set out the verbal agreements and understandings accompanying the transactions of December 1, 1915, and January 4, 1916, and objected to the evidence offered to prove such agreements and understandings, upon the following grounds:

"First. Because to allow verbal testimony of such detailed account of past transactions or declarations would, in effect, tend to vary and change and add to the terms of the chattel mortgage of February 17, 1916, under which petitioner seeks to have his claim allowed as a valid secured claim.

"Second. Because under the provisions of the Bankruptcy Act the trustee occupies, as to all the property coming into his possession, the position of a lien creditor, and any prior verbal understandings or agreements had with the bankrupt or any declarations made by him would not be binding upon this trustee, nor would any such testimony be admissible against him for the purpose of affecting his title to such property.

"Third. Such testimony is wholly irrelevant and immaterial to any issue in the case."

These exceptions and objections were sustained by the referee. The trustee objected to the allowance of the Bank's claim as a secured claim on the

grounds that the mortgage constitutes a preference prohibited by the Bankruptcy Act and that it was void under article 3970 of the Revised Civil Statutes of Texas. Evidence adduced before the referee was to the following effect:

As De Bona acquired the automobiles covered by his written and verbal mortgages to the Bank, he placed them in the front part of his store in Eagle Pass, in which he conducted a general brokerage business, handling automobiles, automobile accessories and parts, automobile tires, buggies, etc. None of the automobiles mortgaged to the Bank were sold by De Bona or any of his assistants without De Bona first consulting the Bank and getting special authority from it to sell that car. He was permitted to demonstrate the cars whenever he had a prospective purchaser, but he had no authority from the Bank to make sales which would confer on the purchasers title unincumbered by the Bank's lien. The sales which were made were specially authorized by the Bank, and the amounts realized on such sales were paid to the Bank and applied on the secured debt. The referee held that the mortgage of February 17, 1916, was void under article 3970 of the Revised Civil Statutes of Texas, disallowed the Bank's claim as a secured claim, and allowed it as an unsecured claim.

The Bank appeals from a decree of the District Court which affirmed the order of the referee.

R. D. Wright, of Eagle Pass, Tex. (Sanford & Wright, of Eagle Pass, Tex., on the brief), for appellant.

John J. Foster, of Del Rio, Tex. (King & White, of Eagle Pass, Tex., on the brief), for appellee.

Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge (after stating the facts as above). [1] Under the law of Texas a verbal mortgage or lien is valid between the parties and as against purchasers with notice and creditors other than lien creditors. Gardner v. Planters' National Bank, 54 Tex. Civ. App. 572, 118 S. W. 1146; Crews v. Harlan, 99 Tex. 93, 87 S. W. 656, 13 Ann. Cas. 863; Galbraith v. First State Bank (Tex. Civ. App.) 133 S. W. 300; Grace v. Wade, 45 Tex. 522; Overstreet v. Manning, 67 Tex. 657, 4 S. W. 248. Under section 47a, cl. 2, of the Bankruptcy Act, as amended in 1910 (36 Stat. 838, 840), the trustee in bankruptcy takes the status of a lien creditor as of the time the petition in bankruptcy is filed. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275; Martin v. Commercial National Bank, 228 Fed. 651, 143 C. C. A. 173. Valid liens created by mortgages made by the bankrupt before the institution of the bankruptcy proceeding are not subordinated to the rights of his trustee in bankruptcy, which vest as of the date of the filing of the petition in bankruptcy. When the verbal mortgages to the Bank were made by De Bona, the lien of the trustee was not in existence. The statute in question does not purport to displace valid liens given before the petition in bankruptcy was filed.

[2] The evidence which was excluded was admissible to prove that the mortgage of February 17, 1916, was not given to secure an indebtedness which previously was unsecured, but was given to secure debts all of which were secured at the times they came into existence by liens valid against any one other than a purchaser without notice or a creditor holding a prior lien. The effect of the execution of that mortgage was to give the creditor written evidence available for rec-

ord, and recorded, of a lien given in exchange for previously existing liens given when the secured debts came into existence. The mortgage of February 17th did not operate as a preference, as it did not diminish the debtor's estate; the effect of it being the mere substitution of one written lien in place of previously existing valid verbal and written liens covering the same property.

[3] "Every mortgage, deed of trust or other form of lien attempted to be given by the owner of any stock of goods, wares or merchandise daily exposed to sale, in parcels, in the regular course of the business of such merchandise, and contemplating a continuance of the possession of said goods and control of said business, by sale of said goods by said owner, shall be deemed fraudulent and void." Revised Civil Statutes of Texas (1911) art. 3970. The facts to which this statute gives the effect of invalidating a mortgage, deed of trust, or other form of lien attempted to be given by the owner of any stock of goods, wares, or merchandise are that a continuance of the owner's possession of the goods and control of the business are contemplated and that the goods are daily exposed to sale, in parcels, in the regular course of business. The mortgagor's continued possession of the mortgaged goods does not by itself avoid such a mortgage. To have the invalidating effect given by the statute that fact must be accompanied by the further fact that the mortgaged goods are daily exposed for sale, in parcels, in the regular course of business. The invalidating facts must be shown either by the instrument itself, which undertakes to give the lien, or by other evidence. Bergen v. Producers' Marble Yard, 72 Tex. 53, 11 S. W. 1027; Gregg & Son v. Cleveland & Co., 82 Tex. 187, 17 S. W. 777; Bettes v. Weir Plow Co., 84 Tex. 543, 19 S. W. 705. Certainly under the terms of De Bona's mortgage to the Bank the former did not have the right to expose the mortgaged automobiles for sale, in parcels, in the regular course of business. The uncontradicted evidence was to the effect that such a right was explicitly withheld, and that it was contemplated and understood by the parties that no mortgaged automobile was to be sold by De Bona without his first getting special permission from the Bank to make the sale. The evidence further showed that the only sales of any of the mortgaged automobiles which were made were in pursuance of special permission given by the Bank, it receiving the proceeds of the sale when made. Sales negotiated and made in the manner disclosed by the evidence are plainly out of the regular course of a mercantile business. Under the evidence in the case the transaction between De Bona and the Bank did not have the effect of enabling the former to deal with the mortgaged machines just as he could have done if they had not been subject to the lien of the mortgage. He was not empowered to sell them in the usual course of business. He could not sell them at all, freed of the lien of the mortgage, except by the Bank's special permission, given after an opportunity to make a sale was presented, and then the proceeds of the sale had to be paid to the Bank, to be applied on the mortgage indebtedness. The statute is aimed at a form of security which would enable a merchant to deal with his stock of goods just as if it was unincumbered, selling it in parcels, freed of the mortgage lien, the mortgagee not receiving the proceeds, and at the same

time have it shielded from the claims of his creditors, other than the preferred one, to whom the ineffectual lien is given. The undisputed evidence in the case negatives the conclusion that the mortgage in question was such a one as the statute quoted declares shall be deemed fraudulent and void.

As the rulings made by the trial court were in conflict with the conclusions above stated, the decree appealed from is reversed.

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MELLON v. ST. LOUIS UNION TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 26, 1917.)

No. 4402.

1. JUDGMENT ⊜326—CORRECTION NUNC PRO TUNC.
   While a judgment may be corrected, after the expiration of the term at which it was rendered, so as to speak the truth by a nunc pro tunc order, this power cannot be exercised to change or modify the decree or in any wise void the force of any part of the judgment or decree as originally intended and pronounced.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. § 628.]

2. JUDGMENT ⊜342(1)—CORRECTION—POWER OF.
   Ordinarily, a court loses all control over its judgment at the expiration of the term at which it was rendered.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. § 668.]

3. JUDGMENT ⊜474—COLLATERAL ATTACK—JUDGMENT OF—FEDERAL COURTS.
   Though the national courts are courts of limited jurisdiction and the complaint must contain allegations necessary to show the jurisdiction of the court, nevertheless a judgment rendered on a complaint failing to allege the necessary jurisdictional facts is not void or subject to collateral attack, and a judgment or decree rendered after an erroneous refusal to remand the case to the state court is not void, but must be given effect by all courts until reversed by an appellate court.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. § 909.]

4. JUDGMENT ⊜503—COLLATERAL ATTACK—PLEADING.
   In a suit to foreclose a mechanic's lien on demised property, the lessor filed a cross-bill against the lessee setting forth the lease provisions that no mechanic's lien for improvements should be placed on the premises during the term, that in event liens should be filed the lessee should discharge the same within 30 days after judgment, and in case of failure the lessor should have the right to pay off the same, the amount thus paid being added to the rent, and that if default in the payment of such sums and the rent should continue for three months the lessor should have the option to terminate the lease, the improvements to be forfeited without compensation if forfeiture was on account of mechanic's liens. The cross-bill averred a breach of the provisions of the lease and prayed for foreclosure of the lessor's liens and also for general relief. *Held* that, as under a prayer for general relief the court has the power to grant all the relief which the allegations of the bill warrant, that portion of the decree providing that, on the lessor's payment of all liens declared by the decree to be superior to her claims, she should become absolute owner of the lease and improvements placed on the demised premises, was not without the scope of the pleadings so as to be subject to collateral attack.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943.]

On application of Dora Finley, formerly Dora Patterson, to modify the court's opinion and decree. Application denied, and former opinion upheld.

For former opinion, see 225 Fed. 693, 140 C. C. A. 567.

H. N. Boardman, of Oklahoma City, Okl., for the motion.

J. H. Everest and R. M. Campbell, both of Oklahoma City, Okl., opposed.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

TRIEBER, District Judge. The petitioner asks for a modification of the decree rendered by this court at the May term, 1915 (225 Fed. 693, 140 C. C. A. 567), so far as it adjudges that, upon the payment by Mrs. Mellon of all liens declared by the decree to be superior to her claims, she should become the absolute owner of the lease and building, free from the terms of the lease, and the claim of all parties to the action. This petition was filed at the December term, 1916.

The petitioner bases her claim upon two grounds: First. That the court may, at any time, after the term at which the decree was rendered has expired, amend its decree by a nunc pro tunc order. Second. That this part of the opinion of the court was absolutely void because not within the issues raised by the pleadings.

[1] 1. As to the first proposition, the authorities cited by counsel for the petitioner are inapplicable. All they hold is that the court may, at any time after the expiration of the term, amend its decree by a nunc pro tunc order, to conform to what was actually determined by the court, but which, by an oversight, or an error of the clerk in entering it, was omitted or erroneously stated. In other words, a nunc pro tunc order is made for the purpose of making the record speak the truth and show what was actually determined by the court. But this power cannot be exercised to change or modify the decree, or in any wise void the force of any part of the judgment or decree as originally intended and pronounced. Hickman v. Fort Scott, 141 U. S. 415, 418, 12 Sup. Ct. 9, 35 L. Ed. 775; St. Louis & N. A. R. R. Co. v. Bratton, 93 Ark. 234, 124 S. W. 752; 1 Black on Judgments (2d Ed.) § 516; 23 Cyc. 873.

[2] 2. That, ordinarily, a court loses all control over its judgment after the expiration of the term at which it was rendered, is too well settled to require the citation of authorities. Thomas v. American Freehold Land & Mortgage Co. (C. C.) 47 Fed. 550, 12 L. R. A. 681, is relied on by counsel for petitioner as in point. That was an action at law, and the decision of the court was based entirely upon the statutes of the state of Georgia, which the court held controlled, by virtue of the Conformity Act of 1872 (section 914, Rev. Stat.; Comp. St. 1913, § 1537). But in this the learned judge delivering the opinion of the court in that case was clearly in error. United States v. Mayer, 235 U. S. 55, 69, 35 Sup. Ct. 16, 59 L. Ed. 129; Wellman v. Bethea (D. C.) 213 Fed. 367.

The main ground upon which counsel rely is that this part of the decree was absolutely void, as it was not within the issues raised by

the pleadings; that for this reason it is subject to collateral attack, and, this being the case, the court has not only the power, but it is its duty to modify or set it aside, regardless of terms. Numerous authorities are cited to sustain this proposition. It may be conceded that, if that part of the decree was absolutely void and therefore subject to collateral attack, the court has the power to set it aside at any time, even after the expiration of the term.

[3] But was the court without jurisdiction to render that part of the decree? It has been uniformly held by the Supreme Court that although the national courts are courts of limited jurisdiction, and the complaint must contain the allegations necessary to show the jurisdiction of the court, a judgment rendered upon a complaint failing to allege the necessary jurisdictional facts is not void, and cannot be attacked collaterally, but is merely erroneous, and can be corrected by appeal only. Skillern v. May, 6 Cranch, 267, 3 L. Ed. 220; McCormick v. Sullivant, 10 Wheat. 192, 199, 6 L. Ed. 300; Evers v. Watson, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520; Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463; Cutler v. Huston, 158 U. S. 423, 15 Sup. Ct. 868, 39 L. Ed. 1040. It has also been uniformly held that a judgment or decree rendered by a Circuit or District Court after it had erroneously refused to remand the case to the state court, from which it had been removed, is not void, but must be given effect by all courts, until reversed by the appellate court. Chesapeake & Ohio R. Co. v. McCabe, 213 U. S. 207, 220 29 Sup. Ct. 430, 53 L. Ed. 765; In re Metropolitan Trust Co., 218 U. S. 312, 321, 31 Sup. Ct. 18, 54 L. Ed. 1051. In the Metropolitan Trust Company Case, the facts were that the Circuit Court overruled a motion to remand that case, which had been removed from a state court. Thereafter a final decree was rendered in that case in favor of the trust company, and also in favor of the other defendants. An appeal was taken from the decree in favor of all the defendants except the Trust Company, and the Circuit Court of Appeals upon that appeal held that the Circuit Court had erred in overruling the motion to remand it to the state court. Thereupon the plaintiff applied to the Circuit Court to set aside the decree in favor of the Trust Company, which was granted; but the Supreme Court granted a mandamus to vacate the order of the Circuit Court setting aside the decree, holding that, the term at which the decree in favor of the Metropolitan Trust Company was rendered having expired, the court was without jurisdiction to set it aside; the judgment overruling the motion to remand having been merely erroneous and not void.

[4] In the cross-bill filed by Mrs. Mellon against the petitioner, the lease, which was the basis of her cross-bill and made a part thereof, provided:

"During the demised term no mechanics' liens for improvements shall be put upon the demised premises, and in the event liens should be filed thereon, the lessee was to pay the same off within thirty days after final judgment, and if she failed to do so, the lessor should have the right to pay the same off, and the amount thus paid should be added to the rent, and if the default in the payment of such sums and the rent continues for three months after they become due, the lessor has the option to declare the lease terminated, and if

the forfeiture is on account of any mechanics' liens, the improvements shall also be forfeited without compensation therefor."

It was charged that these provisions of the lease had all been violated, and, while the specific relief asked was for a foreclosure of her liens, the bill also contained a prayer for general relief.

It also appeared from the record that it was claimed that the value of the mortgaged premises was insufficient to pay off the mortgage and mechanics' liens, which latter had been assigned to the trust company, the mortgagee, and the court, having found this to be true, appointed a receiver to collect the rents and profits of the premises, pending the litigation, in order that they may be applied to the trust company's claims. In addition to these debts, there was due to Mrs. Mellon a large sum of money for rent of the ground, and for taxes, which Miss Patterson had failed to pay. It therefore appeared that she had in fact no interest whatever in the premises, and, if Mrs. Mellon paid off the prior liens, it would be a useless expense to have a foreclosure sale, and that a strict foreclosure would be to the interest of all, relieving Miss Patterson of a deficiency decree, if the premises should, upon a sale, sell for less than the amount due by her to all the parties. That this would be so appeared from the record as a certainty. That under the prayer for general relief the court has the power to grant all the relief, which the allegations in the bill warranted, has been expressly determined in Gibbs v. Alger, Smith & Co., 201 Fed. 47, 119 C. C. A. 379, decided by this court. In that case an action had been brought in the district court of the state of Minnesota to remove a cloud on plaintiff's title to certain lands. A statute of the state of Minnesota permitted a person in possession of lands to maintain an action to determine adverse claims thereto. The prayer of the bill was:

"That plaintiff be adjudged the owner in fee of said lands, and that his title thereto be quieted as against the claims of said defendants. * * * That the defendants Frederick L. Gilbert and Edward T. Buxton be adjudged and held to have no right, title, interest, estate, or lien upon said lands, and that the plaintiff may be adjudged the absolute owner, free from all claims, right, title, interest, estate, or lien in and to said lands as against each and all of said defendants, and that plaintiff may have all other proper relief in the premises," etc.

The district court of the state held that, as the allegations in the petition were sufficient to entitle the plaintiff to the relief under the statute to determine adverse claims, although the bill itself was drawn for the purpose of removing clouds on plaintiff's title, and that was the specific relief prayed, he was entitled, under the prayer for general relief, to have the adverse claims under the statute, determined. Upon appeal to the Supreme Court of Minnesota this decree was affirmed. Thereafter an action was instituted in the national court for the district of Minnesota, by the unsuccessful litigants in the state court, the contention being that the action in the state court was to remove the cloud on the title, and was not an action to determine adverse claims under the statute, and that, as the decree of the state court went beyond this prayer for relief, its judgment was without jurisdiction, in

so far as the relief granted exceeded that of removing the cloud caused by the executor's deed. But this court held this contention untenable, saying:

"If the court, on examining this petition, found the allegations and a prayer for relief strictly authorized by the statute to determine adverse claims and due service, it had jurisdiction of both the subject-matter and the persons, and, if it proceeded to grant such relief, it was at most erroneous. Under such circumstances, the decision was a finality"—citing authorities.

In Omaha Ry. v. Cable Tramway Co. (C. C.) 32 Fed. 727, it was claimed that the Circuit Court was without jurisdiction to assess damages in an action only praying for an injunction. Mr. Justice Brewer, then Circuit Judge, denied this contention, upon the ground that there was also a prayer for general relief in the bill. He said:

"Again, inasmuch as the prayer for relief contains also the general prayer for other and further relief, it is familiar law that the court may award such other relief as is justified by the facts stated in the bill, and may fairly have been considered within the contemplation of the parties in the litigation."

See, also, Lockhart v. Leeds, 195 U. S. 427, 437, 25 Sup. Ct. 76, 49 L. Ed. 263; Salton Sea Cases, 172 Fed. 792, 97 C. C. A. 214; McCormick v. Oklahoma City, 204 Fed. 921, 122 C. C. A. 215.

In Standard Oil Co. v. Missouri, 224 U. S. 270, 285, 32 Sup. Ct. 406, 410 (56 L. Ed. 760, Ann. Cas. 1913D, 936) a writ of quo warranto had been filed by the state of Missouri in the Supreme Court of that state against the Standard Oil Company, and after a hearing the court sustained the prayer for the writ, and imposed a fine of $50,000 on the Standard Oil Company, although the petition asked for no penalty. It was claimed that, as there was no prayer for a penalty in the petition, the judgment imposing it was void, depriving the company of its property without due process of law. But this contention was by the Supreme Court overruled, the court saying:

"The facts stated fix the limit of the relief that can be granted. While the judgment must not go beyond that to which the plaintiff was entitled on proof of the allegations made, yet the court may grant other and different relief from that for which he prayed."

Van Vleet on Collateral Attack, § 256, says:

"If the object of the petitioner can be ascertained from the allegations, no matter how defective they are, or how many necessary ones are omitted—the court having power to grant the relief sought, and having the parties before it—the judgment is not void. * * * The cases all agree that, if the allegations tend to show each material fact necessary to constitute a cause of action, they will shield the judgment from collateral attack."

We are of the opinion that the court is without jurisdiction to grant the relief prayed, and it is denied.

## MARYLAND CASUALTY CO. OF BALTIMORE, MD., v. ORCHARD LAND & TIMBER CO.

(Circuit Court of Appeals, Ninth Circuit. February 26, 1917.)

No. 2751.

1. APPEAL AND ERROR ⊜209(1)—REVIEW—QUESTIONS PRESENTED.

Rev. St. §§ 649, 700 (Comp. St. 1913, §§ 1587, 1668), made applicable to District Courts by Judicial Code (Act March 3, 1911, c. 231) §§ 289–291, 36 Stat. 1167 (Comp. St. 1913, §§ 1266–1268), declare that issues of fact in civil cases may be tried and determined by the court without the intervention of jury, whenever the parties or their attorneys of record file with the clerk a written stipulation waiving a jury, the finding of the court, which may be either general or special, having the same effect as the verdict of the jury, and that, when an issue of fact in any civil cause is tried and determined by the court without the intervention of a jury, the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed upon writ of error or upon appeal, and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. In an action tried to the District Court without a jury, plaintiff in error, the defendant below, made no objections and reserved no exceptions to the introduction of evidence, and made no motion or request for special findings of fact. *Held*, that assignments of error that the court did not make findings of fact and conclusions of law covering the issues presented by the pleadings that there was no evidence and insufficient evidence to justify the findings of fact cannot be reviewed, for where a jury is waived, and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1290.]

2. APPEAL AND ERROR ⊜977(1)—NEW TRIAL ⊜6—CIRCUIT COURT OF APPEALS—REVIEW.

A motion for new trial is addressed to the sound discretion of the lower court, and cannot be reviewed by the Circuit Court of Appeals on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3860; New Trial, Cent. Dig. §§ 9, 10.]

3. COURTS ⊜405(17)—CIRCUIT COURT OF APPEALS—REVIEW—ASSIGNMENTS OF ERROR.

Rules 11 and 24 for the Circuit Courts of Appeals (150 Fed. xxvii, xxxiii, 79 C. C. A. xxvii, xxxiii), both providing that errors not specified according to the rules will be disregarded, but that the court at its option may notice a plain error not assigned or specified, apply to the assignment of errors in the Circuit Court of Appeals, and do not warrant the review in an action tried to the court of matters not reviewable under Rev. St. § 700, because not presented below.

In Error to the District Court of the United States for the District of Oregon; R. S. Bean, Judge.

Action by the Orchard Land & Timber Company, a corporation, against the Maryland Casualty Company of Baltimore, Md., a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Action upon a policy of insurance issued by the plaintiff in error to indemnify the defendant in error against loss from the liability imposed by law upon the defendant in error for damages on account of bodily injuries suffered

by one of its employés. Plaintiff in error pleads no loss within the terms of the policy. Judgment for the defendant in error. The plaintiff in error will hereafter be designated as the Casualty Company, and the defendant in error as the Timber Company.

On June 5, 1912, the Casualty Company, a Maryland corporation, issued to the Timber Company, an Oregon corporation, its policy No. A-34208, by the terms of which the Casualty Company agreed to indemnify the Timber Company against loss from the liability imposed by law upon the Timber Company for damages on account of bodily injuries, including death resulting therefrom, suffered by any employé of the Timber Company, while upon the premises, or upon the sidewalks, or other ways immediately adjacent thereto, provided for the use of the employés of the Timber Company or the public, and occupied by the Timber Company in the conduct of its business, within a period of 12 months beginning on the 5th day of June, 1912, upon which policy a premium of $140 was then paid by the Timber Company to the Casualty Company.

On the 8th day of June, 1912, O. W. Dunne was employed in and about the mill of the Timber Company, situated in Lane county, Or., and while in such employment, and engaged in work in and about the mill and yards of the Timber Company, Dunne was seriously injured. On October 9, 1912, Dunne brought an action at law in the circuit court of the state of Oregon, for Lane county, against the Timber Company, setting forth the injuries received, and praying for judgment in the sum of $15,000, besides his costs and disbursements. The Casualty Company was promptly notified of such injuries, as required by the terms of the contract of indemnity, and when the action was brought the Casualty Company was promptly notified thereof, and the complaint and other papers in the case were promptly transmitted to the Casualty Company. The Casualty Company thereupon assumed entire charge and control of the conduct and defense of the action, under and pursuant to the terms of the contract of indemnity. Upon the trial in the circuit court of Lane county, Or., a judgment was entered in favor of Dunne and against the Timber Company in the sum of $7.500, and for his costs and disbursements, taxed and allowed in the sum of $102.60. Thereafter the Casualty Company declined to settle the claim and judgment, and in the name of the Timber Company took an appeal from the judgment to the Supreme Court of the State of Oregon, where the judgment of the lower court was affirmed.

Thereafter Charles A. Hardy, attorney for Dunne, procured an execution to be issued against the Timber Company, and had a notice to garnishee served upon the Casualty Company, but the latter proceeding was dismissed. The Dunne judgment remaining unsatisfied, Hardy obtained from the Timber Company its promissory note for the amount of the judgment, together with an assignment of any judgment which the Timber Company might recover in the present action as security, and in consideration thereof had the Dunne judgment satisfied of record. He then brought this action, in the name of the Timber Company, against the Casualty Company, to recover the amount of the Casualty Company's liability under the contract of indemnity above referred to.

The casualty company answered, admitting all the allegations of the complaint, with the exception of the allegation that the Timber Company had paid the judgment in favor of Dunne. With respect to this allegation the Casualty Company alleged that "plaintiff has not sustained any loss for any liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered by any employé of the assured, or by the said O. W. Dunne referred to in said plaintiff's amended complaint, and said defendant [the Casualty Company] alleges that said plaintiff [the Timber Company] did not, on or about the 11th day of November, 1914, or at any other time, pay the judgment referred to in said plaintiff's [Timber Company's] amended complaint, and in paragraph VIII thereof."

The case was thereafter tried before the District Court, sitting without a jury, and on October 18, 1915, the court found generally "that by reason of all the matters and things set forth in the complaint, the plaintiff, Orchard Land & Timber Company, suffered and sustained damages in the sum of $5,000, together with interest thereon, * * * amounting to $246.50." Judg-

ment was thereupon entered in favor of the Timber Company and against the Casualty Company for $5,246.50 and costs taxed at $20.40.

Wilbur, Spencer & Beckett and F. C. Howell, all of Portland, Or., for plaintiff in error.

Charles A. Hardy, of Eugene, Or., and Clark, Skulason & Clark, of Portland, Or., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). 1. This is an action to recover the amount of a policy indemnifying the Timber Company against loss from the liability imposed by law upon the insured for damages on account of bodily injuries accidentally suffered by one of its employés. A jury having been waived by stipulation of the parties, the case was tried by the court without a jury. The court found, generally, "that by reason of all the matters and things set forth in the complaint, the plaintiff [the Timber Company] * * * suffered and sustained damages in the sum of $5,000, together with interest thereon * * * amounting to $246.50," and as a conclusion of law the court found "that the plaintiff, Orchard Land & Timber Company, is entitled to judgment against the defendant, Maryland Casualty Company of Baltimore, for the sum of $5,246.50, besides the costs and disbursements of this action," and judgment was entered accordingly.

[1] The case comes here on writ of error. The errors assigned are that the court did not make findings of fact and conclusions of law covering the issues presented by the pleadings; that there was no evidence, and not sufficient evidence, to justify and support the findings of fact; that the evidence and findings were not sufficient to justify or authorize the conclusions of law; that there was no evidence to justify the judgment; and that the court erred in not granting defendant's motion for a new trial.

Section 649 of the Revised Statutes (Act March 3, 1865, c. 86, § 4, 13 Stat. 500, 501 [Comp. St. 1913, § 1587]) provides:

"Issues of fact in civil cases in any Circuit Court [District Court (sections 289–291, Judicial Code, 36 Stat. 1167)] may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700 (Act March 3, 1865, § 4, 13 Stat. 500, 501 [Comp. St. 1913, § 1668]) provides:

"When an issue of fact in any civil cause in a Circuit Court [District Court (sections 289–291, Judicial Code, 36 Stat. 1167)] is tried and determined by the court without the intervention of a jury, according to section 649 the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

In Dirst v. Morris, 14 Wall. 484, 491, 20 L. Ed. 722, the Supreme Court of the United States, referring to this statute (then Act March 3, 1865, § 4, 13 Stat. 500, 501), said:

"As the law stands, if a jury is waived and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence."

In Grayson v. Lynch, 163 U. S. 468, 472, 16 Sup. Ct. 1064, 1066 (41 L. Ed. 230), the court said:

"This court has held in a series of cases that the special findings of facts, referred to in the acts allowing parties to submit issues of fact in civil cases to be tried and determined by the court, is not a mere report of the evidence, but a finding of those ultimate facts upon which the law must determine the rights of the parties; and, if the findings of fact be general, only such rulings of the court in the progress of the trial can be reversed as are presented by a bill of exceptions, and that in such cases a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury."

This construction of the statute was followed by this court in Dunsmuir v. Scott, 217 Fed. 200, 202, 133 C. C. A. 194, and in Sierra Land & Live Stock Co. v. Desert Power & M. Co., 229 Fed. 982, 984, 144 C. C. A. 264. In the first-mentioned case, this court said, on page 202 of 217 Fed., page 196 of 133 C. C. A.:

"The bill of exceptions cannot be used to bring up the oral testimony for review" (citing a number of cases, including Dirst v. Morris and Grayson v. Lynch, supra).

The court said further:

"The question whether or not, at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action, is a question of law which arises in the progress of the trial. Where the trial is before a jury, that question is reviewable on exception to a ruling upon a request for a peremptory instruction for a verdict. Where the trial is before the court, it is reviewable upon a motion which presents that issue of law to the court for its determination at or before the end of the trial. In the case at bar there was no such motion, and no request for a special finding. We are limited, therefore, to a review of the rulings of the court to which exceptions were reserved during the progress of the trial."

When, upon the trial of this case, the attorney for the Timber Company, for the purpose of proving the liability of the Casualty Company upon its indemnity contract, offered in evidence its promissory note issued to Dunne for $7,602.60 and a certified copy of the judgment docket of Lane county, Or., showing satisfaction of the judgment in favor of Dunne and against the Timber Company for that amount, no objection was made to the evidence, and no exception taken to its introduction; and, as there were no objections made, and no exceptions reserved or taken during the progress of the trial, and no motion or request made for a special finding, there is nothing in the record before us to review with respect to the proceedings upon the trial of the case.

[2] 2. The denial of a motion for a new trial in the federal courts is within the discretion of the court, and where that discretion has been exercised, and there is evidence to support the findings and judgment, as in this case, the motion is not reviewable on a writ of error. Dwyer v. United States, 170 Fed. 160, 165, 95 C. C. A. 416; Hedderly v. United States, 193 Fed. 561, 571, 114 C. C. A. 227; Pickett v. United States, 216 U. S. 456, 461, 30 Sup. Ct. 265, 54 L. Ed. 566; Holmgren v. United States, 217 U. S. 509, 521, 30 Sup. Ct. 588, 54 L. Ed. 861,

19 Ann. Cas. 778; Shepard v. United States, 236 Fed. 73, 77, — C. C. A. —.

[3] 3. It is contended by the plaintiff in error that a review may be had under rule 11 of this court (150 Fed. xxvii, 79 C. C. A. xxvii), relating to the assignment of errors, wherein it is provided that:

"Errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned"

—and rule 24 (150 Fed. xxxiii, 79 C. C. A. xxxiii) relating to briefs, wherein it is provided that:

"Errors not specified according to this rule will be disregarded: but the court, at its option, may notice a plain error not assigned or specified."

These rules relate to proceedings in this court, over which we have the control here indicated; but in this case we are dealing with the proceedings in the District Court, which are regulated by statute in the matter under consideration. In the exercise of our appellate jurisdiction, we cannot disregard a statute prescribing its limitation.

The judgment of the District Court is affirmed.

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LEE WONG HIN v. MAYO, Immigration Com'r.

(Circuit Court of Appeals, Fifth Circuit. March 10, 1917.)

No. 3017.

ALIENS ⇐32(1)—DEPORTATION OF CHINESE—PROCEEDINGS—STATUTES.

Chinese Exclusion Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 479 (Comp. St. 1913, § 4313), provides that any Chinese person found unlawfully in the United States may be arrested on warrant issued on complaint by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of the United States court, or before any such court, and when convicted upon a hearing, and found not entitled to remain in the United States, he shall be removed, but, if convicted before a commissioner, he may appeal to a judge of the District Court. Immigration Act Feb. 20, 1907, c. 1134, §§ 20, 21, 34 Stat. 904 (Comp. St. 1913, §§ 4269, 4270), provide for the deportation of aliens, who have violated any of the provisions of the Immigration Act, upon warrant issued by the Secretary of Labor, without a right to a judicial determination of his status, unless the Secretary acted beyond his legal authority or without evidence, and provide that the procedure shall be applicable to any alien subject to deportation under the provisions of that act, or of any law of the United States. Section 43 of the same act (Comp. St. 1913, § 4289) provides that nothing therein shall be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons. *Held* that, even though the Chinese Exclusion Act is the only "other law of the United States" to which the Immigation Act could refer, a construction of that act as permitting the deportation of a Chinese person after an administrative hearing only would be a repeal and alteration of the provisions of the Chinese Exclusion Act for a judicial hearing contrary to section 43 of the Immigration Act, and therefore a Chinese person unlawfully within the United States under the Exclusion Act, but who has committed no offense under the Immigration Act, cannot be deported on the warrant issued by the Secretary of Labor.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Application by Lee Wong Hin against John P. Mayo, Commissioner of Immigration, Port of New Orleans, for a writ of habeas corpus. From an order of the District Court dismissing the petition, petitioner appeals. Reversed and remanded, with directions.

W. J. Waguespack and Herbert W. Waguespack, both of New Orleans, La., and C. A. Miranne, for appellant.

Jos. W. Montgomery, Asst. U. S. Atty., of New Orleans, La., for appellee.

Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This is an appeal from an order of the District Court of the United States for the Eastern District of Louisiana, dismissing the petition of the appellant, as relator, for a writ of habeas corpus. The appeal presents a single question of law. The appellant was arrested under a warrant issued by the Secretary of Labor, and was ordered by the Assistant Secretary of Labor, after a hearing, to be returned to the country from whence he came to this country at the expense of the steamship company importing him. The warrant of arrest and that of deportation charged the appellant with having been "found within the United States in violation of section 2, Chinese Exclusion Act of November 3, 1893 [28 Stat. 8, c. 14 (Comp. St. 1913, § 4324)], having secured admission by fraud, not having been at time of entry a lawfully domiciled exempt, returning to resume a lawfully acquired domicile and to follow an exempt pursuit in this country." He was not charged with any offense under the Immigration Act of February 20, 1907. The appellant insists that, the only offense for which he is being detained being one under the Chinese Exclusion Act, by the terms of which he was entitled to a judicial hearing to determine whether or not he was found unlawfully in the United States, he cannot be held under the warrant of deportation issued by the Secretary of Labor under the Immigration Act of February 20, 1907, and by that means denied a judicial hearing.

It is settled that the Immigration Act of February 20, 1907, makes no exception from the classes of undesirable aliens covered by it of Chinese persons, and that persons of whatever race, who enter this country in violation of its provisions, subject themselves to deportation by the method provided for in sections 20 and 21 of the act, after an administrative hearing only. United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354. The question presented in this case is a different one. The appellant is charged with no violation of the Immigration Act, as was Wong You in the case cited. He is charged with a violation of the Chinese Exclusion Act only, and the government's contention is that the plain language of section 21 of the Immigration Act makes the procedure provided for in that act applicable to any alien "subject to deportation under the provisions of this act or *of any law of the United States*," and that the appellant, being subject to deportation under the Chinese Exclusion Act, which is a law

of the United States, may therefore be deported under the procedure provided in the Immigration Act. Section 43 of the Immigration Act is as follows:

"That the act of March third, nineteen hundred and three, being an act to regulate the immigration of aliens into the United States, except section thirty-four thereof, and the act of March twenty-second, nineteen hundred and four, being an act to extend the exemption from head tax to citizens of Newfoundland entering the United States, and all acts and parts of acts inconsistent with this act are hereby repealed: Provided, that this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, nor to repeal, alter, or amend section six, chapter four hundred and fifty three, third session Fifty-Eighth Congress, approved February sixth, nineteen hundred and five, or, prior to January first, nineteen hundred and nine, section one of the act approved August second, eighteen hundred and eighty two, entitled "An act to regulate the carriage of passengers by sea."

This section prohibits a construction of the Immigration Act that would have the effect of repealing, altering, or amending existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. Section 21 of the act ought, therefore, not to be given a construction that would operate to repeal, alter, or amend any part of the Chinese Exclusion Laws, in force when the Immigration Act was enacted. It is said that the purpose of the proviso to section 43 was to prevent Chinese aliens from obtaining admission into the United States, under the Immigration Law, where they would have been excluded under the Exclusion Acts. Whatever may have been the motive for the insertion of the proviso, its language must be given its natural effect, which is to prohibit a construction that would operate as a repeal, alteration, or amendment of the Chinese Exclusion Act in any material respect whatsoever. The question, then, is whether the making of the deportation procedure, provided in sections 20 and 21 of the Immigration Act, applicable to persons whose only offense was a violation of the Chinese Exclusion Act, would work a repeal, alteration, or amendment of that act, or any material part of it.

To determine this question, it will be helpful to consider what were the rights of the Chinese person under the Chinese Exclusion Act, and what they will be if section 21 of the Immigration Act is construed as contended for by the government. The Chinese Exclusion Act of September 13, 1888 (section 13), provides:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district."

Under it the Chinese person is entitled to a judicial hearing to determine his status, either before a justice, judge or commissioner, or before a United States court, and is entitled, if convicted before a

commissioner, to an appeal to the District Judge, and from the order of the District Court is entitled to an appeal to the Circuit Court of Appeals. Under the Immigration Act (sections 20 and 21) the alien is entitled only to an executive hearing and investigation, and deportation may follow such executive hearing. Unless the Secretary of Labor acts beyond his legal authority, or without evidence, the alien has no right to a judicial determination of his status, under the Immigration Act.

If sections 20 and 21 of the Immigration Act be construed to provide a method of deportation available to the government as against violators of the Chinese Exclusion Act alone, then such persons are, by such a construction of the Immigration Act, deprived of the right to a judicial hearing to determine their right to remain in this country, which they theretofore had under the Chinese Exclusion Act. That such a construction would accomplish an alteration or amendment of the Chinese Exclusion Act in a material respect is obvious. It would, at the option of the government, make the Chinese person's right to stay in this country depend upon an executive determination of his status, instead of upon the result of the judicial inquiry accorded to him by the Exclusion Act. That this was a valuable right to the Chinese person goes without saying. The effect of such a construction, so far as concerns the government, may be, as contended by it, merely to provide a cumulative, distinct, and independent remedy to that provided by the Exclusion Act. From the point of view of the Chinese person, however, the effect of the construction would be to deny him, at the option of the government, his remedy under the Exclusion Act of a judicial inquiry into his right to remain in this country, and to substitute therefor a mere executive determination by the department.

We think to adopt such a construction would be to ignore the direction of section 43 of the Immigration Act that "this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons, or persons of Chinese descent." Refusing to adopt the construction contended for by the government, it may be difficult to find a field of operation for the words "or any law of the United States," found in section 21 of the Immigration Act, unless they be held to relate to future legislation. In any event, they should not be given a function as referring to the Exclusion Act, when the doing so brings the court in direct conflict with the proviso of section 43. The effect of the proviso of section 43 is to except from the operation of the general words of the preceding section 21, "or any law of the United States," the Chinese Exclusion Act.

This was the holding of District Judge Carpenter in the case of United States ex rel. Lem Him v. Prentis et al. (D. C.) 230 Fed. 935, affirmed by the Circuit Court of Appeals for the Seventh Circuit at its October term, 1916, January session, 1917 (unreported), and of District Judge Cochran, in the case of Ex parte Woo Jan (D. C.) 228 Fed. 927, still pending on appeal in the Sixth Circuit. The following cases are to the contrary: Ex parte Lam Pui (D. C.) 217 Fed.

457; Sibray v. United States, 227 Fed. 1, 141 C. C. A. 555; and Ex parte Woo Shing (D. C.) 226 Fed. 141. But in each the case of United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354, was held to be controlling, and we think it only so where the alien is held under a warrant charging a violation of some provision of the immigration act, which was the case in the Wong You Case, but is not so in this case.

This conclusion leads to a reversal of the order of the District Court, dismissing appellant's petition for a writ of habeas corpus, and a remand of the case to the District Court, with directions to entertain the petition and grant the writ, unless the United States, within such time as the District Judge deems reasonable, institute proceedings against the relator under the provisions of the Chinese Exclusion Act.

And it further appearing from the record that there is a stipulation between counsel for the parties that whatever judgment shall be rendered in the case of Lee Wong Hin, now decided, shall also be rendered in the cases of Lee Soon v. John P. Mayo, Commissioner of Immigration at Port of New Orleans, No. 2982, and Lee Bing Shou v. John P. Mayo, Commissioner of Immigration at Port of New Orleans, No. 2983, now pending in this court, a judgment of reversal shall accordingly be entered in each of said cases.

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## ATLANTIC COAST REALTY CO. v. ROBERTSON.*

(Circuit Court of Appeals, Fourth Circuit. February 14, 1917.)

No. 1481.

FRAUDS, STATUTE OF ⇐56(9)—INTEREST IN LANDS—CONTRACT OF AGENCY.

A contract by which defendant, an owner of land, gave plaintiff an exclusive agency to sell the land, plaintiff to make advancements for development, advertising, etc., which were to be repaid by defendant, and to receive as its compensation one-half the net profits received from the sales above the fixed value placed upon the lands, creates an agency, and not a partnership, since plaintiff acquired no interest in the profits as such, but merely a right to compensation for services measured by the profits, and such a contract was therefore not required to be in writing by Code Va. 1904, § 2840, subd. 6, providing that no action shall be brought on any contract for the sale of real estate, or for the lease thereof, unless the contract or some memorandum thereof is in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 136–138.]

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by the Atlantic Coast Realty Company against Wirt Robertson. Judgment for defendant on demurrer to plaintiff's bill, and plaintiff brings error. Reversed and remanded.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

Charles T. Lassiter, of Petersburg, Va., and James Mann, of Norfolk, Va. (Lassiter & Drewry, of Petersburg, Va., and Mann & Tyler, of Norfolk, Va., on the brief), for plaintiff in error.

C. V. Meredith, of Richmond, Va., and J. M. Townsend, of Petersburg, Va., for defendant in error.

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied May 28, 1917.

PRITCHARD, Circuit Judge. This case comes here on writ of error from the District Court of the United States for the Eastern District of Virginia. The court below sustained the demurrer interposed by the defendant to the bill filed by the plaintiff.

The plaintiff alleges that the defendant was the owner of a tract of land purchased at the price of $31,000, which he desired to cut up in lots or parcels and to sell; that the plaintiff, being engaged in advertising and selling property on commission, was employed by the defendant to sell and dispose of the property in question on a percentage basis on any amount realized over and above the original purchase price of the land. It is further alleged that the defendant was interested in the approaching sale of lots in a tract of land near by, and in order that this tract would be first placed upon the market he was anxious that plaintiff should become pecuniarily interested; that defendant proposed that plaintiff become the exclusive agent for the sale of his property, and make, among other things, advancements for development, advertising, etc., which were to be refunded by defendant, and that after defendant should receive $40,000, as the gross value of his land, plaintiff was to be paid one-half of the net profits as its commission or compensation; that after this verbal agreement was made, and the parties had shaken hands in full acceptance of its terms, the defendant sold one Charles Barrow (who owned neighboring property) the land in question for $80,000; that this sale was made without notice to plaintiff, and defendant now seeks to avoid his agreement with plaintiff on the ground that it was verbal and not in writing.

Plaintiff instituted suit to recover its commissions, based on the price at which it could have sold the property, and to recover certain amounts it had expended in pursuance of its agreement with defendant. The court below held that the contract was for the sale of real estate, and that therefore it was unenforceable, because not reduced to writing. The defendant's demurrer to the declaration was sustained, and the suit was dismissed.

The agreement between the parties is set out in the declaration in the following language:

"That the said defendant * * * proposed that said plaintiff take the exclusive agency for the development, subdivision, and handling, together with the exclusive right to sell, the said 'Baker property' at public auction and at private sale (the title to the said property to remain in said defendant, and to be conveyed by him direct to the purchasers); that it provide a valuable consideration for this exclusive right to sell, by agreeing to spend its own money for engineers, laborers, tools, teams, advertising, auctioneers, and other necessary purposes in that connection; that, out of the first proceeds of the said sales, said plaintiff be reimbursed for its expenditures, so to be made, upon expense vouchers to be submitted by it to him; that, after the payment of said expenses, the said defendant should then receive out of the proceeds of said sales the sum of forty thousand dollars ($40,000.00); and that whatever residue might be produced by such sales should be divided equally between said plaintiff and said defendant. * * *"

The following is the only ground of demurrer filed by the defendant:

"That it appears upon the face of said declaration that the alleged contract stated therein was one providing for the sale of an interest in real estate, and was not in writing as required by the statute, set forth in subdivision 6 of section 2840, Code of Virginia."

The statute of frauds of Virginia, so far as applicable, is as follows:

"No action shall be brought in any of the following cases. * * * Sixth. Upon any contract for the sale of real estate, or for the lease thereof for more than a year, * * * unless the promise, contract, agreement, representation, assurance or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent."

The question to be determined is within a narrow compass, to wit: Is the contract sued upon "a contract for the sale of real estate"?

It is insisted by counsel for defendant that the parties to this contract entered into a partnership by virtue of which plaintiff became invested with an interest in real estate; while, on the other hand, it is urged by plaintiff that the contract as set forth in the declaration clearly shows that it was to act as the agent of the defendant in preparing, placing upon the market, and selling the property; that it was to have the exclusive right to sell the property, and was required to keep an itemized account of incidental expenditures, for which it was to be reimbursed out of any proceeds that might be realized from the sale of this property in excess of the sum agreed upon, to wit, $40,000. There is no provision in the contract whereby any portion of this property was to be conveyed to the plaintiff. On the contrary, the title is to remain in the defendant until such time as the plaintiff might effect a sale of the same, at which time the defendant was to convey it to the purchaser. After realizing $40,000 and a sufficient amount to pay the incidental expenses, then any residue was to be divided equally between the parties.

The court below based its judgment upon a decision of the Supreme Court of Virginia in the case of Burgwyn v. Jones, 113 Va. 511, 75 S. E. 188, 41 L. R. A. (N. S.) 120, Ann. Cas. 1913E, 564. In that case a partnership was clearly established, in referring to which the complainant averred that:

"Your complainant avers that said agreement was in effect a partnership agreement, and that said parties were, as between themselves, copartners; that it was mutually understood and verbally agreed by and between said parties that your complainant, by reason of the services to be rendered by him for the benefit of said undertaking, was to have an interest in the said property equal to that of any of said parties, after the purchase price of said property and the expense of maintaining the same had been deducted; and that all of the said parties would work together for their common benefit."

Thus it will be seen that the Burgwyn Case, supra, is not analogous to the case at bar. There the sole purpose of the suit was to ascertain the interest in the tract of land growing out of the partnership between the parties; also there was nothing in that case upon which plaintiff could reasonably contend that the agency had been established.

In this instance the plaintiff makes no claim that it has an interest in the land in question, nor is there anything in the pleading which tends in the slightest degree to sustain the contention that this is a suit to recover land based upon a verbal contract. The plaintiff, among other things, alleges that it was to take the "exclusive agency" for the sale of this land. It is not only alleged that plaintiff was simply acting as an agent of defendant, but every fact and circumstance surrounding this transaction clearly shows that this was a contract whereby the relation of principal and agent was established between defendant and

plaintiff. The fact that plaintiff was interested in the profits and agreed to make certain expenditures in preparing the property for sale is not sufficient to warrant the conclusion that this is a partnership, as contradistinguished from an agency. At most it can only be said that the money advanced for the purpose of putting this property in an attractive condition for sale was in the nature of an advancement or loan, for the repayment of which, according to the declaration, specific provision was made as a part of the contract.

The Supreme Court of Virginia in the case of Jackson v. Haynie, 106 Va. 365, 56 S. E. 148, in referring to what it takes to constitute a partnership, said:

"The principles of the law of partnership lead to the conclusion that, if a trader makes an arrangement in regard to a commercial business with another by reason of which that other becomes interested as owner in the resulting profits, while they are undivided and remain as profits, the two are partners; the general rule being that, to constitute a partnership, there must be a community of interests inter sese, and that the parties should share the profits and losses. It is, however, far from being universally true that a mere participation in the profits constitutes the party a partner. At most it is true only sub modo. The same principle that leads to the general rule mentioned leads directly to the other conclusion that a mere payment, or promise to pay, out of the profits a sum of money as a specific proportion of the profits does not necessarily constitute the payee a partner, and gives him no interest in the profits and no right to the profits, but only a personal claim for such share of the profits, after they are ascertained and may be divided. If a party has no interest whatsoever in the capital stock, and as between himself and the other party has no rights as a partner, or no mutuality of powers and duties, but is simply employed as an agent and is to receive a proportion of the profits as a compensation for his labor and services, he will not be deemed a partner from that fact alone. Story on Partnership, § 30 et seq.; Parsons on Partnership, p. 72 et seq. It is clear from the authorities that if the parties merely occupy the relation of principal and agent, or employer and employé, no partnership can be predicated upon the fact that such agent or employé receives a share of the profits as compensation for his services or other benefits conferred. This proposition is illustrated by numerous decisions of the courts. Bowyer v. Anderson, 2 Leigh (Va.) 550; Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec. 766; Sodiker v. Applegate, 24 W. Va. 411, 49 Am. Rep. 252; Berthold v. Goldsmith, 24 How. 542, 16 L. Ed. 762; Blanchard v. Coolidge, 22 Pick. 151; Rice v. Austin, 17 Mass. 197; Loomis v. Marshall, 12 Conn. 69, 30 Am. Dec. 596; Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267. * * * In the case at bar the weight of the evidence shows that no partnership was intended by the parties, nor did one result from the verbal understanding between them. It sufficiently appears that the appellee's intestate was employed by the appellant to take charge of his mill as miller, and for his services in that behalf the deceased was to receive one-third of the profits. This interest in the profits, to which Haynie became entitled when they were ready to be divided, did not make him a partner. It merely constituted the manner of payment and the measure of his compensation for his services as miller."

So in this instance any profits arising from the sale of the property after deducting the $40,000 and the incidental expenses was the measure by which the compensation to be paid to plaintiff for its services was to be ascertained.

The case of Seymour v. Freer, 8 Wall. 202, 19 L. Ed. 306, is very much in point. In that case the agreement upon which the suit was based is incorporated in the syllabus in the following language:

"In May, 1835, an agreement was entered into between Price and Seymour, which provided, on the part of Price, that he should devote his time and best

judgment to the selection and purchase of land, to an amount not exceeding $5,000, in certain designated states and territories, or in such of them as he might find most advantageous to the interest of Seymour, that the purchases should be made during the then existing year, and that the contracts of purchase should be made and the conveyances taken in the name of Seymour; and on the part of Seymour, that he should furnish the $5,000, that the lands purchased should be sold within five years afterwards, and that, of the profits made by such purchase and sale, one-half should be paid to Price, and be in full for his services and expenses."

There the court held that the facts clearly established an agency and that the parties did not have an interest in the land as partners. The Chief Justice, in referring to this phase of the question, said:

"We do not consider the agreement as creating any partnership between the parties, or as vesting in Price any interest, legal or equitable, in the lands purchased. It provides simply for services to be rendered by Price for Seymour and a contingent compensation to be made to him for such services."

For the reasons stated we are impelled to the conclusion that the contract as set forth in the complaint constitutes an agency rather than a partnership, and it necessarily follows that such contract is not required by the laws of Virginia to be in writing.

Therefore we are of opinion that the judgment of the court below should be reversed, and the cause remanded, with instructions for further proceedings not inconsistent with the views herein expressed.

Reversed.

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## OTIS ELEVATOR CO. v. MILLER & PAINE.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1917.)

No. 4767.

1. MASTER AND SERVANT ⟸389—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—RIGHT TO SUBROGATION.

Under Nebraska Workmen's Compensation Act, § 109 (Rev. St. Neb. 1913, § 3659; Laws 1913, c. 198, § 18), providing that, where a third person is liable to the employé or to dependents for the injury or death, the employer shall be subrogated to the right of the employé or to dependents against such third person, the fact that the employer's negligence concurred with the negligence of the third person in causing the injury does not bar the employer's right to subrogation.

2. MASTER AND SERVANT ⟸389—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—SUBROGATION—INSURANCE.

Nor does the fact that the employer was insured against loss under the provisions of sections 137, 123, of the act (Laws 1913, c. 198, §§ 46, 47) bar his right to subrogation.

3. MASTER AND SERVANT ⟸367—WORKMEN'S COMPENSATION—INDEPENDENT CONTRACTOR—RIGHT TO SUBROGATION—NEGLIGENCE OF SUPERINTENDENT.

One employed by a contractor as superintendent of construction is not an "independent contractor," within Nebraska Workmen's Compensation Act, § 107 (Laws 1913, c. 198, § 16), providing that any person creating or carrying into operation any scheme to execute work without being responsible to the workmen shall be included in the term "employer," and with the immediate employer shall be jointly and severally liable for the compensation, but that the section shall not be so construed as to cover

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

or mean a contractor who in good faith lets to a subcontractor, and requires the subcontractor to procure a policy of insurance guaranteeing payment of compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

4. MASTER AND SERVANT ⟸389—WORKMEN'S COMPENSATION—RIGHT OF SUBROGATION—AMOUNT OF RECOVERY.

Under Nebraska Workmen's Compensation Act, § 109, providing that, where a third person is liable to the employé or to dependents for the injury or death, the employer shall be subrogated to the right against such third person, and the recovery by the employer shall not be limited to the amount payable as compensation to the employé or dependents, but he may recover any amount which the employé or his dependents would have been entitled to recover, and that any recovery by the employer in excess of the compensation paid after deducting the expenses thereof should be paid forthwith to the employé or the dependents, and treated as an advance payment by the employer on account of any future installments of compensation, recovery by the employer against a third person is not limited to the maximum recovery by the employé, but where the recovery exceeds the maximum compensation the excess is added to the payment to the employé.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by Morris W. Folsom, as administrator of the estate of Harry D. Pettengill, against Miller & Paine, a corporation, to have determined compensation due to dependents of deceased, in which the Otis Elevator Company was made a party defendant on the cross-petition of Miller & Paine. From a judgment of the District Court, after removal to that court of the controversy between the original defendant and the Otis Elevator Company, for the original defendant, the Otis Elevator Company brings error. Affirmed.

William F. Gurley and David A. Fitch, both of Omaha, Neb., for plaintiff in error.

Edmund C. Strode, R. J. Greene, and Maxwell V. Beghtol, all of Lincoln, Neb., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and RINER, District Judge.

CARLAND, Circuit Judge. On September 14, 1915, Miller & Paine, a corporation, was constructing a building at Lincoln, Neb. Harry D. Pettengill was at the time mentioned one of its employés, engaged in the performance of work on said building. While so engaged he received an injury which immediately caused his death. The employer and employé were subject to the "Workingmen's Compensation Act." Sections 92 to 146, inclusive, article 8, chapter 35, Rev. St. Neb. 1913. The employé left surviving him and dependent upon him for support a wife and child. The law above mentioned provided (section 113 [Laws 1913, c. 198, § 22]) that the employé should be entitled to compensation from his employer in an amount equal to 50 per cent. of his wages at the time of death provided the compensation should not be more than $10 nor less than $5 per week, payable

during the period of dependency which should not exceed 350 weeks. It provided (section 116 [Laws 1913, c. 198, § 25]) that except as otherwise provided said compensation should be paid periodically in accordance with the method of payment of wages at the time of the death of the employé. It provided (section 113) that the employer should be liable for the reasonable expense of the last sickness and burial of the employé, not exceeding the sum of $100. It provided (section 127 [Laws 1913, c. 198, § 36]) that the parties interested within the limitations of the law might settle all matters relating to compensation. It provided (section 130 [Laws 1913, c. 198, § 39]) that in the event there was a dispute as to the compensation due an employé either party might bring an action in the state court to determine the amount thereof and how it should be paid.

April 20, 1915, Morris W. Folsom, administrator of the estate of Pettengill, commenced an action in the district court for Lancaster county, Neb., against Miller & Paine, to have the amount of the compensation due the dependents of Pettengill determined and also the manner of paying the same. Miller & Paine filed an answer to the petition of the administrator, and also a cross-petition against the Otis Elevator Company, an Illinois corporation, hereinafter called "Elevator Company," which it asked should be made a party defendant in the action. In the cross-petition against the Elevator Company, Miller & Paine set forth facts which, if true, would have entitled the dependents of Pettengill, or the administrator of his estate, to recover damages for the negligent killing of Pettengill. The state court ordered that the Elevator Company be made a party defendant, as prayed for by Miller & Paine.

Subsequently the Elevator Company removed the whole case into the United States District Court for the District of Nebraska, on the ground of diverse citizenship. After the cause had been removed as stated, the administrator filed a motion to remand. On considering this motion the United States District Court decided that there were two controversies arising on the record: One between the administrator and Miller & Paine under the statute, and the other between Miller & Paine and the Elevator Company under its right of subrogation hereinafter mentioned. Being of this opinion, the United States District Court remanded the issue between the administrator and Miller & Paine to the state court and retained jurisdiction of the action between Miller & Paine and the Elevator Company. The last-named action proceeded to trial, and a verdict and judgment in the sum of $10,000 was recovered. From this judgment against it the Elevator Company has prosecuted a writ of error to this court, assigning certain errors.

The assignment of errors has been discussed by counsel on both sides in their briefs under three propositions, and we will follow the method adopted by counsel in disposing of the case. Counsel for the Elevator Company contend, first, that section 109 of the Workingmen's Compensation Act does not apply to an employer whose negligence concurred in causing the injury or death of his employé; second, that section 109 does not apply to an employer whose employé was injured or killed through the negligence of a third person without

fault on the part of the employer, where said employer has suffered no money damage by the payment of compensation or compensation to be paid, and who in the event of a recovery has no interest in the avails of the suit or any part thereof; third, that section 109 does not apply to an owner who carries on his work, as provided by section 107, through an independent contractor, who is required to carry a policy of insurance from a company licensed to make such insurance, which policy of insurance guarantees payment of compensation to injured workmen. Sections 109 and 107 above referred to read as follows:

109: "Where a third person is liable to the employé or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employé or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employé or dependents, but such employer may recover any amount which such employé or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employé or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation." Laws 1913, c. 198, § 18.

107: "Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this article, shall be included in the term 'employer' and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this article. This section, however, shall not be so construed as to cover or mean an owner who lets a contract to a contractor in good faith, or a contractor who, in good faith, lets to a subcontractor * * * as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to make such insurance in this state, which policy or policies of insurance shall guarantee payment of compensation according to this article to injured workmen." Laws 1913, c. 198, § 16.

[1] The Supreme Court of Nebraska, so far as we are advised, has never construed the foregoing sections with reference to the questions now raised, nor are we aided by the decisions of other courts under statutes differing in their phraseology from the Nebraska statute. It is claimed by counsel for the Elevator Company that they ought to have been permitted to show that the negligence of Miller & Paine concurred with that of the Elevator Company in causing the death of Pettengill, and, this fact being shown, there could be no recovery by Miller & Paine against the Elevator Company. We do not think that any such construction can be placed upon section 109 without reading into the statute language that the Legislature did not deem proper to place there. The liability of Miller & Paine was positively fixed by law, regardless of the question of negligence on its part. The law then provided that Miller & Paine should be subrogated to the rights of the dependents of Pettengill against the Elevator Company, providing it was the negligence of the Elevator Company that caused his death. To construe section 109 as not permitting Miller & Paine to prosecute an action for the benefit of itself and the dependents of Pettengill, if the negligence of Miller & Paine concurred with that of the Elevator Company in causing his death, would destroy the section.

The object of the section, as clearly appears from its language, was to permit the employer to reimburse himself by an action against the party whose negligence caused the death and also to allow the dependents of the deceased employé to recover a sum over and above the amount for which the employer was absolutely liable, regardless of negligence, if the evidence should permit such recovery.

The action brought by Miller & Paine against the Elevator Company under its right of subrogation must be treated, so far as the right to recover is concerned, just as if the action had been brought by the administrator of the estate of Pettengill. To decide that the concurring negligence of Miller & Paine could defeat such an action would not only permit one wrongdoer to plead the fault of a joint wrongdoer in defense, but would, as heretofore said, destroy the right of subrogation granted by the statute. The liability to compensate an employé, imposed by law upon the employer regardless of negligence, is in lieu of his liability for all other reasons. The trial court did not err in its rulings in reference to this proposition.

[2] The second proposition advanced by counsel for the Elevator Company is based on the fact that the Elevator Company at the trial below offered to show that the liability of Miller & Paine under the Compensation Act had been insured by an insurance company licensed to do such business in the state of Nebraska, and that therefore, as Miller & Paine would suffer no damage, it could not recover any damages against the Elevator Company. But this argument involves a misconception of the action brought by Miller & Paine. That action was to be tried just the same as if it had been brought by the administrator of the estate of Pettengill. If nothing had been paid by Miller & Paine, or other person for them, the whole recovery would go to the dependents of Pettengill. Just how the amount recovered in this action shall be divided as between the dependents, Miller & Paine, or the insurance company, is no concern of the Elevator Company.

The Compensation Act itself (sections 137, 123 [Laws 1913, c. 198, §§ 46, 47]) provides that the employer may insure his liability to pay compensation and prescribes the form of the policy. To say that the employer could insure his liability, and then construe the law in such manner that he could not be subrogated if he did so, would be to cause one section of the law to destroy the other, which certainly is not permissible. The whole law must be construed together, and each provision thereof given effect, if possible.

[3] The third proposition argued by counsel is not sound, for the reason that Olson was not an independent contractor within the meaning of section 107. He was, as the evidence shows, employed by Miller & Paine as superintendent of construction.

[4] Some suggestion has been made in reference to the excess of the recovery in this action over and above the compensation fixed by the statute being considered as an advance payment upon the amount due as compensation from Miller & Paine to the dependents of Pettengill. The compensation in this case might be $10 per week for 350 weeks, or a period of about 7 years. Under the statute Miller & Paine are entitled to deduct from the amount of the recovery in this

action the expense of recovering the same and the amount already paid for compensation and the expense of last sickness and burial, the balance to be paid forthwith to the dependents. The law says this balance shall be treated as an advance payment by Miller & Paine on account of any future installments of compensation. We think a fair construction of the law is that this excess, in so far as the unpaid installments are concerned, shall be considered as an advance payment; but where, as in this case, the recovery exceeds the whole compensation to be paid, the law by its language did not intend to limit the recovery allowed by the first clause of section 109, which specifically provides that the amount of recovery shall not be limited to the amount payable as compensation.

Finding no error in the record, the judgment below must be affirmed; and it is so ordered.

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## CHICAGO, M. & ST. P. RY. CO. v. GEORGE A. HORMEL & CO.

(Circuit Court of Appeals, Eighth Circuit. March 5, 1917.)

No. 4754.

1. APPEAL AND ERROR ⟸209(1)—REVIEW—TRIAL TO COURT—SUFFICIENCY OF EVIDENCE.

Under Rev. St. § 700 (Comp. St. 1913, § 1668), providing that, when an issue of fact in a civil cause is tried by the court without a jury, the rulings of the court in the progress of the trial, if excepted to and presented by bill of exceptions, may be reviewed on a writ of error or appeal, and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment, assignments of error attacking the judgment as not based on the evidence cannot be considered, where there was no request for findings of fact or declarations of law and none were made by the court, though rulings on the sufficiency of the petition and on the admission and exclusion of evidence may be reviewed if proper exceptions were taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1290.]

2. COMMERCE ⟸88—ORDER OF COMMISSION—MODIFICATION OF ORDER—EFFECT.

Where the Interstate Commerce Commission made an order in which it recited that it had made a report containing its findings of fact and conclusions, which report was made a part of the order, and subsequently made an order reciting that cause had been shown for modification of its former report and granted a still further reduction in the rates objected to by the shipper, the subsequent order was merely a modification of the former and did not set it aside, and therefore did not render the report, inadmissible in an action to enforce the reparation awarded, even though it was incorporated in the former order.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141.]

3. COMMERCE ⟸88—INTERSTATE COMMERCE COMMISSION—MODIFYING REPORT—FINDINGS.

Where the Interstate Commerce Commission had made an order incorporating therein a report which properly found that the rate complained of by a shipper was unjust, unreasonable, and discriminatory, and by a subsequent order and report found that cause had been shown for the modification of the former report, and that a further reduction of the rate complained of was proper, and that the shipper had been damaged to the

amount of the excess of the rate charged over the rate therein found to be just, and the case was held open for further proceedings as to reparation which was thereafter awarded as reparation on account of unreasonable and unjust discriminatory rates, there was a sufficient finding, when the reports and award were read together as they must be, that the rate charged was unreasonable and discriminatory under Interstate Commerce Act Feb. 4, 1887, c. 104, § 14, 24 Stat. 384 (Comp. St. 1913, § 8582), requiring the commission to make a written report of the findings of fact on which an award is made.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141.]

4. CARRIERS ⟸200—EXCESSIVE CHARGES—INTEREST—ORDER OF INTERSTATE COMMERCE COMMISSION.

The Interstate Commerce Commission may allow interest on rates found to be excessive when the charges have been paid under protest, though until the award the amount due was uncertain and unliquidated.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 901-905.]

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Action by George A. Hormel & Co. against the Chicago, Milwaukee & St. Paul Railway Company to enforce an award of reparation made by the Interstate Commerce Commission. Judgment for the plaintiff, and defendant brings error. Affirmed.

George A. Kelly, of Chicago, Ill. (O. W. Dynes and Winston, Payne, Strawn & Shaw, all of Chicago, Ill., on the brief), for plaintiff in error.

J. N. Nicholsen, of Austin, Minn., for defendant in error.

Before CARLAND, Circuit Judge, and RINER and MUNGER, District Judges.

MUNGER, District Judge. George A. Hormel & Co., hereafter referred to as "plaintiff," brought suit against the Chicago, Milwaukee & St. Paul Railway Company, hereafter referred to as "defendant," and recovered a judgment enforcing an award of reparation made by the Interstate Commerce Commission in favor of the plaintiff. It appears from the pleadings that plaintiffs were packers of meat, having a packing house at Austin, Minn. On November 1, 1911, the defendant had put in force a new and higher schedule of rates affecting plaintiff's shipments. Thereafter plaintiff filed its complaint before the commission, a hearing was had, and on February 3, 1913, the commission filed a report in which it found the rates complained of were unreasonable and discriminatory as to plaintiff and that plaintiff was entitled to reparation. On the same day it made an order requiring the defendant to desist from charging the old rates and to establish new rates not exceeding the rates fixed in the order. Geo. A. Hormel & Co. v. C., M. & St. P. Ry. Co., 26 Interst. Com. Com'n, 112. This order began with a recital which reads as follows:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof."

The plaintiff requested and obtained a rehearing before the commission. As a result of the rehearing, the commission on April 6, 1914, filed a second report finding that cause had been shown for a modification of its former report, and that a further reduction of the rate should be made. The plaintiff was held to be entitled to an award of reparation, and the case was held open for further proceedings relating to the award. An order was made on the same day requiring the defendant to desist from charging the rates it was then charging and to establish new rates not exceeding the lesser rates fixed in its second order. Geo. A. Hormel & Co. v. C., M. & St. P. Ry. Co., 30 Interst. Com. Com'n, 98. On April 21, 1915, the commission made its final award of reparation, reciting the fact that its prior reports of February 3, 1913, and of April 6, 1914, contained its finding of fact and conclusions thereon, and also the fact that the parties had filed agreed statements respecting the movements of the shipments involved and of the amount of reparation due under the commission's findings, and the award was of this amount. When the case came on for hearing, a jury was waived by written stipulation and trial was had to the court. The court made a general finding of the amount due plaintiff but made a special finding of the amount allowed to plaintiff as attorney's fee.

[1] Some of the assignments of error attack the judgment on the theory that it is not based on the evidence. There was no request made to the trial court for a special finding of the facts, for a ruling upon the sufficiency of the evidence, nor for any declaration of law. The effect of section 700, U. S. Rev. Stats. (section 1668, U. S. Comp. Stats. 1913), in limiting the right of review of cases tried to the court, when a jury has been waived, has often been stated. Where the finding of facts is general, the court's conclusion is final on all questions of fact to the same extent as the verdict of a jury. In the absence of a request for declarations of law, and when the court has made none, there can be no error assigned because of the holdings of the court on questions of law. There may be a review of the sufficiency of the petition and of rulings upon the admission and exclusion of evidence, if proper exceptions are taken. The insufficiency of the evidence to support the judgment must be presented to the trial court. Mason v. United States, 219 Fed. 547, 135 C. C. A. 315, and cases cited; Mound Valley V. B. Co. v. Mound Valley N. G. & O. Co., 205 Fed. 147, 123 C. C. A. 478; Tiernan v. Chicago Life Ins. Co., 214 Fed. 238, 131 C. C. A. 284; Bunday v. Huntington, 224 Fed. 847, 140 C. C. A. 415; Wear v. Imperial Window Glass Co., 224 Fed. 60, 139 C. C. A. 622; Felker v. First Nat. Bank, 196 Fed. 200, 116 C. C. A. 32; Keeley v. Ophir Hill Consol. Mining Co., 169 Fed. 598, 95 C. C. A. 96; Hayden v. Ogden Savings Bank, 158 Fed. 90, 85 C. C. A. 558; Streeter v. Sanitary Dist. of Chicago, 133 Fed. 124, 66 C. C. A. 190; York v. Washburn, 129 Fed. 564, 64 C. C. A. 132; Kentucky Life & Acc. Ins. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42.

[2] The only assignment of error relating to the reception of evidence complains of the admission in evidence of the report and order of the commission dated February 3, 1913. The ground of objection

was that the order had been vacated by a subsequent order. There was no error in this ruling, because the same report and order had been pleaded and set forth as exhibits to plaintiff's petition, and had been admitted by the answer. The defendant contends that this order had been vacated by the commission because of the recital in the order which accompanied it:

"The commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof."

The defendant says that the effect of this latter clause was to so incorporate the report in the order that, when the commission set aside this order and granted a rehearing, it thereby set aside the report. It was a permissible convenience for the commission to refer to the report in its contemporaneous order, instead of rewriting it in the order. The effect of the recital was to incorporate the report by reference in the order, but that did not destroy its separate existence and efficacy. The commission did not manifest any intention to set aside its first report. Its second report purports to be a mere modification of the first report, the award of reparation refers to both of the reports as containing its findings of fact and conclusions of law thereon, and they are again incorporated by reference in the award. Both reports were cited as precedents in later decisions by the commission in other cases. Decker & Sons v. C., M. & St. P. Ry. Co., 30 Interst. Com. Com'n, 547; Interstate Packing Co. v. Chicago, 41 Interst. Com. Com'n, 396.

[3] One assignment of error reaches the sufficiency of plaintiff's petition to warrant the judgment. The ground of challenge is that it appears from the reports of the commission, attached to the petition, that there was no finding by the commission that the rates charged plaintiff were unreasonable or discriminatory at the time the shipments moved. In its first report, the commission found that the rate charged was "unreasonable in and of itself and unjustly discriminatory" against plaintiff. It also found that plaintiff had been damaged to the extent that those rates exceeded rates which were found to be just and reasonable, and that it was entitled to reparation, and directed that further proceedings be had to ascertain the amount to be awarded. The second report of the commission recited that in its previous report it had found the rate charged to be unreasonable and unjustly discriminatory and to what extent. It found that cause had been shown for a modification of the conclusion in the former report, and that a further reduction of one-half cent per hundred pounds was proper, and this lesser rate was made the maximum of just and reasonable rates for the future. It further found that plaintiff had been damaged to the extent that the charges it had paid exceeded "charges which would have been paid at the rate found to be just and reasonable," and the case was held open for the further proceedings as to reparation, which was thereafter awarded, "as reparation on account of unreasonable and unjustly discriminatory rates" charged plaintiff on its shipments. Section 14 of the act to regulate commerce requires the commission to make a writ-

ten report of the findings of fact on which an award is made, and, under plaintiff's complaint, a finding was essential that the rates collected from the plaintiff were unreasonable and discriminatory. Meeker v. Lehigh Valley R. Co., 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691. Defendant does not complain of the insufficiency of the findings in the first report, but charges that the second report did not contain sufficient findings, and that the award must fail because the first report had been vacated and the only support for the award was the second report. The contention that the first report had been vacated has already been held to be unfounded. When the first and second reports and the award are read together, as they should be, because the latter merely supplement and give effect to the former (Meeker v. Lehigh Valley R. Co., 236 U. S. 412–428, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691), a plain finding is deduced that the prior rates were found to be unreasonable and discriminatory to the extent that they exceeded the rates finally found to be just, and the award was made on that basis. The finding in the second report reciting the former finding holding the rates to be "unreasonable and unjustly discriminatory" to a certain extent, and then holding that cause had been shown for a modification of the first report, and that a further reduction "would be proper," and that plaintiff had been damaged to the extent payments exceeded charges then "found to be just and reasonable," supplemented by the statement in the order of award that it was granted "as reparation on account of unreasonable and unjustly discriminatory rates charged," can have no other rational meaning than that the rates charged plaintiff were found to be unreasonable and unjustly discriminatory during the time when its shipments were made, and to the extent of the excess above the rates finally determined to be reasonable. Mills v. Lehigh Valley R. Co., 238 U. S. 473, 35 Sup. Ct. 888, 59 L. Ed. 1414; New York Cent. & H. R. R. Co. v. Murphy, 224 Fed. 407, 140 C. C. A. 111.

[4] A further objection is made as to the allowance of interest to plaintiff on the amount awarded from a date prior to the date of the award. The objection is based on the ground that until the award the amount due was uncertain and unliquidated. The petition alleged that the higher rates had been exacted by the defendant against its protest. The commission may allow interest on rates found to be excessive when the charges have been paid under protest. Denver & R. G. R. Co. v. Baer Bros. Mercantile Company, 209 Fed. 577, 126 C. C. A. 399; Missouri Pac. Ry. Co. v. C. E. Ferguson Sawmill Co., 235 Fed. 474, —— C. C. A. ——. See, also, De La Rama v. De La Rama, 241 U. S. 154, 36 Sup. Ct. 518, 60 L. Ed. 932.

This disposes of all questions presented by the record, and, as no error is found, the judgment will be affirmed.

## CHICAGO, M. & ST. P. RY. CO. et al. v. GEORGE A. HORMEL & CO.

(Circuit Court of Appeals, Eighth Circuit. March 5, 1917.)

No. 4753.

APPEAL AND ERROR ⊂=232(1)—PRESENTING QUESTIONS BELOW—ATTORNEY'S FEES—JOINT JUDGMENT.

Where separate suits were brought by a shipper against two railway companies to enforce an order of the Interstate Commerce Commission which were heard together, error, if any, in awarding a joint judgment for plaintiff against both defendants for attorney's fees, does not require a reversal, where the only objection made in the trial court was that the amount was excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1368, 1430.]

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Separate suits by George A. Hormel & Co. against the Chicago, Milwaukee & St. Paul Railway Company and another to enforce awards of reparation made by the Interstate Commerce Commission. Separate judgments were rendered in favor of plaintiff against each defendant, and a joint judgment was rendered against both for attorney's fees, and defendants bring error. Affirmed.

George A. Kelly, of Chicago, Ill. (O. W. Dynes and Winston, Payne, Strawn & Shaw, all of Chicago, Ill., on the brief), for plaintiffs in error.

J. N. Nicholsen, of Austin, Minn., for defendant in error.

Before CARLAND, Circuit Judge, and RINER and MUNGER, District Judges.

MUNGER, District Judge. George A. Hormel & Co. filed separate suits against the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, Great Western Railroad Company, to enforce awards of reparation made by the Interstate Commerce Commission. The cases were heard together, but a separate judgment in favor of the plaintiff was rendered against each railway company, and a joint judgment was also rendered in favor of the plaintiff against both of the railway companies as an allowance for attorney's fees in prosecuting these cases in the District Court. Separate proceedings in error have been presented upon one record in the three cases. The general facts are stated in the decision in the case of Chicago, Milwaukee & St. Paul Ry. Co. v. George A. Hormel & Co., 240 Fed. 381, filed herewith.

The only assignment of error in this case relates to the allowance of an attorney's fee, and it is based on the fact of the entry of a joint judgment against the defendants for the amount allowed. Had this objection been presented to the trial court, either a separate judgment could have been entered, or a ruling could have been obtained as to the right to a joint judgment, and an exception saved. The only ob-

jection made in the trial court was that the amount requested by plaintiff, which was much larger than the amount which was allowed, was excessive.

As the question presented here was not presented in the court below, the judgment will be affirmed.

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## CHICAGO GREAT WESTERN R. CO. v. GEORGE A. HORMEL & CO.

(Circuit Court of Appeals, Eighth Circuit. March 5, 1917.)

No. 4755.

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Suit by George A. Hormel & Co. against the Chicago Great Western Railroad Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

George A. Kelly, of Chicago, Ill. (O. W. Dynes and Winston, Payne, Strawn & Shaw, all of Chicago, Ill., on the brief), for plaintiff in error.

J. N. Nicholsen, of Austin, Minn., for defendant in error.

Before CARLAND, Circuit Judge, and RINER and MUNGER, District Judges.

MUNGER, District Judge. This case arises out of similar facts and presents the same questions as are presented in the case of Chicago, Milwaukee & St. Paul Ry. Co. v. George A. Hormel & Co. (No. 4754) 240 Fed. 381.

The decision in that case controls the decision here, and the judgment, therefore, will be affirmed.

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## HUDGINS v. HANN.

(Circuit Court of Appeals, Fifth Circuit. March 7, 1917.)

No. 2927.

1. MASTER AND SERVANT ⟸315—LIABILITY TO THIRD PERSONS—DUTY TO KEEP PREMISES SAFE.

The general rule that a person is not liable for injury caused by another's negligence unless the relation of master and servant existed between them, the negligence of an independent contractor not rendering the contractee liable, does not apply where the law imposes upon the employer or contractee the duty to keep the subject of the work in a safe condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1241, 1244–1253, 1255, 1256.]

2. WORDS AND PHRASES—"INDEPENDENT CONTRACTOR."

An "independent contractor" is one who has the general control of the work with the right to determine what shall be done and the manner of doing it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

3. MASTER AND SERVANT ⟸315—LIABILITY TO THIRD PERSONS—OWNER OF BUILDING—DELEGATION OF DUTY.

The ownership of a building imposes on the owner the duty of preventing its injuring another person or his property rightfully upon or near to

it so far as the exercise of ordinary care will enable it to be done, and his liability for failure to perform the duty cannot be escaped by his intrusting the performance of it to another, though he was free from negligence in selecting the persons to perform it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1241, 1244–1253, 1255, 1256.]

4. NEGLIGENCE ⊂⊃44—OWNER OF BUILDING—LIGHTNING.

The owner of a building which had been injured by fire leaving a dangerous wall standing is liable for injuries to an adjoining owner caused by a fall of the wall when struck by the lightning, if a reasonably prudent person would have anticipated that the wall, in the condition it was was liable to fall as the result of a stroke of lightning.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 59.]

In Error to the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

Action by Charles Hann against Mrs. Lucy P. Hudgins. Judgment for the plaintiff, and defendant brings error. Affirmed.

Sidney J. Bowie and Hugh Morrow, both of Birmingham, Ala. (Cabaniss & Bowie and Tillman, Bradley & Morrow, all of Birmingham, Ala., on the brief), for plaintiff in error.

Augustus Benners and Borden Burr, both of Birmingham, Ala. (Percy, Benners & Burr, of Birmingham, Ala., on the brief), for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge. On the 12th of December, 1914, a store building in the city of Birmingham, Ala., owned by the plaintiff in error (hereinafter referred to as the "defendant"), which adjoined another store building in which the defendant in error (hereinafter referred to as the "plaintiff") carried on business, was partially destroyed by fire. The fire left standing, without the supports it previously had, a wall adjoining, and extending considerably above, the building occupied by the plaintiff. Two days after the fire, the city building inspector notified the defendant's agents that the walls of the building were not in good condition and to make the necessary repairs. The defendant employed a reputable building contractor to do all that was considered necessary to make the walls safe. She also employed a reputable architect to supervise the contractor's work. The architect and contractor undertook the tasks for which they, respectively, were employed. No limit was put on the price of the work to be done. The contractor was to be paid, and was paid, the cost of his labor and material and 10 per cent. in addition thereto as his compensation, and the architect was paid for his services a commission on the total cost of the work. On the 21st day of April, 1915, the wall adjoining the plaintiff's store fell thereon, destroying and injuring property of his therein, and he brought this suit to recover damages so caused. The defendant was not negligent in the selection of the architect and contractor who engaged to comply with her instructions to do all that was necessary to make the wall safe. There was evidence tending to prove

that there was a negligent failure by the architect and the contractor to comply with their respective undertakings, and that the fall of the wall and the plaintiff's consequent loss and damage were attributable to such negligence.

It is insisted that the defendant's freedom from personal negligence exempted her from the liability asserted against her. The trial court ruled against this contention.

[1, 2] The general rule is that one person is not ordinarily liable for an injury produced by the negligence of another, unless the relation of master and servant exists between them; and that when such injury is done by an independent contractor—or one who has the general control of the work, with the right to determine what shall be done and the manner of doing it—the quasi employer, or contractee, cannot be held liable for an injury resulting from the negligence of such contractor, or his servants, in the performance of the work contracted to be done. This rule is not applicable where the law imposes upon the employer the duty to keep the subject of the work in a safe condition. Mayor and Aldermen of Birmingham v. McCary, 84 Ala. 469, 4 South. 630; 1 Thompson on Negligence, §§ 665-667, 1115.

[3] The ownership of a building or structure imposes upon the owner the duty of preventing its injuring another person or his property rightfully upon or near to it, so far as the exercise of ordinary care will enable this to be done. This social duty, imposed to protect the owner's neighbor from injury, is so far absolute in its nature that the former's liability for injury occasioned to the latter by a failure to fulfill the duty cannot be escaped by his intrusting performance of it to another. Ainsworth v. Lakin, 180 Mass. 397, 62 N. E. 746, 57 L. R. A. 132, 91 Am. St. Rep. 314; Bower v. Peate, 45 L. J. Q. B. (N. S.) 446; 1 Thompson on Negligence, §§ 1060, 1115.

We have been referred to a number of decisions to the effect that the owner is not liable in such a case as the instant one where he was free from personal negligence in the selection of those employed to make damaged structures on his premises reasonably safe. It seems to us that such decisions are inconsistent with the recognition and proper enforcement of the duty of the owner of property so to use it as not to injure another. He is not an insurer against injuries to others due to the faulty condition of a structure on his premises; but he is under a positive duty to keep his property from being a cause of danger to others rightfully on or near to it by reason of any defect in structure or condition of repair which reasonable care and skill can guard against, and liability for injuries resulting from a breach of this duty cannot be shifted by the owner to another selected to act in the former's stead, and who fails to exercise the requisite care and skill. Lauer v. Palms, 129 Mich. 671, 89 N. W. 694, 58 L. R. A. 67; Ainsworth v. Lakin, supra; Ryder v. Kinsey, 62 Minn. 85, 64 N. W. 94, 34 L. R. A. 557, 54 Am. St. Rep. 623; Marney v. Scott, 1 Q. B. (L. R.) 986; Webb's Pollock on Torts, 638. A proprietor's right to the use of his premises is not an absolute one, but is qualified and limited by the right of others to the lawful possession and enjoyment of their property. The continuance of a damaged structure on his property binds him to adopt such precautions as reasonable care and skill

suggest to avoid a physical invasion of another's premises by the fall or collapse of such structure. Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; St. Peter v. Denison, 58 N. Y. 416, 17 Am. Rep. 258. The conclusion is that it was not error to refuse to direct a verdict in favor of the defendant.

[4] The falling of the wall occurred during a storm in which there was a high wind and lightning. There was evidence tending to prove that there was a stroke of lightning during the storm which caused or proximately contributed to the collapse of the wall. An exception was reserved to the part of the court's charge which dealt with this evidence. The purport of the instructions on this phase of the evidence was that, if the overthrow of the wall was due to its being struck by lightning, the defendant was not liable for an injury so caused, if a reasonably prudent person would not have anticipated that the wall in the condition in which it was permitted to remain was liable to fall as a result of a stroke of lightning; but that the defendant was liable for such injury if a reasonably prudent person would have reasonably anticipated that lightning was so apt to strike the wall and cause it to fall that such a person would not have permitted it to stand in the condition in which it was left. This amounted to saying that the owner of property should take precautions against dangers incident to such ordinary manifestations of the forces of nature as a reasonably prudent person would anticipate and guard against, but is not chargeable with negligence in failing to provide against a danger which a reasonably prudent person would not have anticipated or taken action to avoid. We are not of opinion that there is any just ground of complaint against the instruction in question. Certainly, it is not permissible for one to maintain a structure on his premises in such a condition that a reasonably prudent person would realize that it would become a source of danger to persons or property rightfully near by whenever an ordinary and reasonably to be anticipated force of nature might happen to come into play upon it.

An examination of the record in the light of the arguments of counsel has led us to the conclusion that it does not show the commission of any reversible error.

The judgment is affirmed.

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## UNITED STATES v. KIMI YAMAMOTO.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1917.)

No. 2803.

ALIENS ⇐51—GROUNDS FOR DEPORTATION—PRACTICING PROSTITUTION—CONSTRUCTION OF STATUTE.

In the provision of Immigration Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899, as amended by Act March 26, 1910, c. 128, § 2, 36 Stat. 264 (Comp. St. 1913, § 4247), for the deportation of "any alien who shall be found * * * practicing prostitution after such alien shall have entered the United States," the words "after such alien shall have entered

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the United States" should be construed as though they read "while such alien is in the United States," and the provision applies to all alien women whether they came into the United States at a port of entry, or by the annexation of the land in which they lived, as in case of alien residents of Hawaii at the time of its annexation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 111.]

Appeal from the District Court of the United States for the Territory of Hawaii; Sanford B. Dole, Judge.

Habeas corpus by Kimi Yamamoto. From an order discharging petitioner, the United States appeals. Reversed.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellee came to the Hawaiian Islands in 1897, and has ever since been a resident thereof. She was ordered deported upon proof of the charge that she practiced prostitution after entry into the United States. The facts in the case are practically the same as in the Cases of Sui Joy, Wong Yuen, and Ching Lum, 240 Fed. 392, — C. C. A. —, just decided by this court, and all four cases were dealt with in the court below in a single opinion.

The definition of the charge under which the appellee is held for deportation is limited by the words "after such alien shall have entered the United States." It is true that she has never technically entered the United States. While the territory of Hawaii may in a sense be said to have entered the United States by its annexation on August 12, 1898, it does not follow that its inhabitants thereby became immigrants to the United States. In ascertaining the intention of Congress in making the amendment of 1910, an important fact is that the amendment was made by striking certain words from the former act, whereby the time limitation in the former act was repealed. We think that Congress intended by the amendment to say that any alien found in the United States practicing prostitution shall be sent out of the country, and that such exclusion shall apply to all alien women, whether they came into the United States at a port of entry, or by the annexation of the land in which they lived, or became aliens by marriage to an alien, or were born alien within the United States, as not being "subject to the jurisdiction thereof," and that the words "after such alien shall have entered the United States" should be construed as if they read "while such alien is in the United States." It should be assumed that Congress intended to make no discrimination between these classes of aliens. The consideration which induced the amendment was that the objectionable aliens were in the United States, not the manner in which they got there.

We need not discuss the question whether Congress could order the deportation of aliens for prostitution practiced before the date of the act, for it is admitted that the appellee has practiced prostitution since the amendment of 1910. Other considerations applicable to

this case are discussed in the Cases of Sui Joy and Others, above referred to.

The judgment is reversed, and the cause is remanded to the court below, with instructions to dismiss the writ and remand the appellee to custody for deportation.

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## UNITED STATES v. SUI JOY. SAME v. WONG YUEN. SAME v. CHING LUM.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1917.)

Nos. 2800-2802.

1. ALIENS ⊜51—GROUNDS FOR DEPORTATION—CONSTRUCTION OF STATUTE.
The provisions of Immigration Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899, as amended by Act March 26, 1910, c. 128, § 2, 36 Stat. 264 (Comp. St. 1913, § 4247), for the deportation of "any alien * * * who shall receive, share in, or derive benefit from any part of the earnings of any prostitute," applies to any alien found in the United States, without regard to the manner of entry, including aliens who were resident in Hawaii at the time of its annexation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 111.]

2. ALIENS ⊜39—DEPORTATION—POWERS OF CONGRESS.
While an alien, who has acquired a residence in this country, is entitled to the same protection of life, liberty, and property as a citizen, he acquires no vested right to remain and the government has the power to deport him if, in the judgment of Congress the public interests so require, and such power is not dependent upon the existence of statutory conditions as to his right to remain at the time he became a resident.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 100.]

Appeal from the District Court of the United States for the Territory of Hawaii; S. B. Dole, Judge.

Habeas corpus by Sui Joy, by Wong Yuen, and by Ching Lum. From orders discharging petitioners, the United States appeals. Reversed.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

E. A. Mott-Smith, W. L. Stanley, and Stanley & Wilder, all of Honolulu, Hawaii, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. These cases were heard in the court below upon writs of habeas corpus issued to determine the legality of orders of deportation made against the petitioning aliens and the returns of the inspector in charge to the writs. The charge against each was that he was found receiving, sharing in, and deriving benefit from the earnings of a prostitute, and deportation was ordered under the provisions of section 3 of the act of Congress of March 26, 1910, entitled "An act to amend an act entitled 'An act to regulate the immigration of aliens into the United States,' approved February 20, 1907."

The court below entered orders discharging each of the appellees, holding that those persons who admittedly were residents of the territory of Hawaii before annexation thereof by the United States did not enter the United States, within the meaning of the act above referred to, and that Congress has no power to regulate the affairs of aliens within the United States, excepting under its constitutional authority "to regulate commerce with foreign nations," and that whereas, Congress may permit an alien immigrant to land under certain conditions as to conduct thereafter while in the country, involving forcible deportation upon his failure to perform such conditions, it may not deport alien residents for similar conduct, with whom there has been no such conditional entry into the United States.

[1] Section 3 of the act of February 20, 1907 (34 Stat. 898), provides in part as follows:

"Any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported."

The act of March 26, 1910 (36 Stat. 263), amends section 3 of the former act, and provides as follows:

"Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects or promises to protect from arrest any prostitute shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections 20 and 21 of this act."

It is admitted that the appellees in all these cases were resident aliens in the territory of Hawaii before the transfer of the sovereignty thereof to the United States. We are unable to agree with the court below that the clause "after such alien shall have entered the United States" is to be read into the definition of the offense with which these three appellees are charged. The statute as we read it limits the application of that clause to alien women connected with the management of a house of prostitution or practicing prostitution. We think that Congress by the act has, in unlimited terms, provided that "any alien * * * who shall receive, share in, or derive benefit from any part of the earnings of any prostitute," etc., shall be deemed to be unlawfully within the United States and shall be deported. But, even if that clause were applicable to the offense with which these appellees are charged, we are of the opinion, for reasons stated in United States v. Kimi Yamamoto, 240 Fed. 390, — C. C. A. —, decided simultaneously with this case, that it does not affect the authority of the immigration officials to deport any alien who, while a resident of the United States, commits the acts with which these appellees are charged.

Nor do we think that the act should be construed otherwise from the fact that the Secretary of Labor, under the authority which the

act gives him to establish rules and regulations for carrying out the purposes thereof, promulgated rule 22, which provides that the application for the warrant of arrest of an alien "must state facts bringing the alien within one or more of the classes subject to deportation after entry," and must be accompanied by a certificate of landing, to be obtained from the immigration officers in charge at the port where landing occurred, or a reason given for its absence. The observance of that rule may be essential in all those deportation cases in which the proceedings must be begun within a fixed period after the alien has entered the United States, as, for instance, where the alien becomes a public charge from causes existing prior to landing. But it does not follow from the promulgation of that rule that the officers of the department have construed the provisions of section 3 as amended in 1910, as applicable only to aliens who have entered at a port of the United States, and that in deporting such aliens the fact of entry must be shown. The fact that those officers are now prosecuting these cases shows that they do not so construe the act.

[2] We are unable to assent to the proposition that Congress cannot authorize the deportation of an alien resident of the United States who became such at a time when there was no statutory condition as to his right to remain. It is now well settled that, while an alien who has acquired a residence in the country with the intention of remaining permanently is entitled to the same protection of life, liberty, and property as a citizen, he acquires no vested right to remain, and the government has the power to deport him if, in the judgment of Congress, the public interests so require. In Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905, the court said:

"The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."

In Wong Wing v. United States, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140, the court denied the contention that there is no power to banish aliens who have been permitted to become residents. In Zakonaite v. Wolf, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. 218, the court said:

"It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States, and to regulate their coming, includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend."

In Bugajewitz v. Adams, 228 U. S. 585, 33 Sup. Ct. 607, 57 L. Ed. 978, it was said:

"It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful."

In Lapina v. Williams, 232 U. S. 78, 34 Sup. Ct. 196, 58 L. Ed. 515, it was said:

"The authority of Congress over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country."

And in Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967, the court reaffirmed the power of Congress to deport all aliens within the terms of the excluding clause, irrespective of any qualification arising out of a previous residence or domicile in this country.

The judgment in each of the cases is reversed, and the causes are remanded to the court below, with instructions to dismiss the writs.

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WORTH et al. v. MARSHALL FIELD & CO. et al.

SAME v. MARSHALL FIELD & CO.

In re WORTH MFG. CO.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1917.)

Nos. 1477, 1478.

1. CORPORATIONS ⊂⊃474—BONDS—RIGHT TO PLEDGE.
A corporation may pledge as security for its debts its own bonds which have never been sold, and if the debt be not paid the pledgee stands as to the mortgaged property in as good a situation as one holding pledged bonds which had been sold and issued.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1854.]

2. CORPORATIONS ⊂⊃474—BONDS—PLEDGE—INTEREST.
Where a corporation pledged its bonds which had never been sold to secure a debt, and paid all the interest which had accrued on the debt, the pledgee cannot, after the corporation's bankruptcy, recover from the estate the amount of the interest coupons attached to the bonds, since there was no consideration received by the corporation, except the debt on which the agreed interest had been paid.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1854.]

3. CORPORATIONS ⊂⊃472—BONDS—INTEREST COUPONS—HOLDER AFTER MATURITY.
Any one taking an interest coupon attached to a corporate bond after the date of its maturity takes it subject to all outstanding equities, though as to the bond and subsequent coupons he may be a purchaser for value without notice.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1837, 1839, 1841.]

Appeal from and on Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States, for the Western District of North Carolina, at Greensboro, in Bankruptcy; James E. Boyd, Judge.

In the matter of the Worth Manufacturing Company, bankrupt. From a decree of the District Court permitting Marshall Field & Co. to recover from the estate interest on certain bonds pledged as security, Hal M. Worth and others appeal, and also file a petition to superintend and revise. Decree reversed, and petition to superintend and revise dismissed.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

A. B. Kimball, of Greensboro, N. C. (R. R. King, of Greensboro, N. C., on the brief), for appellants and petitioners.

R. C. Strudwick and William P. Bynum, both of Greensboro, N. C., for appellees and respondent.

ROSE, District Judge. The bankrupt is a North Carolina corporation. In 1902 it mortgaged its property to secure $100,000 of 6 per cent. bonds, to which semiannual interest coupons were attached. It sold $26,000 of these bonds outright, and pledged, without selling, $52,000 more to secure various sums borrowed by it. The controversy at the bar involves the coupons from 1902 to 1913 on $15,000 of these pledged obligations. Shortly after the execution of the mortgage the bankrupt pledged these $15,000 of bonds to a New York firm, to which it owed precisely that sum. For 7½ years, or until about June 1, 1910, these bonds remained in the hands of the firm mentioned, or of a New York corporation which in 1907 had taken over both the debt and the security for it. During all this time the bankrupt regularly and fully paid the interest on its indebtedness.

At or shortly before the date last mentioned, appellee became interested in the bankrupt, and apparently took control of it. At all events, thereafter, and until the adjudication, of the bankrupt's seven directors, four were employés of the appellee. On or about the same time the latter took over the $15,000 debt owing the New York corporation and the bonds by which that debt was secured. Thereupon the bankrupt gave appellee a new collateral note by the terms of which the bonds were made liable, not only for the $15,000, but for every other sum which the bankrupt might at any time owe appellee. This particular note matured 6 months later. It was then surrendered, and the bankrupt gave in its place an ordinary promissory note, which said nothing about collaterals, although the appellee continued to hold the bonds. Some months after the second note was given to appellee, it began making further advances to the bankrupt, and continued doing so until they aggregated $45,000, in addition to the original indebtedness of $15,000, or $60,000 in all. The interest on the entire sum was paid until January 1, 1913.

On October 4, 1913, a petition in bankruptcy was filed against the bankrupt, upon which adjudication followed ten days later. In the bankruptcy proceedings the property subject to the mortgage was sold free of liens. It realized just about enough, after defraying taxes and other preferred claims, and costs of the administration, to pay the principal of the outstanding bonds and a few months' interest thereon, which at the time of the sale the creditors generally supposed was all that was owing. A few days or weeks later the appellee made claim to participate in the distribution of the proceeds as the holder, not only of the $15,000 of bonds, but also of $9,900 of coupons still attached to them, and representing interest on them from the original execution of the mortgage in 1902 until the adjudication in bankruptcy. If its right so to do shall be sustained, the other persons who hold bonds as owners, and most of them who hold them as pledgees, will receive less than the principal due them.

Appellants say that the return in 1910 by the appellee of the collateral note ended any right that note had given it to hold the bonds for any indebtedness other than the $15,000 for which they had always been pledged, and that certain things which took place at the creditors' meeting at which the sale of the mortgaged property was confirmed estop appellee from asserting the claim it now puts forward. We do not find it necessary to pass upon either of these contentions. Assuming, but not deciding, that neither of them stands in appellee's way, nevertheless its claim cannot be sustained.

[1-3] A debtor may pledge as security for its debts its own bonds which have never been sold. If the debt be not paid, the pledgee of these otherwise unissued bonds stands as to the property mortgaged to secure them in as good a situation, with reference to their principal and any interest which may have accrued on them, as does one who holds pledged bonds which have been sold and issued. So much is too plain to require either elaboration or citation of authority, but the question upon which the decision in this case must turn is: Did any interest accrue upon these bonds at any time prior to January 1, 1913? There cannot be interest without principal. One cannot become liable for interest unless he owes a principal sum, nor can he become obligated for more interest than that which represents the rate which he has, by expression or implication, bound himself to pay. The bankrupt until January 1, 1913, paid full interest on all sums due by it to the appellee or its predecessors as pledgees of these bonds. It owed nothing on the face of the bonds, because it had never received anything for them, other than the money upon which it had paid full interest. In consequence, no interest accrued upon these bonds until after default in the payment of interest on the principal sum for which they were pledged. At the time appellee made its additional advances, aggregating, as above stated, $45,000, it knew that the bankrupt had up to that time paid all interest on the principal of its indebtedness and it thereafter received all interest on its entire claim up until the beginning of 1913. Moreover, any one taking a coupon after the date of its maturity, takes it subject to all equities then outstanding against it, although as to the bond itself, and as to other coupons maturing at subsequent dates, he may be a purchaser for value without notice.

From the time the original loan was made in 1902 until some time in 1911 the bankrupt owed to appellee and to appellee's predecessors the sum of $15,000. This sum was represented by its promissory notes. It did not owe an additional $15,000 represented by its bonds. The latter were mere evidences that their holder was secured by $^{15}/_{78}$ of the mortgaged property. So long as the debtor paid the interest on the $15,000 it owed, no interest on the bonds could accrue, for the simple reason that the bonds represented no other principal debt than that upon which interest had been paid. In this respect there is a difference between bonds which the maker has once sold and bonds which never have been sold. In the former case the maker has received a consideration for the bonds, and it owes their face. In the other case, it has received nothing other than the debt for which the bonds were pledged, and only one interest charge can run for that debt.

The matter in controversy is brought up both by appeal and by pe-

tition to superintend and revise. It follows, from what has been said, that in No. 1477, which is the appeal, the decree of the District Court must be reversed. The petition to superintend and revise will be dismissed.

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## ÆTNA LIFE INS. CO. v. WICKER.

(Circuit Court of Appeals, Second Circuit. February 6, 1917.)

No. 153.

1. INSURANCE ⟸646(6)—ACCIDENT INSURANCE—BURDEN OF PROOF—CAUSE OF DEATH.

In an action on a policy insuring against death resulting from bodily injuries effected through external, violent, and accidental means, the burden is on the plaintiff to satisfy the jury by a preponderance of proof that deceased received bodily injuries so effected.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1659–1662, 1664.]

2. EVIDENCE ⟸571(9)—ACCIDENT INSURANCE—SUFFICIENCY OF EVIDENCE—CAUSE OF DEATH.

In an action on an accident insurance policy, where insured had died of appendicitis shortly after falling on the sidewalk and injuring his abdomen, and an expert witness had testified that appendicitis was caused by the fall, the jury were justified in so finding.

3. INSURANCE ⟸455—ACCIDENT INSURANCE—CAUSE OF DEATH—ACCIDENT CAUSING DEATH.

Death resulting from appendicitis, caused by an accidental fall, is within a policy insuring against death resulting directly and independently from bodily injuries effected through accidental means.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166–1169.]

In Error to the District Court of the United States for the Western District of New York.

Action by Helen Adelaide Wicker against the Ætna Life Insurance Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

The judgment here reviewed was entered upon the verdict of a jury for $8,009.97 damages and $99.85 costs, entered in favor of the plaintiff below, Helen Adelaide Wicker, and against the Ætna Life Insurance Company, based upon an accident insurance policy issued by said company on January 12, 1907, which insured the said Helen Adelaide Wicker, in the event of the death of her husband resulting from bodily injury effected solely through external, violent and accidental means, in the sum of $5,000. The parties will be referred to in the opinion as they appeared in the court below, as plaintiff and defendant.

Maurice C. Spratt, of Buffalo, N. Y., for plaintiff in error.

Cohn, Chormann & Franchot, of Niagara Falls, N. Y. (Edward E. Franchot, of Niagara Falls, N. Y., of counsel), for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

COXE, Circuit Judge. [1] The policy in question provides that for a period of one year beginning at noon on January 12, 1907, the insurance company will insure Charles S. Wicker and promises and agrees that in the event of the death of said Charles S. Wicker, "resulting directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means," the sum stipulated in the policy should be paid. There is no doubt that the burden was on the plaintiff to satisfy the jury, by a preponderance of proof, that Charles S. Wicker received bodily injuries effected solely through external, violent and accidental means.

[2] It is alleged that on the 11th day of February, 1915, Wicker accidentally slipped while walking on an icy pavement in the city of Niagara Falls and fell upon his right side with his arm doubled up under him across the right side of the abdomen. He suffered much pain during that day, ate little and retired early. The pain increased during the next day. The night following the pain increased and a physician was called. He found Wicker suffering from general peritonitis which about a week later resulted in death.

An autopsy was requested and granted and all the physicians present, whether representing the plaintiff or the defendant, agreed that Wicker died of peritonitis or inflammation of the appendix. If there were nothing but the fall on the icy sidewalk, the bending of the arm under the abdomen and the paroxysms of pain constantly increasing until death ensued, the question would be one of fact for the jury to say whether the fall produced the disease which caused the death. It being a question where men learned in the medical profession might assist the jury in arriving at a correct result, it was proper that the jury should have the benefit of their experience. It is unnecessary to enter upon a detailed analysis of their testimony.

Dr. Chapin, who saw Wicker after the accident, and was in consultation with Dr. Scott, the physician for the Wicker family, testified upon facts, some of which he knew and some of which were assumed. In answer to the question, "What was the cause of the appendicitis from which he suffered," the doctor answered, "The fall on the sidewalk." Dr. Bentz, called for the defendant, in answer to the question, "What was the cause of his death?" replied, "The cause of his death was a general purulent inflammation of the peritoneum or abdominal lining, that being due to a perforated appendix."

It is unnecessary to quote further from the medical testimony. These answers present the two theories and it was for the jury to decide between them. Upon the evidence the jury were justified in finding that the fall on the icy sidewalk produced the appendicitis which caused Wicker's death. That the question here involved is one of fact for the jury is sustained by an almost unbroken line of authorities. Perhaps the decision which most closely resembles the case at bar is New Amsterdam Casualty Co. v. Shields, 155 Fed. 54, 85 C. C. A. 122, decided by the Circuit Court of Appeals of the Sixth Circuit in which it is said:

"While the policy was in force, on Thursday, September 7, 1905, Mr. Shields was driving in a buggy, when a front wheel ran off and he was thrown against the dashboard, striking his abdomen. That night he complained to his wife

of pain in his bowels, especially on the right side. The next day, Friday, he was at his office, and that afternoon spoke to his family physician, Dr. Wood, of the accident and of the soreness in his bowels. That night he was suddenly seized with severe cramping pains in the abdomen, nausea, vomiting, high fever, and rapid pulse. Dr. Wood could not be reached, so Dr. Ewing was called over the telephone and prescribed castor oil and morphia. On Saturday his condition was worse. Dr. Wood was sent for, and upon his arrival found the patient suffering severely from pains in the abdomen; had been vomiting, temperature high, pulse rapid and irritable, abdomen distended, and his right side very tender and rigid. On Sunday morning, Dr. Douglas, a surgeon of high reputation, was called in consultation by Dr. Wood. They diagnosed the case as acute appendicitis, and that afternoon removed the patient to Dr. Douglas' infirmary. The following Tuesday, September 12th, Dr. Douglas, with the assistance of Drs. Wood and Tigert, performed an operation. This disclosed that the trouble was acute appendicitis, septic peritonitis, and locked bowel. Mr. Shields died on Thursday, September 14th."

At 155 Fed. 58, 85 C. C. A. 126, the court says:

"The conclusion we reach is that the court below properly submitted to the jury the question whether the disease of appendicitis, which brought about the death of the insured, was itself caused solely by the fall against the dashboard."

[3] We think it is clearly established by the authorities that the plaintiff should recover if the appendicitis was produced by the fall upon the sidewalk in the manner described. Whether or not it was so produced is a question of fact which was properly left to the jury to decide and their verdict is conclusive. With this fact found in favor of the plaintiff, there is nothing in the record which requires a reversal of the judgment.

The judgment is affirmed with costs and with 5 per centum added for delay under rule 30 of this court.

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In re P. McGARRY & SON.

AMERICAN BONDING CO. OF BALTIMORE et al. v. CENTRAL TRUST CO. OF ILLINOIS.

(Circuit Court of Appeals, Seventh Circuit. February 8, 1917.)

No. 2283.

BANKRUPTCY ⊂=349—CLAIM—PRIORITY—GOVERNMENT CONTRACTOR—BOND.

Where a government contractor, who had given bond as required by Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), conditioned, among other things, that the contractor would pay for material and labor furnished, though there was no similar clause in the contract, became bankrupt after completion of the work, and the sums due the contractor came into the hands of the trustee in bankruptcy, the materialmen and laborers, who had not been paid, and the surety on the bond, who had paid some of the claims for labor and materials, are entitled to that fund in preference to the assignee of the contractor and to the general creditors, since the purpose of the act requiring the bond was to protect the laborers and materialmen, as well as to secure to the government the performance of the contract.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 533.]

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Petition for Revision of Proceedings of the District Court of the United States for the Eastern Division of the Northern District of Illinois, in Bankruptcy.

In the matter of P. McGarry & Son, bankrupts. From an order of the District Court sustaining the demurrer of the Central Trust Company of Illinois, trustee in bankruptcy, to the petition of the American Bonding Company of Baltimore and others, asserting their right to have their claims paid out of a fund in the hands of the trustee prior to all other creditors, the petitioners appeal. Reversed.

The bankrupt contracted with the United States to furnish all material and perform all labor necessary to install certain improvements in Post Hospital at Ft. Des Moines, Iowa, for the sum of $2,559. For the purpose of securing the performance of all the conditions of said contract, the United States required, in accordance with the statute in such case provided by an act passed August 13, 1894, as amended by act passed February 24, 1905, and the bankrupt furnished a bond with the American Bonding Company as surety, in the sum of $1,250, conditioned that if the bankrupt should "in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said P. McGarry & Son to be observed and performed according to the true intent and meaning of said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then," etc. The contract itself made no reference to the paying of subcontractors.

Thereafter the work was completed and accepted. Whereupon payment became due therefor to the contractor, who had become a bankrupt. The bonding company then notified the government that the materialmen, not having been paid, had made demand upon it for payment under the terms of the bond, and requested that payment be withheld. This request was disregarded and the agent of the government proceeded to pay over said sum to an assignee of the contractor. This was done subsequently to the institution of the bankruptcy proceedings. Afterwards such steps were taken that $2,000 of said fund came to the possession of the trustee in bankruptcy of said contractor. In the meantime the bonding company had made payments to the materialmen of large sums upon their claims. Thereupon the bonding company and certain materialmen whose claims had not been fully covered by the bond, filed their petition in said bankruptcy proceeding setting up said facts and asserting their rights to have their said claims paid out of said fund prior to all other creditors of said bankrupt, the bonding company claiming such right by reason of its said payments to the materialmen, by way of subrogation to the extent of its said advances to the said materialmen. To this petition the trustee in bankruptcy filed its demurrer, which was sustained by the referee. This judgment was approved by the District Judge, and the petition dismissed. This action of the District Court is now before us for review.

Burrell J. Cramer, of Chicago, Ill., for petitioner.
Wm. M. Lawton, of Chicago, Ill., for respondent.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The act requiring the giving of a bond by the contractor is entitled "An act for the protection of persons furnishing material and labor for the construction of public works." Page 2523, Compiled Statutes 1901. One of the purposes of this act, it was held by the court in United States v. National Surety Co., 92 Fed. 549, 34 C. C. A. 526, and also

in United States v. Rundle, 100 Fed. 400, 40 C. C. A. 450, was to afford full protection to all persons who supplied material or labor in the construction of public buildings or other public works. In the Henningsen Case it was held by the Circuit Court of Appeals for the Ninth Circuit (143 Fed. 810, 74 C. C. A. 484), that the bond required by the statute was "intended to perform a double function, in the first place to secure to the government, as before, the faithful performance of all obligations which a contractor might assume towards it; and in the second place to protect third persons from whom the contractor obtained materials or labor."

The $2,000 fund in the hands of the trustee in bankruptcy stands charged with the same equities as to the materialmen and the surety upon the bond who had paid the materialmen as it was bound to do, as when it was undistributed in the hands of the United States. Whatever rights were acquired by reason of the contractor's assignment and payment thereon by the United States, were subject to the right of the materialmen and surety on the bond to have their claims paid in full. Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 410, 28 Sup. Ct. 389, 52 L. Ed. 547. "It was," says the court in Greenville Savings Bank v. Lawrence, 76 Fed. 545, 22 C. C. A. 646, "a fund withheld under the stipulation of the contract for a particular class of creditors, to which mere assignees of the fund do not belong, and the rights of such assignees, if they have any, must be postponed until the creditors who have a special equity are paid."

In Re Scofield Company, 215 Fed. 45, 131 C. C. A. 353, which was a case in which the special reference to laborers and materialmen was contained in the bond exacted as here and not in the contract proper, the court, having reference to that fact, says:

"Nevertheless, when the contract is construed in its entirety and in connection with the obligations imposed by the bond, it will be found that an equity was created in favor of the surety in the reserved fund to which it is the duty of this court to give effect."

That the surety, on payment of labor and material claims, was subrogated and that its equity attached as of the date of the bond, and that a mere volunteer's rights would be subject to those of the surety who pays the labor and material bills, was clearly laid down in Prairie State Bank v. United States, 164 U. S. 227, 240, 17 Sup. Ct. 142, 41 L. Ed. 412. This was approved in Henningsen v. United States, supra.

In the case at bar, the assignee of the contractor stands in the position of a mere volunteer and is not therefore entitled to the benefit of the doctrine of subrogation. Under the authorities quoted, the materialmen and the surety in the case at bar have a prior right to the extent of their claims in the fund so in the hands of the trustee, in the nature of an equitable lien. It precedes the rights of assignees of the contractor and also those of the general creditors.

There can be no doubt but that the trustee in bankruptcy took the fund, as above stated, charged with the payment of claims of the materialmen and of the surety on the bond as prior liens thereon and with the duty of making distribution of said several sums so due thereon. Cleminshaw v. International Shirt and Collar Co. (D. C.) 165 Fed. 797;

Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055.

The judgment of the District Court is reversed, with direction to proceed further in accordance herewith.

MACK, Circuit Judge. I concur in the result, solely on the authority of Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547.

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## GERNERT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 5, 1917.)

No. 2785.

CONSPIRACY ⊜47—EVIDENCE—SUFFICIENCY—PARTICIPATION.

In a prosecution for conspiracy to use the mails in furtherance of a fraudulent scheme to sell corporate stock, evidence, consisting of a letter written by defendant to the sales manager, requesting the manager to write defendant certain false statements concerning the demand for the machines which the corporation was represented to be manufacturing and for the corporate stock, and the manager's reply, *held* sufficient to show defendant's participation in the conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105–107.]

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

O. E. Gernert was convicted of conspiring with other persons to use the mail in furtherance of a fraudulent scheme, and he brings error. Affirmed.

Littlefield & Maguire, of Portland, Or., for plaintiff in error.

Clarence L. Reames, U. S. Atty., and John J. Beckman, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was indicted with certain other persons, to wit, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, for a violation of section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1913, § 10201]). All of the defendants to the indictment, except Hunter, Muraine, and Hopson, came up regularly for trial, which trial resulted in the conviction of each of them, except Bilyeu, as to whom the verdict of the jury was by direction of the court not guilty. Thereafter Menefee, Todd, Campbell, and Bonnewell sued out a writ of error, which, upon presentation to this court, received its very careful consideration, the decision on which is reported in 236 Fed. 826, —— C. C. A. ——. The present plaintiff in error sued out a separate writ, which is now for disposition.

The charge against the defendants to the indictment is fully and clearly stated by this court in the former case, reported as above stated, and need not be here repeated. And all of the material questions involved on the present writ were there very carefully considered by this court and decided adversely to the contentions of the present plaintiff in error, except his contention that there was no evidence given in the case tending to show that he was connected with the alleged conspiracy. In answer to that contention we think it sufficient to quote the following letter of the plaintiff in error, who was assistant sales manager to the sales manager of the United States Cashier Company, and the latter's reply to that letter appearing in the evidence:

"The Stockton.

"Stockton, Cal., 2/24.

"My dear Le Monn: I have yours of the 27th. As to this country give me two inches of rain and I'll come home with forty feet of gold. What is Amsden doing in Sacramento he is hiring men posing as fiscal ag't. A fellow by the name of Nathan was in Lodi last week with a street car machine. Some one in Stockton this week. I am working Tracy, wired you today asking for list of stockholders & especially Cal. & S. Francisco holders.

"I believe I will do business with the Tracy bank, directors el all. I told them I had 35000 to sell & if I sold it all in their community the Co would permit one man to seat on the advisory board & see that everything is taken up legitimately. They are to have another special meeting at which my presence will be required at which time I must have stockholders list & statement. Show up cash & notes in one item.

"Write me a personal letter and tell me you will do all in your power to help me get that 1000 machines I ask for, for my territory. Also say in a joking way that you never knew there were so many banks in the country, as the letters show which are coming in daily asking about machines. Also state that one of the directors stated at luncheon the other day that they are figuring to keep the wheels running 24 hrs a day 3—8 hr shifts in order to supply the great demand which I know there is for our new born toy.

"Also state that the other two agencies are almost through with the stock selling & if I want to let them have what I got to sell to let you know as they want it, but personally you wouldn't do it as it would mean that I would have to lay ideal for a month or two until the machines are ready.

"I am feeling fine physically & seem to be sound mentally, its only once in a while I get bugs.

"Yours mit lof Gernert

"P. S. I hocked my sparker today in order to save myself from being knocked down, theres so many hold ups these days."

"March 2, 1912.

"Mr. O. E. Gernert, Stockton, Calif.—My Dear Gernert: I have your favor of the 27th and have carefully noted contents of same, and beg to advise that Mr. Amsden has reported at this office this afternoon and is not leaving any one working in California.

"We are to-day sending you a partial list of stockholders in California, as the entire list was eight pages long, together with financial statement as shown by our books February 1, 1912.

"We will be only too pleased to have a member on the Advisory Board from that section of California providing they sell $35,000 worth of stock allotted to you, as then they would have a sufficient investment to take a deep personal interest in advising with us as to plans of manufacturing and selling.

"You may count upon me using my personal influence in giving you all the possible support toward providing you with 1000 machines which you have requested for your territory. You would really be surprised at the number of unsolicited orders that are coming in from almost every quarter, and it

has been a very agreeable surprise to the writer, as I had no idea there were that many banks and paymasters in the country.

"You may be interested to know that the Board of Directors have decided to have the factory work overtime and we are figuring on getting the factory on three shifts of eight hours each, which means that they will have to work twenty-four hours a day if the orders keep on coming, in order to supply the great demand, which we are assured for this new device, our Automatic Cashier.

"Just a word to advise you that the other two fiscal agents have almost sold their entire allotment and want to know if we can supply them with another block, which means, if we are to do this, that we get same from you and want you to advise us by return mail if you are willing to release any part of your block and turn it over to them. In fact, I think they would give you a small premium if you would do so. Just bear in mind that we are not asking you to do this, as it would mean that you and your men would have to remain idle for at least thirty or sixty days until we could supply you with enough machines to keep your men busy.

"It may interest you to know that a week ago I saw the first Standard Commercial Automatic Cashier demonstrated and in action and watched it work for a period of thirty minutes without it making a symbol of an error and I believe that this demonstration proved one fact: That it is the first time in the history of the world that any machine ever made three automatic visible records of a transaction, two of which were permanent, one on the endless tape and the other on the check itself, and these, together with the visible total which is always before you, constituted these three records. Besides these three records we had two others, one when the keys were depressed, and as you know remain down until the machine is operated, and the other the money which was paid from the machine automatically.

"We have been very enthusiastic after this demonstration and are absolutely satisfied that these machines will revolutionize the present systems of handling money and prove to be one of the greatest of modern inventions.

"Am glad to know that you are feeling yourself again and wishing you continued success, beg to remain,

"Yours very truly, Sales Manager.

"FML:E"

We agree with the attorney for the government that comment upon these letters is unnecessary.

The judgment is affirmed.

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LYON v. BLEEG.

In re DAKOTA PLOW & WAGON CO.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1917.)

No. 4697.

1. CORPORATIONS ⟸469—INDEBTEDNESS—CONSIDERATION—ANTECEDENT DEBT.
Under Const. S. D. art. 17, § 8, providing that no corporation shall issue stocks or bonds except for money, labor done, or property actually received, and that all fictitious increase of stock or indebtedness shall be void, the bonds of a corporation of that state issued and pledged to secure an antecedent debt and with no consideration other than an extension of the time of paying the debt are void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1832.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. TRIAL ⊜404(1)—FINDINGS—CONSTRUCTION.

Findings by the trial court that a corporation delivered bonds to a bank, which held a note of the corporation indorsed for its accommodation by five of its directors, to secure the note and the indorsement, to extend the time of payment thereof and as collateral thereto, and that thereafter the accommodation indorsers gave a note of their own to the bank in payment of the corporation's note leaving the bonds with the bank as collateral, showed that the bonds were delivered as collateral for the antecedent debt, not that they were delivered to the makers of the note as consideration for the making of the note.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 957.]

3. CORPORATIONS ⊜474—INDEBTEDNESS—BONDS—PLEDGE—STATUTE.

Civ. Code S. D. § 2124, providing that a pledgee cannot sell any evidence of debt pledged to him except the obligations of governments, states, or corporations, but may collect the same when due, does not prohibit but expressly permits the sale of corporate bonds pledged to secure the corporation's debt, so that to sustain bonds pledged to secure an antecedent debt would be to permit a duplication of corporate indebtedness.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1854.]

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

In the matter of the Dakota Plow & Wagon Company, bankrupt. From a decree of foreclosure of a mortgage upon the property of the bankrupt given to secure its bonds, in which decree the bonds held by W. H. Lyon were declared void. On the objection of John P. Bleeg, trustee in bankruptcy, the bondholder appeals. Affirmed.

W. H. Lyon, of Sioux Falls, S. D. (Davis, Lyon & Bradford, of Sioux Falls, S. D., on the brief), for appellant.

P. G. Honegger, of Sioux Falls, S. D. (Bailey & Voorhees, of Sioux Falls, S. D., on the brief), for appellee.

Before SANBORN and SMITH, Circuit Judges, and AMIDON, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree of foreclosure of a mortgage upon the property of the Dakota Plow & Wagon Company, a corporation of South Dakota, and it presents the single question whether its bonds numbered 29 to 52, aggregating $12,000, which, if valid, are secured by the mortgage, are valid or void in view of section 8 of article 17 of the Constitution of South Dakota, which reads in this way:

"Sec. 8. No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void."

The case is presented to this court without the evidence upon the findings of fact and the decree of the court below. The facts thus found that are material to the question at issue in this court are these: During the years 1911 and 1912, the Sioux Falls Plow Company, which subsequently became the Dakota Plow & Wagon Company, borrowed from the Sioux Falls Savings Bank $12,000, which was used in the business of the former company, and that company gave its promissory note to the bank indorsed for its accommodation by five of its

directors for this sum. After the Sioux Falls Plow Company became the Dakota Plow & Wagon Company, the latter company took up that note and gave its own note to the bank therefor with the same accommodation indorsers. In June, 1913, the bank was pressing the Dakota Plow Company for the payment of this note and, as the court below found, "in order to secure said note and protect said directors for their personal indorsement thereof, and to extend the time of payment of said note, and as collateral thereto, the said Dakota Plow & Wagon Company * * * delivered to the said Sioux Falls Savings Bank" the bonds here in question. Thereafter, about June 30, 1913, the accommodation indorsers gave their note to the bank for the debt of $12,000, and with their note took up the note of the Dakota Plow & Wagon Company. At the time the bank delivered up to these indorsers the note of the plow company, it offered to return to them the bonds; but at the request of the indorsers the bank kept and held the bonds as collateral security for the payment of the new note. The new note was subsequently renewed by the same parties, and that renewal note was finally paid by W. H. Lyon, one of its makers, about June 22, 1915, and it was then assigned and delivered to him by the bank together with the bonds. Mr. Lyon claimed that the bonds were valid, that they were secured by the mortgage, and were therefore entitled to share in the proceeds of the foreclosure with the other bonds secured thereby. The court below, however, held that they were void in view of the section of the Constitution cited at the opening of this opinion.

[1] The decision of the court below is sustained by two decisions of this court relative to the construction and effect of a similar provision of the Constitution and statutes of the state of Missouri. Kemmerer v. St. Louis Blast Furnace Co., 212 Fed. 63, 128 C. C. A. 519; Mudge v. Black, Sheridan & Wilson, 224 Fed. 919, 140 C. C. A. 397. As the question decided in those cases has been twice deliberately considered, as the reasons for our conclusion have been twice carefully stated by this court, and as the court is still of the opinion that bonds of a corporation of a state, issued by that corporation to secure an antecedent debt with no new consideration except an extension of the time of payment of the debt, are void by virtue of the constitutional or statutory provision of that state prohibiting corporations organized under its laws from issuing bonds, except for labor done, or money or property actually received, the court declines to again discuss that question in the case at bar.

[2] Counsel for Mr. Lyon, however, contend that his case is not governed by the rule established in those cases, because the bonds were in legal effect delivered to the makers of the new note on or about June 30, 1913, and the obligation of the Dakota Plow Company was then surrendered, so that in reality the bonds were issued to the makers of the new note for that note and in payment of the old note of the corporation which was surrendered. If such had been the actual transaction, the position of counsel might have been plausible. But the findings of the court below which have already been set forth are so inconsistent with the contention of counsel that it cannot be sustained, for those findings clearly are that the bonds were issued and deliv-

ered by the Dakota Plow Company for the sole purpose of securing an antecedent debt without any new consideration, except the extension of the time of its payment, and they never became anything else but collateral security for the debt.

[3] Another argument of counsel is that section 2124 of the Civil Code of South Dakota provides that "a pledgee cannot sell any evidence of debt pledged to him, except the obligations of governments, states or corporations, but he may collect the same when due"; that this statute forbids the sale of the bonds of the debtor pledged for its own debt; that such pledges can be enforced by the collection of the bonds only; that there is not, therefore, in South Dakota that danger of the increase or duplication of the indebtedness of corporations which is stated in the opinions above cited as one of the reasons (212 Fed. 63, 64, 128 C. C. A. 519; 224 Fed. 920, 921, 140 C. C. A. 397) for the conclusion reached in those cases, but there are other and convincing reasons stated in those opinions for the conclusion there reached. Moreover, section 2124 of the Civil Code does not in our opinion prohibit, but expressly permits, the sale of the bonds of a corporation pledged by it to secure its own debt. The unavoidable result is that the bonds held by Mr. Lyon fall under the rule established in Kemmerer's Case, they were issued in violation of section 8 of article 17 of the Constitution of South Dakota, were void in their inception, and the decree below must be affirmed.

It is so ordered.

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## LEE MOW LIN et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 5, 1917.)

No. 4671.

INTERNAL REVENUE ⟸39, 40—VIOLATIONS OF LAW—MANUFACTURE OF SMOKING OPIUM.

Defendants were convicted under an indictment which charged that they did engage in the business of manufacturers of opium for smoking purposes without having given the bond required by law of manufacturers of opium for smoking purposes. Act Jan. 17, 1914, c. 10, 38 Stat. 277 (Comp. St. 1916, §§ 6287a–6287f), declares that an internal revenue tax of $300 per pound shall be levied and collected on all opium manufactured in the United States for smoking purposes, and no person shall engage in such manufacture who is not a citizen of the United States and has not given the bond required by the Commissioner of Internal Revenue, and that the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue in a penal sum of not less than $100,000. It appeared on trial that defendants were not citizens, but were Chinese persons. *Held* that, as it did not appear that defendants failed to give the bond required and they were not charged with manufacturing opium for smoking purposes while aliens, they could not be convicted under the indictment.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Lee Mow Lin and others were convicted of violating Act Jan. 17, 1914, by engaging in the business of manufacturing opium for smok-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ing purposes without having given the bond required by law of manufacturers of opium for smoking purposes, and they bring error. Reversed, and new trial awarded.

Chester H. Krum, of St. Louis, Mo., for plaintiffs in error.

Benjamin L. White, Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before CARLAND, Circuit Judge, and RINER and MUNGER, District Judges.

MUNGER, District Judge. Plaintiffs in error were convicted under an indictment which charged that on March 28, 1914, they did "engage in the business of manufacturers of opium for smoking purposes, without having given the bond required by law of manufacturers of opium for smoking purposes." The act of Congress of January 17, 1914 (38 Stat. 277, 6 U. S. Comp. Stat. 1916, §§ 6287a–6287f), provided for a punishment for violation of certain sections of the act. In those sections are found the following provisions:

"An internal revenue tax of $300 per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes; and no person shall engage in such manufacture who is not a citizen of the United States and who has not given the bond required by the Commissioner of Internal Revenue. Every person who prepares opium suitable for smoking purposes from crude gum opium, or from any preparation thereof, or from the residue of smoked or partially smoked opium, commonly known as yen shee, or from any mixture of the above, or any of them, shall be regarded as a manufacturer of smoking opium within the meaning of this act." Section 6287a.

"The bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue, and in a penal sum of not less than $100,000; and the sum of said bond may be increased from time to time and additional sureties required, at the discretion of the collector or under instructions of the Commissioner of Internal Revenue." Section 6287b.

In the trial of the case the fact appeared that each of the defendants was not a citizen of the United States, but was a Chinese person, and at the close of the evidence defendants requested an instruction that the jury be directed to find the defendants not guilty as charged. This instruction should have been given. The defendants were not charged with manufacturing opium while aliens, but were charged with a failure to give the bond required by law of manufacturers of opium for smoking purposes, and, while so failing, engaging in the business of manufacturing opium for smoking purposes. There was no proof that defendants had failed to give the bond required by the Commissioner of Internal Revenue, and he could not have required a bond of the defendants, as the statute restricted the right of manufacture to citizens of the United States. There was a failure to prove an essential element of the indictment. Chin Sing v. United States, 227 Fed. 397, 142 C. C. A. 93.

The judgment of the District Court is therefore reversed, and a new trial awarded.

## AMERICAN PIANO CO. v. HEAZEL et al.

### In re HOBBIE CO.

(Circuit Court of Appeals, Fourth Circuit. February 14, 1917.)

No. 1456.

BANKRUPTCY ⊂=440—METHOD OF REVIEW.

A claim by a manufacturer for pianos in possession of the trustee in bankruptcy, based on a consignment for sale contract, which claim was not resisted by the trustee, but was opposed by a creditor, who claimed a landlord's lien on the bankrupt's property, presents a controversy in bankruptcy, an order determining which is reviewable on appeal, under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (Comp. St. 1913, § 9609) and not a proceeding in bankruptcy reviewable by petition to revise under section 24b (Comp. St. 1913, § 9608).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915.]

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Roanoke, in Bankruptcy; Henry Clay McDowell, Judge.

In the matter of the Hobbie Company, bankrupt; F. J. Heazel, trustee. On petition by the American Piano Company to superintend and revise in matter of law an order of the District Court permitting E. M. Coulter to hold under a landlord's lien property claimed by petitioner under a consignment contract. Petition dismissed.

C. A. McHugh, of Roanoke, Va. (Henry A. Heiser, of New York City, on the brief), for petitioner.

H. T. Hall, of Roanoke, Va. (Hall & Apperson, of Roanoke, Va., on the brief), for respondents.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This case comes here on petition to superintend and revise in matter of law proceedings (in bankruptcy) of the District Court of the United States for the Western District of Virginia.

The petitioner set up a claim of title to four pianos that passed into the hands of the trustee, which was presented in the form of a report filed by the trustee, the petitioner claiming these pianos under an assignment contract. The trustee did not resist this claim, but the respondent, E. M. Coulter, resisted it upon the ground that he was entitled to have the pianos in question subjected to his landlord's lien, thereby raising a question as to the ownership of the pianos. Thus it will be seen that the controversy is between the petitioner, the American Piano Company, on the one hand, claiming title to the same, as we have stated, under a consignment contract, and the respondent, Coulter, claiming under a landlord's lien. The respondent insisted that the title had become invested in the Hobbie Company so far as the creditors of the Hobbie Company were concerned. The referee held that the American Piano Company was the true owner of the pianos and

entitled to the possession thereof; that they were not subject to the liens or claims of creditors of the Hobbie Company. After the decision of the referee, respondent, Coulter, appealed to the District Court. The court below reversed the decision of the referee, and held that respondent was entitled to subject the pianos in question to the payment of his claim for rent against the bankrupt, the Hobbie Company.

The respondent filed a motion in this court to dismiss the petition upon the following grounds:

"First. Because the alleged errors complained of in said petition are not such as could be reviewed by this court on the petition to superintend and revise in matter of law.

"Second. Because the correctness of the decree or order complained of depends, not only upon matters of law, but also upon matters of fact, and therefore cannot be reviewed in this proceeding.

"Third. The relief prayed for in said petition involves a consideration of the evidence taken before the referee on the petition of the petitioner, and an appeal is the exclusive relief to review the action of the District Court on said claim, as provided in said Bankruptcy Act."

It is contended by the respondent, Coulter, that this is a controversy arising in bankruptcy proceedings, and that the case should have been brought here by appeal in pursuance of section 25a, while, on the other hand, it is contended by petitioner that the only question involved is as to the character of the trustee's possession, and that this is purely a question of law, and that therefore a petition to superintend and revise under section 24b is the proper method of bringing the controversy before this court.

While the record in this instance presents questions of law, a petition to superintend and revise is not the proper method for review, inasmuch as this case is a controversy arising in bankruptcy proceedings, as distinguished from proceedings in bankruptcy. Therefore, without entering into an extended discussion, we only deem it necessary to say that this question has been decided adversely to the contention of petitioner by the Supreme Court of the United States in several cases, notably among them being Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, and Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725. Further, the claim asserted by petitioner in this instance is adverse to the title of trustee, and is precisely the question involved in the case of Home Bank for Savings v. Lohm, 223 Fed. 633, 139 C. C. A. 179, wherein this court dismissed a petition to superintend and revise upon the ground that petitioner's remedy was by appeal.

From what we have said it necessarily follows that the petition should be dismissed. In passing, we think that it is not amiss to say that we have examined this case upon its merits, and that if the same were here by the proper method we would, with reluctance, feel it our duty to affirm the judgment of the court below.

Petition dismissed.

## MOUND COAL CO. v. JEFFREY MFG. CO.

(Circuit Court of Appeals, Fourth Circuit. February 26, 1917.)

No. 1369.

LANDLORD AND TENANT ⊂=248(1)—LIEN OF LANDLORD—PRIORITY—FAILURE TO RECORD LEASE.

A lease of a seller of machinery to a lessee under a conditional sale contract, recorded as required by Code W. Va. 1913, c. 74, § 3 (sec. 3831), is superior to the lien of the landlord for merchandise reserved in the lease, which contained a clause that the lessor should have a mortgage on the property placed on the premises, which lease was not recorded.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1003, 1005–1008, 1017.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

On rehearing. Original opinion, affirming the judgment of the court below, adhered to.

For original opinion, see 233 Fed. 913, 147 C. C. A. 587. See, also, 240 Fed. 129, — C. C. A. —; 215 Fed. 222.

Hubbard & Hubbard, of Wheeling, W. Va., for plaintiff in error.

W. Wilson Carlile, of Columbus, Ohio (J. C. Simpson, of Moundsville, W. Va., and J. B. Sommerville, of Wheeling, W. Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This case was heard and decided at the May term, 1916, of this court, and the opinion is to be found in 233 Fed. 913, 147 C. C. A. 587, wherein the judgment of the court below was affirmed. A petition for rehearing was filed on the 21st day of June, 1916, and a rehearing was granted as to the fourth assignment of error (240 Fed. 129, — C. C. A. —); the assignment in question being in the following language:

"The court erred in making its last-mentioned order sustaining the plaintiff's motion for judgment, and entering judgment against the defendant for the sum of $8,726.85, with interest from said date and cost."

The Mound Coal Company claims that a minimum royalty of $5,000 was due to it by the Mound City Coal Company when the property was abandoned by the Mound City Coal Company, and that it was entitled to enforce a landlord's lien for that sum, less a credit of $2,230.30, which had been paid by the lessee, and less $1,615.76 collected in bankruptcy proceedings. This contention is based on the ground that the Mound City Coal Company abandoned its contract at the expiration of six months, and therefore one-half of the minimum royalty of $10,000 became automatically due. The Mound Coal Company, as landlord, acting under the impression that it was necessary to take a mortgage on the property placed on the premises to secure the payment of any royalties that might be due under the lease, inserted a clause in the same to that effect, but failed to have the lease recorded.

The plaintiff, the Jeffrey Manufacturing Company, had sold with reservation of title to the Mound City Coal Company certain machinery on the 16th day of June, 1911, and the conditional contracts for the

sale of this property were recorded on the 19th day of August, 1911, in pursuance of chapter 74, section 3831, of the Code of West Virginia, which is in the following language:

"And if any sale be made of the goods and chattels, reserving the title until the same is paid for, or otherwise, and possession be delivered to the buyer, such reservation shall be void as to creditors of, and purchasers without notice from, such buyer, unless a notice of such reservation be recorded in the office of the clerk of the county court of the county where the property is."

The plaintiff having recorded its conditional contracts in pursuance of the provisions of the foregoing statute, it thereby gave notice of its ownership. When the landlord re-entered the premises, this machinery was found unattached on the soil of the leased property. The lease not having been recorded in pursuance of the laws of that state, the defendant acquired no lien on the same as against creditors and purchasers without notice. Therefore the only other remedy by which the landlord could have secured a lien on the property in question was by distraint under the landlord and tenant act of West Virginia, and having failed to avail itself of that remedy the lien of the plaintiff upon the property was entitled to priority over the claim of the landlord at the time these proceedings were instituted.

For the reasons stated we are clearly of opinion that the plaintiff's lien entitled it to the possession of the property in question. Therefore we adhere to our former opinion affirming the judgment of the lower court.

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## BENSON v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 2, 1917.)

No. 2630.

1. CRIMINAL LAW ⟸265—INDICTMENT AND INFORMATION ⟸139—PLEA IN ABATEMENT—MOTION TO QUASH—DELAY IN FILING.

Objections made on the day the case was called for trial by motions to abate the prosecution and to quash the indictment, which stated facts sufficient to constitute the offense, were properly overruled as not having been made with due promptness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 616, 617; Indictment and Information, Cent. Dig. § 473.]

2. CRIMINAL LAW ⟸1036(8)—APPEAL—PRESENTING QUESTIONS BELOW—EXCEPTIONS—SUFFICIENCY OF EVIDENCE.

The question of the sufficiency of the evidence to support the charge made by the indictment is not presented for review, where no exception was reserved to a ruling of the court thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2641.]

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

D. L. Benson was convicted of violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 824 [Comp. St. 1913, §§ 8812-8819]), and he brings error. Affirmed.

F. E. Kennamer, of Madill, Okl. (C. A. Coakley, of Madill, Okl., on the brief), for plaintiff in error.

James C. Wilson, U. S. Atty., and Wm. E. Allen, Asst. U. S. Atty., both of Dallas, Tex.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. The indictment in this case alleged conduct of the defendant (the plaintiff in error here) containing every ingredient required to constitute an offense denounced by the statute known as the White Slave Act. 36 Stat. 825. Under the ruling made in the case of Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. —— (January 15, 1917), the judgment presented for review is not subject to be reversed on the ground that the indictment failed to charge the commission of a criminal offense.

[1] The objections made on the day the case was called for trial by motions to abate the prosecution and to quash the indictment were subject to be overruled on the ground that they were not made with due promptness after the opportunity was afforded the defendant to make them. Lowdon v. United States, 149 Fed. 673, 79 C. C. A. 361. Assuming that either of those objections would have been sustainable if the defendant had acted with due promptness in making it, he lost the right to urge it by withholding the making of it until a trial of the charges made was about to be entered upon.

[2] The question of the sufficiency of the evidence adduced to support a charge made by the indictment is not presented for review by any exception reserved to a ruling of the court on that subject.

We find no reversible error in the record.

The judgment is affirmed.

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## GREGORY v. PRITCHARD et al.

(Circuit Court of Appeals, Eighth Circuit. March 5, 1917.)

No. 4587.

BANKRUPTCY ⊜396(5)—HOMESTEAD—PROPERTY EXEMPT—PURCHASE OF LEASED PREMISES.

A bankrupt, who had no other real estate, and who had purchased dwelling property which in area and value was within the provisions of Const. Okl. art. 12, § 1, as to homesteads, with the declared intention of making the property his home, but who was kept from possession thereof by a tenant under a lease for one year, notwithstanding reasonable effort on his part to obtain possession, is entitled to have the property set off as his homestead.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 668.]

Appeal from the District Court of the United States for the Western District of Oklahoma; F. A. Youmans, Judge.

In the matter of A. A. Gregory, bankrupt. From an order of the District Court, reversing the referee's order in setting off a homestead claimed by the bankrupt as exempt, over the objections of L. H. Pritchard, trustee in bankruptcy, and others, the bankrupt appeals. Order of the District Court reversed, and cause remanded.

Norman R. Haskell, J. S. Estes, and Charles L. Moore, all of Oklahoma City, Okl., for appellant.

W. F. Wilson, John Tomerlin, E. E. Buckholts, and A. M. Oliphant, all of Oklahoma City, Okl., for appellees.

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⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This case involves a right of homestead under the Constitution and laws of Oklahoma. The bankrupt scheduled the property in controversy as a homestead, and the referee set it off as exempt; but the trial court reversed the action of the referee, and held it as general assets of the estate.

About 11 months before the proceedings in bankruptcy were begun the bankrupt purchased a dwelling property in Oklahoma City for the declared purpose of occupying it as a home for himself and wife. At the time of purchase it was in possession of a third party under a lease for a year recently executed. The bankrupt had been informed that he could probably obtain possession and so made the purchase; but the tenant, upon being applied to by the bankrupt and by others in his behalf, finally declined to vacate the premises, or to let the bankrupt and his wife have a room in the house. The bankrupt made all reasonable efforts to obtain possession, but failed. He had no other homestead and no other real property. Between his purchase and the bankruptcy proceedings he painted the house, made some repairs on and about it, and pruned the fruit trees. In area and value this property was within the provisions of the Oklahoma Constitution as to homesteads. Article 12, § 1.

Illinois Life Ins. Co. v. Rogers (Okl.) 160 Pac. 56, decided since the ruling below, answers the question here. The court said:

"Under a liberal construction of the homestead law—and it must be conceded that this law should be liberally construed in favor of the people for whose protection it was enacted—it must be held that a purchase of a piece of land within the statutory limits as to quantity and value with intention in good faith of presently residing on it, or residing on it as soon as some temporary obstacle to such residence can be removed or some necessary preparation for the same can be made, is equivalent to actual occupancy of the residence, and said property is exempt from lien, levy, or forced sale."

We think the case is properly here, and that the motion to dismiss should be denied. The order of the District Court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

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EDWARD G. BUDD MFG. CO. v. ENGLAND MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. February 16, 1917.)

No. 2820.

1. PATENTS ⇐328—INVENTION—AUTOMOBILE DOOR.
The England patent, No. 1,008,805, for a door for automobiles, *held* void for lack of invention.

2. PATENTS ⇐17—INVENTION—PRODUCT MADE BY NEW METHOD.
A product, the making of which by manual operations involved only the ordinary skill of the artisan, is not patentable because invention was involved in making it by machinery.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 16, 17.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by the England Manufacturing Company against the Edward G. Budd Manufacturing Company. Decree for complainant, and defendant appeals. Reversed.

Wilber Owen, of Toledo, Ohio (Samuel E. Darby, of New York City, and Owen, Owen & Crampton, of Toledo, Ohio, of counsel), for appellant.

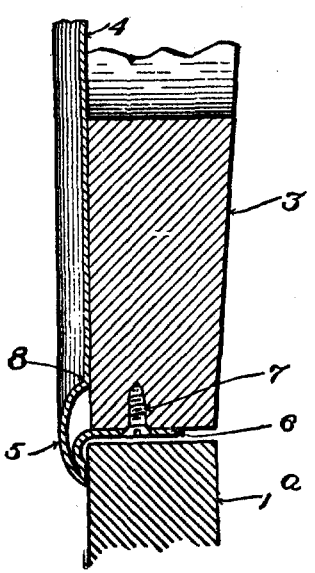
R. A. Parker, of Detroit, Mich., for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

DENISON, Circuit Judge. In the court below the England Company, as plaintiff, secured the usual interlocutory decree for injunction and accounting, based upon patent No. 1,008,805, issued November 14, 1911, to Fred England, for a "door for automobiles and other vehicles." The defendant below, the Budd Company, by this appeal presents questions of validity and infringement.

[1] The device is very simple. It sufficiently appears from Fig. 2 of the drawings and claim 1 of the patent reproduced below. Claims 2 and 3, while more limited in form, present the same issue of validity as does claim 1. The "metallic panel" is *4*, the "flange disposed at an angle" is *6*, the "integral molding" is *5*, and, as doubled back upon itself before it is developed into the flange *6*, it constitutes the "projecting portion outside the flange."

Fig. 2.




"1. A metallic panel for vehicle bodies, having an edge fashioned with a flange disposed at an angle to the surface of the body of the panel, a projecting portion outside the said flange and the body of the panel, and a molding integral with the metal adjacent the said projecting portion."

To have a metal panel or cover drawn or developed into both a right-angled flange and a flange projecting in approximately the plane of the panel, so as to cover the crack or opening otherwise left on closing the cover, is the commonest expedient; it is seen, for example, in the ordinary covered tin pail. The same thought had been applied to metal doors. Smith, patent No. 522,861, in a fireproof shutter which had a metal panel covering a wooden door, employed precisely the device of England's claim, excepting for the beading or molding; and Tyra, patent No. 838,672, showed a hollow metal door with the same panel, right-angled flange and projecting flange. Even for automobile doors the general thought was not new. Smith, by patent No. 813,640, disclosed an auto-

mobile door made of wood and covered with a metal panel, the bottom closure taking the form shown in Fig. 2 and the side closure taking the form shown in Fig. 3, here reproduced.

Fig. 2.

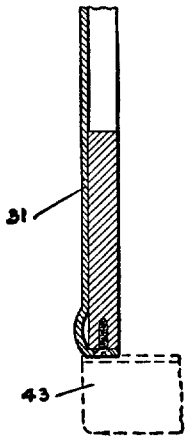



Fig. 11. Smith Pat.—813460
Automobile Door
Bottom

Fig. 3.

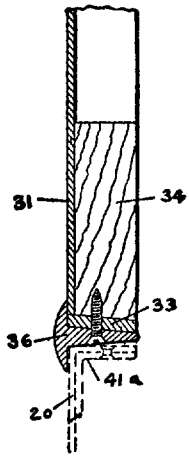



Fig. 4. Smith Pat.—813460
Automobile Door
Side

It is apparent that Fig. 2 is the same as England's, save for the flange projecting in the line of the panel to cover the crack; and Fig. 3 has this projecting flange, but in the form of a separate strip screwed to the right-angled flange, instead of being formed integrally with the panel, as had been done by Smith (522,861) and Tyra, and as was common everywhere. It is therefore plain that what England did was (1) to take the bottom of the door of Smith (813,460) and add the crack covering and positioning projecting flange of the common tin pail; or (2) to take the side of the same door and make the attached molding and projecting flange integral instead of separate; or (3) to take the door, panel, and two flanges of Smith (522,861), and add the familiar stiffening bead, common in sheet metal, and already used by Smith on automobile doors (No. 813,460). From no one of these points of view, and upon familiar principles, can we see anything more than the common knowledge and skill of the sheet metal worker. For applications of this principle in this court, see Bullock Co. v. General Co., 149 Fed. 409, 416, 79 C. C. A. 229; Babcock Co. v. Toledo Co., 170 Fed. 81, 84, 95 C. C. A. 363; Hilker Co. v. Mop Co., 191 Fed. 613, 617, 112 C. C. A. 176; New Idea Co. v. Keene, 231 Fed. 701, — C. C. A. —; Pelton v. Williams, 235 Fed. 131, — C. C. A. —.

It appears from the proofs—and this seems to have influenced the result below—that it was very difficult to make dies which would produce both the flange extending in two directions and the hollow molding or bead; and it is probable that the supposed impossibility of making such dies had prevented the making of a structure just like England's, and this because to make it by hand would be too expensive.

[2] It is possible that invention was involved either in the devising of the proper dies or in the method of their operation; but, if so, that cannot help this patent. England had a patent, not for the dies, and not for the method of construction, but for the product; and if the product was a thing, the making of which by manual operations involved only the ordinary skill of the artisan, it cannot become patentable just because invention was involved in making it by machinery. Rubber Co. v. Goodyear, 9 Wall. 788, 796, 19 L. Ed. 566; Cochrane v. Badische, 111 U. S. 293, 311, 4 Sup. Ct. 455, 28 L. Ed. 433.

This conclusion makes it unnecessary to consider the other questions presented, and requires that the decree should be reversed and the case remanded, with instructions to dismiss the bill.

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## ICELESS ICE BOX CO. v. MITCHELL et al.

(Circuit Court of Appeals, Sixth Circuit. February 20, 1917.)

No. 2877.

PATENTS ⇐328—VALIDITY—WINDOW COOLING BOX.

The Morse & Lucas patent, No. 906,545, for improvements in adjustable cooling boxes, intended for use in windows, is void for lack of novelty and invention.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Suit in equity by the Iceless Ice Box Company against George F. Mitchell and Harry W. Mitchell, partners as G. F. Mitchell & Son. Decree for defendants, and complainant appeals. Affirmed.

Wm. R. Miller, of Cleveland, Ohio, for appellant.

Karl Fenning, of Cleveland, Ohio, for appellees.

Before WARRINGTON and KNAPPEN, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. The appellant (who will be called the "plaintiff") brought this action in the court below, charging that the appellees (who will be called the "defendants") had infringed letters patent No. 906,545, upon certain improvements in adjustable cooling boxes, which had been granted on December 15, 1908, to John F. Morse and Morand D. Lucas, and by them subsequently assigned to plaintiff.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The bill contained the usual prayers for an injunction and an accounting.

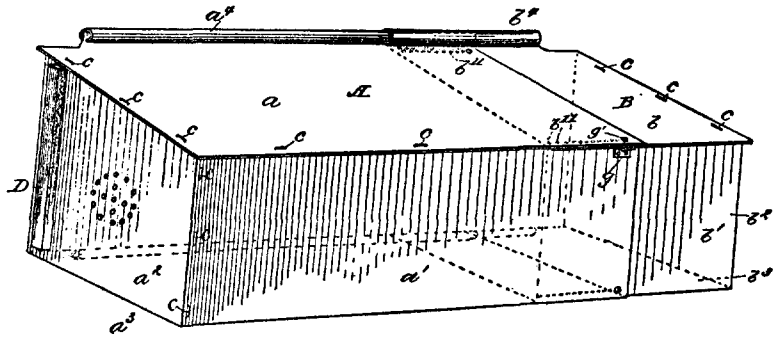
It was conceded at the hearing that only the first three claims of the patent were involved. They are as follows:

"1. A device of the class described comprising two parts which combined form the required inclosure, said parts being movable relatively to each other so as to render the structure capable of lateral adjustment to fit within the casing of windows of various widths, each such strip provided upon its end with a vertical strip adapted to seat in the outer sash groove.

"2. A device of the class described comprising two sections movable relatively to each other and together capable of forming the required enclosure, the roof of each section being formed with part only of one edge extending beyond the adjacent vertical plane of the structure, such edge being parallel with the direction of adjusting movement and adjacent to an open side of the section.

"3. A device of the class described comprising two sections movable relatively to each other and together forming the required enclosure, the roof of each section being formed with a part only of one edge extending beyond the adjacent vertical plane of the structure, such edge being parallel with the direction of adjusting movement and adjacent to an open side of the section, such projecting portions engaging each other to secure the two sections to each other at such edge."

One of the drawings embraced in the patent, and which will adequately illustrate the characteristics of plaintiff's alleged improvements, is here inserted:



Reduced to plain language, it may be enough to say that the patent is for improvements upon an adjustable cooling box intended to project from windows of various widths. When the box is in place, the lower part of the window forms the side next to the room. To accomplish its objects, the box is in two parts, which, being movable one within the other, are so combined as to make a box capable of lateral adjustments to fit the casings of windows of different widths. Each part of the box has, near the front edge and upon the outside of the respective end walls, a vertical strip adapted to seat in the outer sash groove. The roof of each section of the box is formed with part only of its front edge extending beyond the front of the box, and which edge is parallel with the bottom of the window and near the open side of the box. The roof of each section of the box is formed with part of one edge extending beyond the side of the box, this edge

also being parallel with the bottom of the window and near the open side of the section of the box, such projecting portions engaging each other so as to secure the two sections of the box to each other. In other words, the improvements covered by the three claims referred to appear to consist: (1) Of vertical strips at the ends of the box; (2) of a roof formed with part only of one edge extending beyond the side of the box and parallel with the bottom of the window; and (3) of a roof with part of the edge extending beyond the side of the box, parallel with the bottom of the window and near the open side of the section—the projecting portions engaging each other to secure the two sections to each other at the edge.

The defendant, among other things, insisted that neither novelty nor invention was established. The testimony covered every phase of the case, and included much of the prior art. The court below held that the patent was void for want alike of novelty and of invention.

We have carefully considered the record, and, while giving due consideration to any and every presumption that may arise from the action of the Patent Office, we are nevertheless clearly of the opinion that the conclusion of the court below was correct, because there was an absence both of invention and of novelty.

Its judgment is, accordingly, affirmed. The appellees will recover their costs.

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## BECKER v. MILLER PASTEURIZING MACH. CO.

(Circuit Court of Appeals, Third Circuit. March 5, 1917.)

No. 2160.

1. PATENTS ⊕328—INVENTION—ICE CREAM FREEZER.
The Hoefler and Schantz patent, No. 921,837, for an ice cream freezer, *held* void for lack of patentable invention.

2. PATENTS ⊕26(2)—INVENTION—COMBINATION OF OLD ELEMENTS.
While a combination of old elements may be patentable, it is only so if the old elements have been so combined as to operate in a new way or to produce a new and useful result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 29.]

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Suit in equity by the Miller Pasteurizing Machine Company against John J. Becker. Decree for complainant, and defendant appeals. Reversed.

Farrell & Freeman, of Wilkes-Barre, Pa., and Henry D. Williams and William S. Pritchard, both of New York City, for appellant.

Edward R. Alexander, of Cleveland, Ohio, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

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McPHERSON, Circuit Judge. [1] The Miller Pasteurizing Machine Company is the owner of letters patent No. 921,837, issued to Hoefler and Schantz on May 18, 1909, and charges the defendant Becker with infringing the second claim. Without discussing the evidence, the District Judge held the claim to be valid and infringed, following a decision in the Western District of New York. Miller v. Rich (D. C.) 216 Fed. 192. As the record in that case was not offered in the court below, and has not been laid before us on appeal, we are left in a good deal of doubt concerning the weight it should receive. In any event, however, the evidence as we now have it seems to us to indicate a different conclusion, for which we may briefly state the reasons.

The art to which the patent relates is:

"That class of ice cream freezers which are driven by power and in which the refrigeration is effected by circulating brine or similar medium through a jacket which surrounds the cream receptacle."

And the object of the invention is:

"* * * To produce an ice cream freezer of this character which has large capacity, which can be readily assembled for use or dismembered for cleaning, which can be quickly emptied of its frozen contents and securely closed for confining the material to be frozen in the freezing chamber, and which has the connection between the refrigerating jacket and the brine supply and discharge pipes so constructed that the cream can and connecting parts may be tilted for cleaning and other purposes without interrupting the flow of the brine."

In order to attain this object the patentees devised and claimed the following described machine:

"2. An ice cream freezer, comprising a support, an upright cream can having its bottom pivoted to said support to turn vertically, a refrigerating jacket surrounding said can, stationary refrigerating liquid supply and discharge pipes, a swinging or rotary joint for connecting said supply with the refrigerating jacket consisting of a casing connected with said supply pipe and a rotary plug turning in said casing and connected with said bottom and having an axial passage which communicates with the lower end of said refrigerating jacket on one side thereof and a radial passage which opens into the interior of said casing, and a swinging or rotary joint connecting said discharge pipe with the refrigerating jacket consisting of a rotary casing communicating with the upper end of said refrigerating jacket on the opposite side thereof and a stationary plug upon which said rotary casing turns and which is connected with said discharge pipe and has an axial passage communicating therewith and a radial passage opening into the interior of the casing, the axes of said swinging joints and the pivot of said can being in line, substantially as set forth."

[2] With one exception all the elements named in this narrow and specific claim are old in the art (see patents to Miller, to Walker, and to Thompson); and the new element—namely, the swinging joint with axial and radial passages—is an old and well-known device, although it had not as yet been used in the construction of freezers. Evidently, therefore, the claim is for a combination or a subcombination of old elements, and in such a situation the rule is that, while

the combination may still be patentable, a patent should only be granted if the old elements have been so combined as to operate in a new way, or to produce a new and useful result. Tried by this established test, we think the claim in suit cannot be upheld. Every element therein described operates in the same way as before, and, while the result is not precisely the same, the difference is so slight that we do not feel justified in pronouncing the machine either new or useful in a patentable sense. So far as appears, the chief, if not the only, advantage in the construction lies in the fact that when the scraping knives need sharpening—and they need it only about once a week—they are more accessible and can probably be removed more conveniently from a machine that tilts than from a machine that is fixed in place. In other respects we do not see that the patent affects the usual operation of a freezer in any degree that needs attention. The brine flows in the same way and by the same course; the mixture to be frozen is the same and is subjected to the same cold; it is removed in the same way, and its quantity and quality are apparently what they were before. Neither is the patented combination used even in the frequent cleaning of the freezer; this is accomplished by an old method, which requires no tilting of the can. In short, the evidence discloses nothing more than this; the product is unchanged, and so is the mode of operation, except that the tilting of the freezer permits the knives to be taken out somewhat more rapidly and conveniently.

Believing this to be insufficient to sustain the patent, we direct the decree to be reversed, and the bill dismissed.

## CORONA CHEMICAL CO. v. LATIMER CHEMICAL CO.

(District Court, D. Colorado. November 18, 1916.)

No. 6527.

PATENTS ⇐328—INVENTION—IMPROVED ACID ARSENATE OF LEAD.

The Hall patent, No. 1,064,639, for an improved acid arsenate of lead, better adapted, by reason of its minute and flocculent particles, to use for mixing with water to spray as an insecticide, *held* void for lack of invention, as being an improvement in degree only over prior products.

In Equity. Suit by the Corona Chemical Company against the Latimer Chemical Company. On motion to dismiss bill. Motion sustained.

A. J. O'Brien, of Denver, Colo., and Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., for plaintiff.

W. W. Boughton, of Denver, Colo., for defendant.

LEWIS, District Judge. This is a demurrer to a bill charging infringement of rights claimed to be secured to plaintiff as assignee of Clare H. Hall to whom letters patent were issued covering Improvement in Acid Arsenate of Lead. The letters are attached to the bill, and I take it that, for present purposes, it is not necessary to closely determine what is claimed in and defined by them; i. e., whether, under the statute, it is an art, article of manufacture or composition of matter. The specifications set out a chemical process by which, in part only, the discovery was made. It is said in them that several steps were taken in making the discovery and are all necessary in the production of the improved article, the first consisting in the mixing or union of well-known chemicals, the resultant product being stated, which is then mechanically subjected to four separate physical treatments before the composition reaches its final stage of commercial usefulness. That is, the chemical resultant is pressed, dried, broken into convenient pieces and then pulverized in a pulverizer of the disintegrator type. This gives basis for a contention that the patent covers a process within the meaning of the statute as an art, while on the other hand the claims call for an article of manufacture or combination of matter. But regardless of that, the specifications present, in the light of common knowledge, the facts on which the sufficiency of the demurrer is rested. They set forth:

"My invention consists in a novel material which is chemically acid arsenate of lead ($PbHAsO_4$) having certain novel and valuable physical properties particularly suiting it for use as an insecticide.

"Acid arsenate of lead, when used as an insecticide, is mixed with a relatively large quantity of water, usually 1 part of the acid arsenate to 400 parts of water by weight, and the physical mixture thus formed is sprayed upon the plants to be treated. Since the acid arsenate of lead is practically insoluble, the resultant mass is simply a physical mixture, and it is of the utmost importance when using it that the acid arsenate of lead be of such physical consistency as to remain suspended in the liquid, without substantial settling, during the period which will be occupied by the spraying.

"The acid arsenate of lead has heretofore been made by precipitating from one or another of the various combinations of salts which will produce it, and the resultant mass has been treated in a filter press to form a pulp. In most cases, this pulp is the commercial product, the pressure being such as to leave about 50 per cent. of water by weight in the mass. In some cases, this pulp has been dried and pulverized, the dry acid arsenate of lead being sold in the form of powder. In use, both products have been added to and stirred in the requisite amount of water.

"It has been found that the drying and pulverizing of the pulp, in practically every case, greatly increases its settling tendency, and, for that reason, prior to my invention, the pulp has been in greatest demand. The pulp, however, has certain important disadvantages. In the first place, the expense of packing and shipping, as compared with packing and shipping the dry product, is considerable. In the second place, the pulp in the hands of the consumer or middleman frequently dries out into a cake which cannot be mixed with water and which is therefore useless. In the third place, there are very stringent Federal requirements as to the percentage of water permitted in the pulp, and from the manufacturing point of view it is an exceedingly difficult matter to maintain the percentage constant, so that one part of a given batch may have 55 per cent. water, while another has 45 per cent., with the result that the manufacturer may unwittingly subject himself to criminal prosecution. In spite of these disadvantages, however, the superior suspension properties of the pulp have led to its being the most popular form of acid arsenate of lead. I have succeeded, however, in producing a dry arsenate of lead of the composition $PbHAsO_4$ which remains in suspension in water as well as any of the pulps heretofore manufactured and far better than any of the dry material of similar chemical composition. The difference in this property is of course caused by a difference in physical constitution, and the material is obtained by employing several steps which co-operate to this end.

"As a first step, it is desirable that the material be thrown down in the form of the most minute possible particles, and this result can be produced by using extremely dilute solutions of the reacting salts; as, for instance, sodium acid arsenate, $NA_2HAsO_4$, and lead nitrate, $Pb\ (NO_3)_2$, the nitrate of lead being formed in a solution of 1 part of nitrate of lead to 150 parts of water, and the sodium acid arsenate being introduced in a relatively strong solution, say 1 part to 10 parts of water and at slow speed. The precipitate thus formed is so fine and flocculent as to make it a matter of some difficulty to press it to the dryness at which commercial pulps are regularly sold. This fine precipitate is pressed in the filter press to what is known as a 35–37 per cent. pulp, that is, a pulp in which the solid matter is by weight approximately 65 per cent. of the cake. The cake is ejected from the filter press, dried, and pulverized in a pulverizer of the disintegrator type, after it has been broken up into pieces of a convenient size—say pieces which will pass an inch mesh. The resultant material is a fine, exceedingly light powder. While the dry bulk of the material, uncompressed, has little relation with the important quality of the length of time it will remain suspended in water, it may be stated as a fact, for purposes of identification, that the present product has, in fact, a rather high dry bulk, about 100 cubic inches or more to the pound, and this is a considerably larger dry bulk than that of the other dried products now available. It will be understood, of course, that this dry material can be compressed somewhat in packing, and the foregoing figure has reference merely to its unpressed condition as it emerges from the pulverizer in marketable condition.

"The most distinctive and important quality of the present material lies in its capacity for remaining suspended in water in which it far excels all other dry materials now available. Since there is no recognized standard for determining or measuring this quality, I have devised a test to which I have submitted the various forms of acid arsenate of lead available, which test is performed in the following manner: In this test 15 grams of the arsenate of lead is pulped with water and diluted until the total volume is 250 c. c., the mixture being performed in a cylindrical glass graduate of this capacity and

with a diameter of approximately 1½ inches. As the temperature of the water has a decided influence on the settlement, a temperature of very close to 15° C. has been used. The density of warm water being much less than cold, the settlement is noticeably faster at temperatures above 15° C. and noticeably slower at temperatures below 15° C. The acid arsenate of lead of course begins to settle, and after a short time a distinct space of clear water can be seen above, the lower part of the graduate remaining full of the white opaque mixture. In making the test which I have devised, the location of the line of separation between the clear water and the mixture is observed at intervals, and I have learned that my product settles in the following manner: At the end of five minutes, the line of separation is at 210 c. c. mark, at the end of 10 minutes, at 175 c. c., at the end of 1 hour, 92 c. c., at the end of 24 hours, 68 c. c., this last figure representing practically final settlement. I have tested samples of the materials on the market in dry form (with the exception of one or two of which I was unable to obtain samples), and I have also tested the various commercial pulps by first drying and then pulverizing the same, and I have also made similar tests on the pulps in their commercial condition. The foregoing rate of settlement is as slow as that of any of the pulps, and it far exceeds that of any of the dry materials available. For practical purposes, manifestly the rate of settlement during the first 10 minutes is the important point, and although the rates of settlement of the different materials in the main correspond, I have discovered some instances where materials settle relatively slowly during the first 10 minutes and relatively fast thereafter. However, my material not only settles slower, but settles much slower during the first 10 minutes than any of the dry products available. In fact, the slowest settlement which I discovered with a dry product was 165 at the end of 5 minutes, and 105 at the end of 10 minutes, and the largest final settlement which I observed was 45 at the end of 24 hours, as against 68 for my product.

"It is thus evident that my product, while chemically the same as other materials sold for the purpose, has radical differences in its physical form, which differences are readily distinguishable by the simple settling test above outlined. It is also a fact that this physical test is directed immediately at the single quality of greatest utility in practice."

The claims are as follows:

"1. The herein-described dry, soft, white bulky powder essentially acid arsenate of lead ($PbHAsO_4$) distinguished by the fact that when mixed with water in the percentage of 15 grams to a total volume of 250 c. c., and allowed to settle the line of demarcation between the clear and clouded parts of the fluid is not below 175 c. c., at the end of 5 minutes, and not below 140 c. c., at the end of 10 minutes.

"2. The herein-described dry, soft, white bulky powder essentially acid arsenate of lead ($PbHAsO_4$) distinguished by the fact that when mixed with water in the percentage of 15 grams to a total volume of 250 c. c., the line of demarcation between the clear and clouded parts of the fluid is approximately at 210 c. c. at the end of 5 minutes and approximately at 175 c. c. at the end of 10 minutes."

The evident and conceded purpose, in its use as an insecticide, is to deposit on and thoroughly cover the infected surface with the poisonous material by ejecting it in a spray; and to thoroughly accomplish that end it is desirable that the poisonous particles be minute. The whole claim of the patentee is that he made the particles minute and flocculent. It is admitted that "my product" is chemically the same as other materials sold for the purpose, but that it has "radical differences in its physical form," and that "it is desirable that the material be thrown down in the form of the most minute possible particles, and this result can be produced by using extremely dilute

solutions of the reacting salts." The precipitate thus formed is fine and flocculent. That difference is said to be demonstrated by the fact that it remains in suspension longer when in water than any other dry acid arsenate of lead then on the market, and as long as the same chemical in pulp form then sold on the market as an insecticide. The same claimed super-quality of suspensibility would undoubtedly be manifested if the powder was cast on the breeze, which is but proof of its relative fineness. So that the improvement which the patent purports to cover is greater fineness and flocculence of particles and not suspensibility attributable to the law of gravity.

Concededly, for present purposes, the patentee's process was new, and the resultant composition was new in commerce; but if only new in the same sense that ground coffee and comminuted glue were new when they were first introduced, it was not new within the sense of the statute as construed; nor in the latter sense would the way in which it is to be made necessarily be new. The patented compound is claimed to have been discovered by combining the solutions of two other chemical compounds, sodium acid arsenate and lead nitrate, both old, well known and widely used.

Starting with the foregoing as resting in common knowledge, we reach the technical field in which the patentee claims he made his exploration and discovery; and we thus credit him with discovering the percentage of water required in each constituent solution and the slow speed of their mixture as the prerequisites to throwing down the resultant in the most minute and flocculent particles. This clearly appears to be all that he did by way of inventing the chemical process which produced his new combination of matter. He claims no more and proof would not go further. With that result in hand, all else in way of treatment is purely mechanical and readily suggestive to any one familiar with the subject.

The chemical process which the patentee thus described, and also its resultant product, each impresses me as but an advancement in degree. He claimed an improvement in acid arsenate of lead. That chemical compound in both the pulp and dry form was well known and widely in use, as he sets forth, for all purposes that were claimed for the patented combination. Admittedly, that in the pulp form could be used as efficaciously as complainant's as an insecticide, and that in the dry form was on the market and was also being used for that purpose. It was inferior in degree only to complainant's. The patentee took a step forward. As he says, it was only an improvement; and that only in degree. It seems the step was simple, an experiment that would occur to any one familiar with the art, when we consider the vast number of combined drugs and chemicals applied to useful and beneficial purposes. To monopolize each under the protection of the patent law would go far to thwart progress. The field of advancement not covered by the statute is larger than the one within its terms. It required only common sense to know that the smaller the poisonous particles were the longer they would remain in suspension for use in the spray, and would more completely cover the infected surface. And this was only raising efficiency in degree without the accomplishment

of any new function. A chemical laboratory is on the same footing under the statute as any other work shop. Every-day knowledge of the chemist and not inventive genius prompted the successful experiment. In this respect the same rule which applies to patented machines applies to patented arts and products. Tire Co. v. Lozier (C. C.) 84 Fed. 659, 668.

On the following cases I am led to the conclusion that the patent is void and that the motion to dismiss is well taken: Glue Co. v. Upton, 97 U. S. 3, 24 L. Ed. 985; s. c., Fed. Cas. No. 9,607; Smith v. Nichols, 21 Wall. 112, 119, 22 L. Ed. 566; Atlantic Works v. Brady, 107 U. S. 192, 199–200, 2 Sup. Ct. 225, 27 L. Ed. 438; Risdon, etc., v. Medart, 158 U. S. 68, 81, 15 Sup. Ct. 745, 39 L. Ed. 899.

The motion is sustained and the bill dismissed.

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## In re STUCKY TRUCKING & RIGGING CO.

(District Court, D. New Jersey. March 3, 1917.)

1. CHATTEL MORTGAGES ⟸92—VALIDITY—CREDITORS.
A chattel mortgage, though invalid as to the mortgagor's creditors under the New Jersey Chattel Mortgage Act (1 Comp. St. 1910, p. 463), is valid as between the immediate parties to the mortgage.
[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 152.]

2. INSURANCE ⟸581—FIRE POLICIES—PROCEEDS—RIGHT TO.
A chattel mortgagee, whose mortgage was invalid as to creditors of the mortgagor, insured his interest in the mortgaged property against fire; the policy providing that the loss, if any, should be payable to the mortgagee. A fire occurred within less than four months of the bankruptcy of the mortgagor and the mortgagor's trustee in bankruptcy claimed the proceeds of the policy. *Held* that, as an insurance policy is a personal contract of indemnity between the insurer and the insured, and in the absence of any equitable lien, the proceeds will pass only to those for whom provision is made in the contract or their assignees, the trustee in bankruptcy was not entitled to the proceeds of the policy, though the chattel mortgage was invalid as to the bankrupt's creditors, and so was subject to attack by the trustee, for the mortgage was valid as between the mortgagee and mortgagor, and the policy only insured the mortgagee's interest.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1444–1447.]

3. BANKRUPTCY ⟸143(11)—FIRE POLICIES—INSURABLE INTEREST.
In such case, the trustee in bankruptcy could not obtain the proceeds of the policy on the ground that the invalidity of the mortgage deprived the mortgagee of an insurable interest, for that defense could be raised only by the insurance company.

4. BANKRUPTCY ⟸143(11)—RIGHT TO PROCEEDS—MORTGAGEE.
Where a chattel mortgage was taken in the name of another for the benefit of the actual mortgagee, and the nominal mortgagee admitted that he was only a trustee, the mortgagor's trustee in bankruptcy is not entitled to the proceeds of the policy on that ground.

5. PAYMENT ⟸39(6)—APPLICATION.
The bankrupt, after giving a bank a chattel mortgage as collateral security, incurred further indebtedness to the bank. Thereafter a portion

of the bankrupt's property was destroyed by fire, and it assigned to the bank all sums to be due on fire policies. There was no direction that the bank should apply such sum on the indebtedness secured by the chattel mortgage, and it applied the recovery to the unsecured indebtedness; the parties treating the mortgage as still existent. *Held*, that the indebtedness secured by the chattel mortgage could not be treated as satisfied, so that the trustee of the bankrupt would, the bank having subsequently insured its interest in the mortgaged property and another fire having occurred, become entitled to the proceeds under the second policy.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 111.]

6. BANKRUPTCY ⊂=228—PROCEEDINGS—REVIEW.

On petition to review an order of the referee in bankruptcy, a matter not disposed of by him cannot be considered.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387.]

In Bankruptcy. In the matter of the bankruptcy of the Stucky Trucking & Rigging Company. On petition to review an order of the referee finding that a certain fund should be paid to the trustee in bankruptcy for the benefit of the bankrupt's general creditors, free from any lien or claim of the Second National Bank of Hoboken, N. J., or the Union Trust Company of New Jersey. Order of referee reversed.

Samuel Heyman, of Jersey City, N. J., for Second Nat. Bank of Hoboken.

George Ralph Hendrickson, of Jersey City, N. J., for Union Trust Co. of New Jersey.

Harry Lane, of Jersey City, N. J., for trustee in bankruptcy.

HAIGHT, District Judge. This controversy relates to the disposition to be made of a fund realized from several fire insurance policies, which covered certain personal property of the bankrupt that was destroyed and damaged by fire prior to the institution of the bankruptcy proceedings. About June 1, 1914, the bankrupt borrowed, directly or indirectly, about $7,700 from the Second National Bank of Hoboken, N. J. (hereinafter referred to as the "Bank"), on its promissory note, indorsed by certain of its officers. It also gave, as collateral security for the loan, a chattel mortgage for the same amount on certain of its property. The mortgage was made to one Philip Stephan, an employé of the Bank, who, admittedly, has at all times held it as trustee for the Bank. The note was renewed several times, and finally, when it became due in March, 1915, was protested for nonpayment. In the meantime the bankrupt had incurred considerably more indebtedness to the bank, represented by its own promissory notes which had been discounted by the bank, as well as a few notes upon which other parties were the makers. On February 13, 1915, a part of the bankrupt's personal property was destroyed and damaged by fire, and shortly afterwards it assigned to the Bank all of the moneys due or to grow due to it on the fire insurance policies which it held on the property so destroyed and damaged. The amounts thus due were subsequently adjusted and paid to the Bank by the insurers. But before these payments were made, and on May 24, 1915, another fire occurred in the premises then occupied by the bankrupt, and resulted in the destruc-

tion of and damage to certain of its personal property, which was covered, as was also that damaged in the first fire, by the chattel mortgage. Prior to the second fire the Bank, without previous express authorization from the bankrupt, had procured certain policies of insurance to cover the property which remained after the first fire. These policies were made out in the name of the bankrupt as owner, but each contained a standard New Jersey mortgage clause providing that the loss, if any, should be payable to Philip Stephan and the White Shoe Company, mortgagees, as their interests might appear. The premiums were, in the first instance, paid by the Bank. The referee has, however, found that they were subsequently charged to the bankrupt on the books of the Bank. If my decision depended upon this determination of fact, I would have great difficulty in finding support for it in the evidence. However, for the purposes of this case, I will assume that such was the fact. On August 21, 1915, the petition in bankruptcy was filed. Prior to that time the Bank had received all of the money due on the policies which were in force at the time the first fire occurred, and a part of that due on the policies which it had taken out, as before mentioned, subsequent to the first fire. The balance realized from these latter policies is in court, and is the fund now in controversy. It also appears that in the latter part of December, 1914, the bankrupt gave a chattel mortgage to a concern known as the "White Shoe Company," which mortgage was subsequently assigned to the Union Trust Company of New Jersey (hereinafter referred to as the "Trust Company"), as collateral security for an indebtedness due to the latter from the White Shoe Company. This mortgage is, admittedly, subsequent to that of Stephan, as is also the claim of the Trust Company subsequent to that of the Bank to any part of the fund now in court. Although there was a question before the referee as to whether this court had jurisdiction to determine, in a summary proceeding, whether the Bank had any lien on or claim to the fund, that question has now been waived and jurisdiction consented to. Neither is the decision of the case embarrassed by any question of preference. The referee held that both of the chattel mortgages were invalid, as respects the trustee representing the creditors of the bankrupt, under the New Jersey Chattel Mortgage Act (1 N. J. Comp. Stat. 463), and that therefore neither the Bank nor the Trust Company had any lien on or claim to the insurance moneys. The reasoning by which he reached the latter conclusion is that the rights of the parties to the insurance moneys were regulated by the mortgagee clauses in the policies, and that as the Bank and the Trust Company had no rights as mortgagees in respect to the chattels covered by the insurance policies, they had no claim on the insurance moneys.

[1, 2] I am unable to concur in his conclusion. The fundamental fallacy in it seems to me to be a failure to recognize that both mortgages, as between the mortgagors and the mortgagees, were entirely valid and enforceable, as well as the nature of the contract of insurance. If the mortgages were invalid, as I shall assume, for the purposes of this argument, that they were to the extent found by the referee, they were so only as to creditors and the trustee in bankruptcy representing the latter. If they had been invalid as respects the mort-

gagor, as distinguished from its creditors (and of this there is no claim). so as to be really nonexistent, the referee's conclusion might be sound, on the theory that the mortgagees' rights under the policies were, by the terms of the latter, dependent upon the existence of the mortgages. It is too well settled to need the citation of authorities that an insurance policy is a personal contract of indemnity between the insurer and the insured, and, in the absence of an equitable lien, the proceeds thereof are payable only to those for whom provision is made in the contract or to their assignees. Each mortgagee, therefore, had, as between it and the bankrupt, an interest by virtue of its mortgage in the property covered by the insurance policies, and therefore, as between the insurance companies, the bankrupt and the mortgagees, the latter, by the terms of the policies, were entitled to any moneys which became due on the policies, by reason of a fire, to the extent of the amounts due on their respective mortgages. Of course, the trustee in bankruptcy has succeeded to the rights of the bankrupt, but they, by the provisions of the policies, were postponed to those of the mortgagees. There was nothing in the policies (so far as the evidence discloses) to make the payment of any losses to the mortgagees dependent upon whether the mortgages were valid as respects creditors of the mortgagor. Nor is there any statute of New Jersey, nor anything in the Bankruptcy Act, as far as I am aware, to that effect. Hence, I am unable to perceive how the mere fact that a mortgage may be invalid as to creditors can nullify the indemnity agreements between the insurance companies, the insured and the mortgagees, to which the creditors were not parties nor privies, except as respects the bankrupt through the trustee.

[3] If the invalidity of the mortgages as respects creditors can be said to have deprived the mortgagees of an insurable interest, that could be urged only by the insurers. Wheeler v. Insurance Co., 101 U. S. 439, 441, 25 L. Ed. 1055. The referee's conclusion seems to me, without warrant, to read into the insurance contract a provision which is not there, namely, "that the loss shall be payable to the mortgagees, if the mortgages are valid as respects creditors." I think these views, although perhaps differently expressed, are in harmony with those entertained by Judge Hale in Hanson v. Blake Co., 155 Fed. 342 (D. C. D. Me.), where the facts as to Mrs. Young's claim were very similar to those in the case at bar.

[4] I see no merit in the trustee's contention that the Bank has no claim because the mortgage was made to Stephan, and the loss under the policies, by their terms, made payable to him. Stephan, admittedly, acted only as trustee for the Bank, and whatever rights he had inure, in equity, to the benefit of the Bank. He does not question this, and it certainly, therefore, does not lie in the mouth of the trustee to do so.

[5] Nor can I find, as urged by the trustee, any evidence to justify the conclusion that the mortgage has been fully paid off by the moneys received by the Bank on the insurance policies which were in existence at the time of the first fire. The amounts due on these policies were expressly assigned to the Bank after the fire took place, and more than four months before the bankruptcy proceedings were instituted, for the purpose of "securing the indebtedness amounting to $19,408 to the

Second National Bank of Hoboken, N. J." It is true that there was included in this indebtedness the amount due on the note which the mortgage was given originally to secure, but there was nothing in the assignment, nor, so far as the evidence shows, was there any agreement between the parties, that these moneys should be applied in satisfaction of the mortgage. On the contrary, it seems entirely clear that it was the intention of the parties that they should not be. The mortgage was treated as still existing, and the moneys received on the first-mentioned policies have been applied by the Bank, as under the circumstances it had a right to apply them, on the part of the indebtedness not secured by the mortgage.

I am forced to the conclusion, therefore, that the Bank is entitled to the fund now in court to the extent necessary to pay the amount due upon the Stephan mortgage. If there is any balance, it should go to the Trust Company. In reaching this conclusion I have not attempted to determine whether the referee's conclusion—that the two chattel mortgages were invalid as to creditors—is correct, because it has seemed to me, for the reasons before stated, that it is quite immaterial as to whether they were or not. The referee's order will, accordingly, be reversed, and he will be directed to enter an order in accordance with these conclusions.

[6] Certain chattels of the bankrupt came into the possession of the trustee and were sold by him free and clear of the mortgages, pursuant to an order of the referee, which provided that the liens of the mortgages, if any, should attach to the proceeds. The Bank makes no claim, by virtue of its mortgage, to any part of the fund thus realized, but the Trust Company does. I, however, cannot find in the record before me any order of the referee adjudging that the Trust Company is not entitled to any part of this latter fund, although in his conclusions regarding the disposition of the insurance fund he held that the Trust Company mortgage was invalid as to creditors. In the absence of an order adjudging that the Trust Company has no lien upon the fund realized from the sale of the chattels, I do not feel at liberty, in this proceeding, to pass upon that question, as there is nothing before me on that point to review.

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In re COPIAG-LINDENHURST CO.

(District Court, N. D. New York. March 14, 1917.)

BANKRUPTCY ⊜181—SALES BY BANKRUPT—CONFIRMATION.

Where the directors of an insolvent corporation had made a contract for the sale of the real estate of the corporation less than a month before its bankruptcy, and there was no evidence to show it was not bona fide, and the purchaser had paid the money into court and received his deed, the sale will be confirmed, notwithstanding an offer by some of the directors of a slightly increased price, and evidence that the value considerably exceeded the sale price, since to accept the offer would involve the estate in expensive litigation with the purchaser.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 271, 273, 274.]

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⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Bankruptcy. In the matter of the Copiag-Lindenhurst Company, bankrupt. On return of order to show cause, on petition of the trustee in bankruptcy, why the trustee should not be authorized and directed to sell, free and clear of all liens, claims, and incumbrances whatever, the real property of the said bankrupt, known as Copiag farm, situate in the town of Babylon, Suffolk county, N. Y., notwithstanding a prior sale by the now bankrupt corporation. Prior sale affirmed.

Jas. H. Merwin, of Utica, N. Y., for petitioner.
J. G. Lamison, of New York City, for Carmichael.
M. G. Palliser, of New York City, for West.

RAY, District Judge. It appears from the papers in the case that the Copiag-Lindenhurst Company, a corporation, was insolvent, and that its real property in Babylon, Long Island, was mortgaged for about $8,000. November 7, 1916, a meeting of the directors of said corporation was held at Utica, N. Y., where it has its principal place of business, at which three of the five directors were present. A foreclosure of such mortgage was then pending. It was then agreed to sell the said property for $12,000, pay the mortgage debt, and turn the balance into the treasury of the corporation. A resolution to that effect was duly adopted. A deed was also executed and delivered to Irving W. Street, a director and secretary of the corporation, for delivery to the real purchaser on payment of the consideration by the purchaser. The name of the real purchaser not being known to him, the name of the grantee was left blank. On the 18th day of December, 1916, the Copiag-Lindenhurst Company was duly adjudicated a bankrupt in the Northern District of New York, and January 2, 1917, Willard C. Hughes, one of the directors of the said company was duly appointed trustee. Prior to said bankruptcy proceedings the mortgage referred to had been foreclosed and a sale advertised; the amount of the foreclosure judgment being $7,347.66. At the time of such resolution to sell for $12,000, an offer had been made of that sum by A. R. Carmichael. Carmichael makes affidavit that he has paid or caused to be paid of his purchase money, agreed to be paid, $8,000 into court to cover the foreclosure judgment, and that he has paid to the trustee in bankruptcy the balance, or $4,000.

Arthur C. West, C. H. Marshall, and Rufus Robinson filed an involuntary petition in bankruptcy against said company in the Eastern District of New York, but such proceeding is, of course, superseded by this proceeding in the Northern District of New York. These men made an offer to the bankrupt, after the above agreement to sell and the execution of said deed, to purchase said property and pay therefore the sum of $12,600. West brought an action in Suffolk county, N. Y., where the property is situated, to prevent the consummation of such sale, and filed a lis pendens. He says in his affidavit in this proceeding:

"I believe the property will realize on a sale far more than $12,000. I am credibly informed that it is worth over $15,000, and would bring that on a sale."

No one has offered that sum, or any sum in excess of $12,600 Willard C. Hughes is the president and a director of said corporation, David W. Watkins is a director, said Irving W. Street was a director and secretary, and said Arthur C. West and one Harry Lancaster are the other directors. There was some delay and negligence on the part of Street in obtaining the money and transferring it to the proper parties, and there is some intimation in the papers that he was seeking to profit by the transaction and secure a commission; but I do not think this contention is sustained. It is clear that West, Marshall, and Robinson would like to secure the property and offer an advance of $600, but for the trustee to disregard the contract of sale made by the corporation and resell would involve this bankrupt estate in litigation, which would involve delay and probably cost it more than that sum, and it would be a loser, instead of a gainer, by such a course.

As I understand the papers, the deed has been delivered, the money paid in to satisfy the mortgage debt, and the $4,000 is in the hands of the trustee for the estate. If so, the trustee will approve and accept the sale as an accomplished fact, and retain the consideration money, $4,000, paid. A somewhat different proposition would be presented if a proposed purchaser had presented himself willing to pay a sum in excess of $12,000, indicating actual fraud in the sale made.

So far as appears, the officers of the now bankrupt corporation received no offer in excess of $12,000 prior to the execution and delivery of the deed. On this motion no affidavit is presented showing an offer for the property in excess of $12,600 at any time. West, a director, claims he had no notice of the directors' meeting at which it was voted to make the sale for $12,000. The trustee is now the owner of the property, and if the sale mentioned was not good, he may sell it under direction of the court. I do not think the invalidity of that sale is established, and am of the opinion that it should be recognized and ratified and confirmed by the trustee, on receipt of the consideration and satisfaction of the mortgage.

So ordered.

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In re HENRY CAMPE & CO.

(District Court, N. D. California, First Division. February 8, 1917. On Motion to Dismiss Petition, March 2, 1917.)

No. 10413.

1. BANKRUPTCY ⟸76(3)—PETITION—RIGHT OF CREDITOR.
A creditor, who has assented to an assignment by his debtor, may not thereafter file an involuntary petition in bankruptcy against the debtor, based on such assignment.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 97.]

2. BANKRUPTCY ⟸76(3)—INVOLUNTARY PETITION—RIGHT OF CREDITORS.
Where a creditor assented to an assignment by his debtor, which made no attempt to follow the state law relating to assignments for benefit of creditors, the creditor cannot, on the ground that the assignment was not recorded and no inventory filed in accordance with the state law, escape

the effects of his assent, and file a petition in involuntary bankruptcy against the debtor, based on the assignment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 97.]

In Bankruptcy. Petition in involuntary bankruptcy against Henry Campe & Co., in which other creditors sought to intervene. Motion to strike the intervention granted, and motion to dismiss the petition in bankruptcy denied.

Sterling Carr, of San Francisco, Cal., for petitioning creditors.

Henry G. W. Dinkelspiel, of San Francisco, Cal., for alleged bankrupt.

John T. Williams, of San Francisco, Cal., for interveners.

DOOLING, District Judge. [1] A. E. Buttner filed a petition as a creditor of Henry Campe & Co., praying that the latter be declared a bankrupt. The petition averred that there were less than 12 creditors, and that the alleged bankrupt had committed an act of bankruptcy by making a general assignment for the benefit of creditors. The alleged bankrupt answered that there were more than 12 creditors and gave their names and addresses. The court then made an order referring the matter to a special master for such proceedings as are provided for by section 59 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 561 [Comp. St. 1913, § 9643]). The master sent out notices to the creditors named in the answer, and the assignees of the claims of two of them have joined in the original petition. A motion was made to strike out their intervention, for the reason that their assignors, the owners of the claims at the time of the assignment, had assented thereto. That a creditor who has assented to an assignment by his debtor may not ordinarily thereafter file an involuntary petition in bankruptcy against him, based solely upon such assignment, is well settled.

[2] It is contended here, however, that this rule does not apply, because the debtor and his assignees have failed to comply with certain provisions of the Civil Code of California, in that the assignment was not recorded, nor was any inventory filed, as required by sections 3461 and 3463 of that Code. But the Code provides a complete scheme under which assignments for the benefit of creditors may be made effective. The first requirement is that the assignment be made to the sheriff of the county in which the assignor resides. It then becomes the duty of the sheriff to call a meeting of all the creditors for the purpose of choosing one or more assignees, to whom, when thus chosen, the sheriff must assign all the property of the debtor theretofore assigned to him. The duties of the sheriff and of the assignees thus selected are laid down specifically in other sections of the Code. The assignment complained of was not made to the sheriff, but to other assignees, not chosen by all the creditors as prescribed by the Code, and the creditors who assented to such assignment assented to a common-law assignment not provided for by the Code, and cannot now complain that the provisions as to recordation and inventory, which

are a part of the Code Scheme, were not carried out by the assignees in the selection of whom they acquiesced; for it is not to be presumed that they either expected or desired the assignees, chosen thus without regard to any of the provisions of the Code governing such selection, to conform to other provisions of the Code which are a part of the complete Code scheme. The assignees thus chosen are bound by the terms and conditions of the assignment, and as the creditors assented to such terms and conditions they can only be heard to complain when the assignees have failed or refused to act in accordance therewith. The failure to record the assignment or to record an inventory, under the circumstances, does not seem to me to be a matter which takes this case out of the ordinary rule that a creditor, assenting to an assignment, may not later complain of such assignment as an act of bankruptcy.

The motion to strike out the intervention will therefore be granted.

On Motion to Dismiss Petition.

The motion to dismiss the petition herein, on the ground that there are more than 12 creditors and that 3 creditors have not joined therein, is denied, for the reason that there are not 12 creditors who are not estopped by their consent to the assignment complained of from joining in the petition.

The respondent may have five days to answer to the merits of said petition.

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## THE JOHNSON LIGHTERAGE CO. NO. 24.

(District Court, D. New Jersey. February 13, 1917.)

1. SHIPPING ⊂⊃41—CHARTER—DEMISE OF VESSEL.
   A time charter of a tug, by which the charterer acquires the exclusive possession, command, control, and navigation of her, is a demise, which makes the charterer owner pro hac vice during the charter term.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 149–155.]

2. SALVAGE ⊂⊃38—SERVICES RENDERED BY CHARTERED VESSEL—APPORTIONMENT OF AWARD.
   As between charterer and owner, even when the charterer was owner pro hac vice under a demise, the determination of the question as to who is entitled to the owner's share of salvage money, awarded for the risk to the vessel, depends both upon who is entitled to the vessel's services and earnings, and upon whom the loss would fall if the vessel had been injured or lost in the salvage operations.
   [Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102.]

3. SHIPPING ⊂⊃54—DEMISE BY CHARTER—LIABILITY OF CHARTERER FOR INJURY TO VESSEL.
   A charterer under a charter which is a demise, in the absence of provisions in the charter party to the contrary, is only responsible for loss of or injury to the chartered vessel in the event that the injury or loss was due to the failure to exercise ordinary care on his part or that of his servants.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221.]

4. SHIPPING ⟸54—CHARTER—LIABILITY FOR INJURY TO VESSEL.
If a vessel under charter is lost or injured when being used by the charterer for a purpose other than that for which she was chartered, the charterer is liable.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221.]

5. SALVAGE ⟸38—SERVICES RENDERED BY CHARTERED VESSEL—DISTRIBUTION OF AWARD.
A time charter of a tug, which was a demise, contained no provision requiring redelivery of the tug in as good condition as when received, but provided that in case it was used for trips to a named port outside of New York Harbor the charterer should procure insurance, or if that could not be obtained should give a bond to protect the owner from loss or damage to the boat "while on this work." *Held*, that the charter did not preclude the use of the tug for any ordinary purpose, including use for a salvage service, in New York Harbor, nor was the rendition of such a service a failure to exercise ordinary care, which cast upon the charterer all the risk of injury to the tug, but that such risk rested upon the owner, which was therefore entitled to some part of the salvage money awarded for risk to the boat while engaged in such service, while the charterer, having the right to the service and earnings of the tug, was also entitled to a part.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102.]

6. SALVAGE ⟸38—APPORTIONMENT OF AWARD—SHARE OF CREW.
The crew of a tug which salved the cargo of a scow, consisting of large caliber ammunition and high explosives, which rendered the service extrahazardous, *held* entitled to one-third of the salvage award.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102.]

7. SALVAGE ⟸38—APPORTIONMENT OF AWARD—CREW'S SHARE.
The fact that the captain of a tug demised to a charterer was entitled to a share of the charterer's part of a salvage award *held* not to deprive him of the right to share also in the award to the crew.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102.]

8. SALVAGE ⟸38—APPORTIONMENT OF AWARD—PASSENGER.
One who at the invitation of the captain was on board a tug at the time of the rendition of salvage services, but who was not a member of the crew and performed no service, *held* not entitled to any part of the crew's share of the salvage award.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102.]

9. ATTORNEY AND CLIENT ⟸150—DISCHARGE OF ATTORNEY—CONTRACT FOR DIVISION OF RECOVERY.
Under the law of New York, which prevails in the federal courts sitting in that state, an attorney, although having a contract to conduct a case to an end for a certain share of any amount which he may recover, may be discharged by his client at any time without cause, and in such case is entitled only to the reasonable value of the services rendered.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 354–357.]

In Admiralty. Suit against the cargo of the deck scow Johnson Lighterage Company No. 24 to recover for salvage services. On distribution of salvage award.

See, also, 231 Fed. 365.

Foley & Martin, of New York City, for libelants, W. J. Scanlan Co., certain members of the crew, and the captain.

Runyon & Autenreith, of Jersey City, N. J., and Edward W. Norris, of New York City, for James Shewan & Sons, Inc.

E. Curtis Rouse, of New York City, pro se and for Seaboard Equipment Corporation, Silas B. Axtell, and certain members of the crew.

George J. Stillman, of Jersey City, N. J., for Andrew Brown.

HAIGHT, District Judge. The controversy now before the court relates to the distribution of the sum of $25,000, heretofore paid into the registry of this court by the owners of the cargo of the deck scow Johnson Lighterage Company No. 24 in settlement of a suit instituted on behalf of the owner, charterers, captain, and members of the crew of the steam tug John A. Seely to recover for salvage services rendered by them in respect to such cargo. The conflicting interests and the respective claims to the fund will hereinafter appear.

1. The main question is as to how that share of the salvage moneys which would ordinarily be awarded to the owner of a vessel rendering the salvage services (hereinafter referred to as the owner's share) should be distributed as between the charterers of the tug and those who have succeeded to the owner's interest (hereinafter, for convenience, referred to as the "owner"). The tug, at the time the salvage services were rendered, was owned by the Seaboard Equipment Corporation, but was under charter to a partnership trading as W. J. Scanlan Company. The charter party, which consisted of a letter, written by the owner to the Scanlan Company, and accepted by the latter, was as follows:

"New York, December 23, 1915.

"Messrs. W. J. Scanlan & Company, New York Office, 31 Union Sq., New York City—Dear Sirs: Confirming our telephone conversation of this morning, we will charter you bare tug John A. Seely from December 24, 1915, with her present equipment, which is now in good condition, for three months, with option of extending this charter. What we mean by 'bare tug' is tug with her present hawsers, bedding, equipment, etc. You to furnish crew, coal, water, and supplies, which you hereby agree to pay for promptly, and hold the boat harmless for the indebtedness. You also further agree to pay for the marine and fire insurance on this boat covering towing from New York harbor to Edgemere and Rockaway inlet. In case tug John A. Seely works in ice, you will be compelled to sheath bow at your expense; also put an ice breaker on the bow of this boat to protect the hull. You further agree to pay this company five hundred ($500) dollars per month for the bare boat as above described, on the tenth (10th) of each month, for the use of the boat. You also further agree to advance payment on account the first month's rental two hundred and fifty dollars ($250). It being further understood that you are to pay insurance premiums promptly, and in the event that the insurance companies will not place marine insurance for towing on the outside to Edgemere, Long Island, that you are to give this company a bond to protect this company in case of loss or damage to the boat while on this work. It is understood that you are to keep the present engineer that is on the boat at your expense, and in case this engineer resigns his position that an engineer acceptable to this company will be engaged.

"Very truly yours, Seaboard Equipment Corporation,

"By John A. Seely, V. President and General Manager.

"This agreement is hereby accepted by W. J. Scanlan & Company, contractors, 31 Union Square, N. Y. City, by Louis H. Friedman, member of firm."

[1] The charterers took possession of the tug on December 24, 1915, furnished their own crew and captain, and were in complete possession and control of it when the salvage services were rendered. Undoubtedly there was a demise of the vessel, so that the charterers were then the owners of her pro hac vice, because they acquired by the terms of the charter, and in fact had assumed, the exclusive possession, command, control, and navigation of her. United States v. Shea, 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403; The Del Norte, 119 Fed. 118, 55 C. C. A. 220 (C. C. A. 9th Cir.); Gibson v. Manetto Co., 194 Fed. 331, 114 C. C. A. 291 (C. C. A. 5th Cir.); Hahlo v. Benedict, 216 Fed. 303, 132 C. C. A. 447 (C. C. A. 2d Cir.).

[2] It is the insistment of the charterers that, in the absence of an express provision in the charter party to the contrary (of which there was none in that in question), a demise of a vessel entitles the charterer to all of the "owner's share" of any salvage money, to the exclusion of the actual owner. The decisions of Judge Brown in the Southern district of New York in The Kaiser Wilhelm Der Grosse (D. C.) 106 Fed. 963, and of the British Court of Admiralty in The Scout, 1 Aspinall's Reports of Maritime Cases (N. S.) 259, and in The Maria Jane, 14 Jurist, 857, are cited in support of that proposition. On the other hand, it is urged on behalf of the owner that such share should be awarded to the one upon whom would fall the loss if the vessel were injured or destroyed while engaged in the salvage operation. In order to ascertain the correct rule, a somewhat extended discussion of the reported cases which have dealt with the question seems necessary:

That part of Dr. Lushington's opinion in The Maria Jane, supra, which is applicable to this case, was merely a dictum. He was dealing with a supposititious case, and expressed the opinion, but not without doubt, that where there was a demise the salvage moneys would inure to the benefit of the charterer. The facts which called for a decision are so different from the facts of this case that his actual decision cannot be considered a precedent on the point in question. While it was held in The Scout, supra, where there was a demise of the vessel, that the owner had no claim to a salvage award, it appears from the opinion that the charterer "in case of damage to the vessel, would have been bound under the charter to repair her. He was bound to deliver her up to the general owners in good condition." Also, while some of the remarks of Judge Brown in The Kaiser Wilhelm Der Grosse, supra (106 Fed. 970), lend support to the charterers' contention, it must be noticed that he also said, before reaching his conclusion:

"It [the charterer] * * * agreed unconditionally to return her [the salving vessel] to the owner in as good condition as it received her, reasonable wear and tear alone excepted. *If the vessel was damaged in any salvage operation, the charterer alone was bound to make good the loss.*"

Thus it appears that in both of those cases the risk of injury to or loss of the vessel during the salvage operations was upon the charterer and not the owner. That was apparently considered a controlling circumstance in each. On the other hand, in The New Orleans, 23 Fed.

909 (C. C. E. D. La.), Judge Pardee held that the salvage money, after deducting the actual expenses of the charterers in the salvage operations, should be divided equally between the charterers, the owner, and the crew. That the charter in that case was one of demise seems clear, for he stated that the cases of The Alfen, Swab. 189, and The Waterloo, 2 Dod. 433 (the latter of which is also referred to by Judge Brown in The Kaiser Wilhelm Der Grosse, supra), were not in point because:

"They refer to charterers who are not in possession of and navigating the ship—were freighters under charter party."

On page 911 of 106 Fed. (in explaining the reason for his subsequent holding) he said:

"At the same time, the owners' property was used to some extent and *was risked in the rendition of services to the New Orleans.* If it were a mere *question of compensation* for work and labor, the owners would be entitled to nothing; but I think the case is very different, so far as it is a question of reward for the use and *risk of property* and *encouragement for the rendition of salvage services.* Why reward a temporary owner and leave out the real owner? Neither one had really anything to say as to whether the services should or not be rendered."

In The Camanche, 8 Wall. 448, 473, 19 L. Ed. 397, Mr. Justice Clifford, in speaking of the rights of charterers to salvage moneys, said that they are not in the same position as owners, unless there be a stipulation in the charter party giving them the benefit of the salvage, "or unless the vessel is chartered and sailed on *their responsibility.*" In The Arizonan, 136 Fed. 1016, 1017 (D. C. E. D. N. Y.), where it was held that there was not a demise of the vessel, Judge Thomas said:

"The general rule is that the owner is entitled to such award [salvage moneys] unless there is a demise of the tug, or the contract of hiring stipulates to whom it shall belong."

He held that the charterer was not entitled to anything. His decision was, however, reversed by the Circuit Court of Appeals of the Second Circuit (144 Fed. 81, 82, 75 C. C. A. 239, 240), and in the opinion of the latter court Judge Coxe said:

"It is true that several text-writers have stated the rule broadly that a charterer is not entitled to salvage unless he becomes the owner pro hac vice, but we are referred to no controlling authority to that effect and are not impressed by the rationale of the rule. The theory of salvage is to reward *all who have contributed anything to the work of saving the imperiled property.* Thus it has included the *risk assumed by the salving vessel,* her services and the services of her master and crew not only, but it has been extended to services rendered by passengers; in some instances, remuneration has been awarded for the risk to her cargo. * * * At the time in question the appellant [the charterer] was entitled to the exclusive use of the tug and to every dollar she might earn during the existence of the charter. On the other hand, the appellee [the owner], not having parted with the ownership, was entitled to remuneration for *any risk* the tug might run while engaging in a dangerous salvage service. We are unable to see why the right to receive remuneration on account of the ownership, which was retained, carries with it the right to remuneration for the services which passed, without qualification, to the appellant. * * * The fact that the charterer would not have been liable for the value of the tug if she had been lost while assisting the Arizonan is not a controlling consideration. * * * The solution of the

present controversy seems plain. The appellee owned the tug, the appellant owned the tug's services. She was in a dangerous occupation and for the risk so run the appellee is entitled to compensation. She did the work of rescuing the Arizonan from the burning dock, and for these services the appellant is entitled to compensation."

There is thus, both in that case and in The New Orleans, supra, a clear recognition of the principle that the owner is entitled to compensation for *the risk* which he incurred and the charterer to compensation for *the services* rendered by the vessel, to which services he was exclusively entitled. The latter is the distinguishing feature between these cases and The Richmond, 181 Fed. 568 (D. C. Mass.). Nor can I see that such a principle is opposed to the decisions in The Scout and The Kaiser Wilhelm Der Grosse, for in both of those cases the risk was borne by the charterer. So whether or not there has been a demise of the vessel has not, I think, been considered by the authorities as the controlling circumstance in the awarding of salvage moneys as between the owner and charterer. Indeed, it is difficult to understand how the mere character of the charter can alone, and irrespective of upon whom the loss or damage to the vessel would fall, be so considered, when one of the most important elements in salvage awards is the risk incurred by the salving vessel. Any such rule would lead to illogical and unjust results. If a charterer, although an owner pro hac vice under a charter of demise, incurs no risk if the salving vessel is injured or lost in the salvage operations, can the salvage award to him be as large as if he had incurred such risk? On principle it would seem not. Yet if that is so the owner of a vessel and cargo which had been saved would be required to pay less for the same services than if the salving vessel had not been chartered, and not because the services were less valuable, but simply because the charterer, who was entitled to all of the award, ran no risk, whereas the owner of the salving vessel did. Thus the owner would be deprived of any compensation for the risk which his vessel ran, and the one to whom the services were rendered would escape the payment of that part of salvage moneys which represents such risk. If, on the other hand, the award to the charterer would be just as large as if he had incurred the risk, he would receive compensation for something which he never contributed. I think, therefore, that the principle upon which the correct rule must rest is that found, as above stated, in the decision of the Circuit Court of Appeals of the Second Circuit in The Arizonan, supra, and hence I conclude that, as between charterer and owner, the determination of the question as to who is entitled to the "owner's share" of the salvage money depends *both* upon who was entitled to the vessel's services and earnings and upon whom the loss of or damage to her during the salvage operations would fall. At the time the salvage services were rendered in this case the charterer was not only entitled to the services of the tug and to all of her earnings, but was in actual possession, control, and management of her.

**[3, 4]** It remains, therefore, to ascertain upon whom rested the risk of damage to or loss of the tug while performing the salvage services. The general rule is that a charterer, such as in this case (who is merely a bailee for hire), in the absence of provisions in the charter party to

the contrary, is only responsible for loss of or injury to the chartered vessel in the event that the injury or loss was due to the failure to exercise ordinary care on his part or that of his servants. Clark v. United States, 95 U. S. 539, 542, 24 L. Ed. 518; Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 654, 22 Sup. Ct. 240, 46 L. Ed. 366. See also the following additional cases illustrating the application of the rule: W. H. Beard Dredging Co. v. Hughes, 113 Fed. 680, 682 (D. C. S. D. N. Y.), affirmed 121 Fed. 808, 58 C. C. A. 192 (C. C. A. 2d Cir.); Smith v. Bouker, 49 Fed. 954, 955; 1 C. C. A. 481 (C. C. A. 2d Cir.); Bleakley v. City of New York, 139 Fed. 807 (D. C. S. D. N. Y.); Lake Michigan, etc., Co. v. Crosby, 107 Fed. 723, 724 (D. C. E. D. Wis.); Charles Killam & Co. v. Monad Engineering Co., 216 Fed. 438, 442 (D. C. E. D. Pa.). But it is equally well settled that where, by the charter party, the charterer has, either expressly or by fair implication, assumed the liability for loss or damage to the vessel without his fault, that he is liable if the vessel is lost or injured. Sun Printing & Pub. Ass'n v. Moore, supra. It is also the rule that, if a vessel is injured or lost when being used in a manner or for a purpose different than that for which she was chartered, the charterer is liable, irrespective of his negligence. Latson v. Sturm, 14 Fed. Cas. 1187, No. 8,115 (D. C. E. D. N. Y.); Sutcliff v. Seligman, 121 Fed. 803, 58 C. C. A. 251 (C. C. A. 2d Cir.); Smith v. Bouker, supra; Beach v. Raritan & Del. Bay R. R. Co., 37 N. Y. 457; The Ely, 110 Fed. 563 (D. C. S. D. N. Y.), affirmed 122 Fed. 447, 58 C. C. A. 429.

[5] It then becomes necessary to determine whether there was any provision of the charter party in this case which imposed a greater liability upon the charterer than that imposed by the general rule of law before mentioned, and whether there was any limitation as to the purposes for which the tug could be used by the charterer, and, if so, whether, in rendering the salvage service, the charterer deviated from such purposes or uses. The charter party contains no covenant that the charterer shall deliver the vessel at the end of the term for which it was chartered in as good condition as when received, nor any express provision regarding liability for loss of or damage to the vessel. What the parties may have agreed upon subsequent to the time the salvage services were rendered, in respect to the charterers' liability, as is possibly evidenced by the Converse guaranty, is of no consequence. While there is implied in every charter, without being expressed, a covenant to deliver up the vessel at the end of the term, this does not, of course, affect the general rule of liability before stated. Charles Killam & Co. v. Monad Engineering Co., supra; Lake Michigan Car Ferry Transp. Co. v. Crosby, supra.

The charter party does provide, however, that the charterer shall pay for fire and marine insurance on the boat "covering towing from New York harbor to Edgemere and Rockaway Inlet," and, in the event of the inability to procure marine insurance "for towing on the outside to Edgemere, L. I.," that the charterer should give the owner "a bond to protect this company [the owner] in case of loss or damage to the boat *while on this work*." Hence, if there are any provisions of the charter party in question which enlarged the charterers' common-law liability, it must be found in the above-quoted parts which

deal with insurance and bond. I think they might be construed (especially in the light of the subsequent actions of the parties) to mean that, while the tug was engaged in the work which the insurance or bond was to cover, the charterers were to be liable for loss or damage to the vessel, irrespective of negligence, and that the insurance or the bond was to be in the nature of security to the owner in addition to the charterers' personal responsibility, doubtless because the latter was not considered sufficient. A bond ordinarily presupposes a primary liability of some kind on the part of the one furnishing it. In addition, on the day after the charter party was signed, the charterer, in writing the owner regarding his inability, before that time, to have procured the insurance or bond, said:

"In the meantime, should we make a trip to Edgemere, we will be entirely responsible to you to the amount of $8,000, in case of loss or damage to the boat while on this work."

This was a recognition of a greater liability on the charterers, in the event that the vessel went outside to Edgemere, than the general rules of law imposed. But certainly these provisions of the contract are not susceptible of a construction that the charterers' general liability was to be enlarged while the tug was engaged on work other than that which the insurance or bond was to cover, which was expressly limited to towing outside to Edgemere and Rockaway Inlet. Hence, unless it can be found that it was intended that the tug was to engage in *no other work than towing outside to Edgemere and Rockaway Inlet*, and that therefore the bond or insurance was to cover all work which it was intended the tug should do, it follows that while engaged in work in New York harbor (which she was doing when the salvage services were rendered) there was nothing in the contract to impose upon the charterers anything more than the common-law liability. Evidence was introduced (out of court) on behalf of the *owner* to the effect that it was understood, at the time the contract was signed, that the vessel was to engage only in towing to Edgemere and Rockaway Inlet. Notwithstanding that it was introduced on behalf of those who have succeeded to the owner's interest, and would, apparently, work to their disadvantage, I do not feel at liberty to consider it, both because I think that the evidence offered on behalf of the charterers—to the effect that there was no such limitation as to the use of the tug—when considered in connection with the subsequent acts of the parties, clearly outweighs it, and also because it was inadmissible, as it would vary the written contract, the latter in this respect being neither ambiguous nor apparently incomplete.

There is no express limitation in the contract as to the uses to which the tug could be put, nor can any be fairly implied; but, on the other hand, it seems entirely clear that it was intended that the tug could be used for any purpose for which such tugs are ordinarily used. If this is not so, why was the limitation in the clause dealing with the bond "to protect this company in case of loss or damage to the boat *while on this work*" (referring to towing on the outside to Edgemere, Long Island), inserted? The use of the words "while on this work" seems to demonstrate that it was contemplated that it would be engaged

on *other* work. In addition, on December 24th, the owner, in writing the charterers regarding the refusal of an insurance broker to write insurance covering towing to Edgemere, said:

"Therefore, in accordance with your agreement you will please obtain a bond *before you send this tug out of N. Y. Harbor to Edgemere, covering loss or damage to this tug in towing from New York to Edgemere, L. I.*, for the amount of eight thousand ($8,000) dollars."

The procuring of such insurance or furnishing of such a bond was (as appears from the subsequent letters of the parties, before referred to, and which crossed each other in the mails, and their actions) undoubtedly considered by parties a condition precedent to the right of the charterers to take the vessel outside of New York harbor. The charterers, however, took absolute possession of the vessel on the day succeeding the signing of the charter party and used it in towing in New York harbor to the knowledge of the owner, and without protest on its part, for several days thereafter, although no insurance had been effected or bond procured. They did not, however, attempt to take it out of the harbor to Edgemere until after some insurance had been procured and a satisfactory guaranty to protect the owner against loss or damage had been obtained from a third party. The use to which the tug could be put was not therefore limited to towing to Edgemere and Rockaway Inlet.

It follows, also, as it was permissible, under the charter, for the charterers to use the tug inside of the harbor for any purposes for which vessels of that kind are ordinarily used, that in rendering the salvage services there was no deviation from the uses which the charter party permitted, because tugs are very frequently called upon to render salvage service, and it must be held that the parties contemplated such use. Nor, under such circumstances, could it be held that the act of rendering salvage services was, simply because they were in their nature dangerous and irrespective of the manner in which they were rendered, a failure to exercise the ordinary care which the law required of the charterers, so as to cast upon them all the risk of loss of or injury to the tug while engaged in the salvage operations. Such a holding would not only be at variance with what I have found was the contract of the parties in respect to the uses to which the tug could be put, and the measure of the charterers' duty when so using it, but would run counter to the settled policy of the law to encourage salvage. Hence, in the absence of negligence in the handling of the tug, all risk of loss of or damage to it, while rendering the salvage services, rested upon the owner. Under the rule which I have endeavored to formulate, as above, the owner is therefore entitled to some part of the salvage moneys, because of the risk which the rendition of the salvage services imposed upon it, and the charterers are entitled to some part because the earnings of the vessel belonged to them.

**[6]** 2. As it is not questioned that the members of the crew, with the exception of the captain, are entitled to participate in the fund, it is necessary to determine how the salvage moneys shall be apportioned between the charterers, the owner, and the crew. Considering that the cargo which was saved was of a very dangerous nature, consisting of

large caliber ammunition and high explosives, and the salvage operations therefore entailed considerable risk on the part of the crew, I have determined to allow as the "crew's share" one-third of the salvage money remaining after deducting the costs and expenses hereinafter mentioned. This is in accordance with the division made in The New Orleans, supra, The Richmond, supra, The Kaiser Wilhelm Der Grosse, supra, and The Scout, supra. It would be unjust, I think, to allow the owners a greater part of the salvage money than the value of the boat, when it is considered that the charterer was entitled to all of her earnings. Although the charter party is silent as to the amount of insurance or bond which the charterers, under the circumstances before mentioned, were to pay for or procure, as the case might be, it is entirely clear that the parties intended that it should be $8,000. This may be fairly considered as the sum which the owner considered that it would lose in the event that the vessel was totally destroyed. It was stipulated that in rendering the salvage services the vessel incurred the danger of being totally destroyed. The "owner's share," consisting of two-thirds, will accordingly be divided equally between the charterers and those who have succeeded to the interest of the actual owner. Such a division will not result in the latter receiving more than the value of the vessel, and will follow the division made by the Circuit Court of Appeals of the Second Circuit in The Arizonan, supra, and in The New Orleans, supra.

[7] 3. The next question is as to who is entitled to participate in the "crew's share," and in what proportions it shall be divided among them. It is contended by counsel for the owner that the captain should not receive any part of this share, because he had an interest in the earnings of the tug. I am unable, however, to agree with this contention. He risked his life, which the charterers did not, and for that reason I think should be compensated to the same extent and in the same way as though he were not to receive any part of the salvage moneys to be awarded to the charterers.

[8] One Andrew Brown, a friend of the captain, who was on board the tug at the time the salvage services were rendered, claims to be entitled to some part of the "crew's share." He admittedly performed no services whatever, nor was he called upon to do so; neither was he a member of the crew in any sense of the word. He took the trip at the invitation of the captain, presumably for recreation, as it was a holiday. I can find no justification in the evidence for the assertion of his counsel that he went on board at the request of the captain, to make up the number of the crew which the law required; there being a deficiency of one, owing to the absence of the mate that day. He was a painter by trade, was without any experience whatever on tug boats, or, for that matter, vessels of any kind. At best his position was that of a passenger, who contributed nothing towards the saving of the salved property. As such he is not entitled to share in the salvage moneys to be awarded to the crew. The Coriolanus, 6 Aspinall's Reports of Maritime Cases, 514. The authorities on which counsel for this claimant relies are not applicable, because they deal with members of a crew.

The mere fact that Mr. Brown states that he was willing to perform services, if he had been called upon to do so, does not overcome the

difficulty that is presented by the fact that he was neither a member of the crew nor a passenger who *actually did render* services. If, under these circumstances, he is entitled to share in the crew's award, it would follow, on principle, that every passenger on board vessels rendering salvage services, who would come into court and testify that he was willing to have performed services if he had been called upon to do so, would be likewise entitled to share in salvage awards. I am constrained to find, therefore, that Mr. Brown is not entitled to any part of the "crew's share" of the salvage moneys.

It is not clear from the evidence as to exactly who constituted the crew at the time in question, nor as to the wages which they were receiving, respectively. It has also been suggested in the case that some members of the crew have already assigned their shares of the salvage money. There will, therefore, be a reference to a commissioner to ascertain who were on board the tug as members of the crew when the salvage services were rendered, the amount of wages which they were respectively receiving, as also the amount of wages of which the captain was in receipt, and whether any of such members has validly assigned his share of the salvage moneys, and, if so, to whom the said share or shares are now due and payable. The "crew's share" will be divided among the captain and the members of the crew in proportion to their wages. If it should develop that the captain was not in receipt of any fixed wages or salary, the commissioner will ascertain what sum was ordinarily paid, at the time in question, to persons occupying a similar position to that which he occupied and doing similar kind of work, and such sum will be, for the purposes of this case, considered as his wages.

[9] 4. As before stated, at the time the salvage services were rendered, the tug was owned by the Seaboard Equipment Corporation. About a month after the original libel was filed that company caused another libel to be filed to recover the salvage moneys to which it conceived that it was entitled as the owner of the tug. The two suits were subsequently consolidated, and the second libel ordered to be treated as a petition of intervention. Subsequently, but prior to the settlement which produced the fund now in court, the tug was sold to James Shewan & Sons, Incorporated, and, as part of the transaction, all of the Seaboard Equipment Corporation's salvage claims were assigned to the vendee. The second libel was filed by Mr. Axtell, an attorney of the state of New York, through Mr. Rouse, a proctor of this court, pursuant to a written agreement between Axtell and the Seaboard Equipment Corporation whereby the former was retained to prosecute the latter's claims for salvage, and was to receive for his services 50 per cent. of any recovery which he might be able to effect. After the interest of the Seaboard Equipment Corporation was transferred to the Shewan concern, the latter applied to be substituted as petitioner or libelant in the place of the former, and asked that proctors selected by it should be substituted for Mr. Rouse. Before this application came on to be heard, the settlement, which produced the fund now in court, was effected. Mr. Axtell, claiming to be entitled, by virtue of the contract before mentioned, to one-half of such part of the salvage moneys

as might be awarded to the Seaboard Equipment Corporation or its assignees, opposed the application unless his claim was fully protected. Thereupon, it appearing that the conflicting interests could be better passed upon at a final hearing, an order was made, by consent of all parties, constituting the Shewan petition a petition of intervention, and the reply which had been made by Mr. Axtell as a petition for a part of the fund.

It is not questioned that the Seaboard Equipment Corporation has parted with any claim or interest which it had in the fund now in court, and that the Shewan concern is entitled to the share of the moneys to which the former would have been entitled but for the assignment. The question on this phase of the case, therefore, is whether Mr. Axtell is entitled to any part of that share, and, if so, to what part or how much. It is claimed, on his behalf, that the contract by which he was retained constituted an equitable assignment of or imposed an equitable lien in his favor on one-half of any moneys which should thereafter accrue to the Seaboard Equipment Corporation on account of the salvage claim. On the other hand, it is urged on behalf of the Shewan concern that the retainer agreement did not have that effect, or, for that matter, create any lien, and that, if it did create a lien, it was only to the extent of the reasonable value of the services rendered by Mr. Axtell and Mr. Rouse up to the time the Shewan interest accrued and their consequent discharge as attorney and proctor, respectively. Shewan & Sons, however, consent that Mr. Axtell may be considered to have a lien, irrespective of how it arose, if in fact it has arisen, on the share which will go to it, to the extent of the reasonable value of the services rendered and disbursements made by him on behalf of the Seaboard Equipment Corporation.

It is settled in New York, where this contract was made, and by the law of which state, under the circumstances of this case, the rights of the parties under the contract are, I think, to be regulated (In re Paschal, 10 Wall. 483, 495, 19 L. Ed. 992), that even though an attorney has a contract, such as this, to conduct a case to an end for a certain part of any amount which he may recover, the client may discharge him at any time without cause, and in such case the attorney is entitled only to the reasonable value of the services rendered by him up to the time of the discharge (Martin v. Camp, 219 N. Y. 170, 114 N. E. 46; Roake v. Palmer, 119 App. Div. 64, 103 N. Y. Supp. 862; Johnson v. Ravitch, 113 App. Div. 810, 99 N. Y. Supp. 1059). The same rule prevails in federal courts sitting in New York. Ronald v. Mutual Reserve Fund Life Ass'n, 30 Fed. 228 (C. C. S. D. N. Y.); Silverman v. Penn. R. R. Co., 141 Fed. 382 (C. C. S. D. N. Y.); Du Bois v. City of New York, 134 Fed. 570, 69 C. C. A. 112 (C. C. A. 2d Cir.); Ibert v. Ætna Life Ins. Co., 213 Fed. 996 (D. C. E. D. N. Y.). The transfer of the interest of the Seaboard Equipment Corporation and the refusal of the assignee to continue the services of the original attorney was tantamount to his discharge by the former. Consequently Mr. Axtell cannot recover under the agreement more than the reasonable value of the services rendered by him

up to the time that Shewan & Sons acquired the interest of the Seaboard Equipment Corporation, together with the disbursements which he had theretofore made. Therefore, even if the agreement in question is sufficient in itself to constitute a lien upon the fund, it can be for no greater amount than the value of the services rendered, plus disbursements.

As Shewan & Sons consent that he may be considered to have a lien to that extent, it is unnecessary to consider whether or not the agreement does in fact entitle Axtell to an equitable lien, or whether, if it does not, the proctor of record has, irrespective of the provisions of the contract, a lien on the fund which came into existence after his discharge for the value of his services and disbursements. It remains only to consider what the services rendered by Mr. Axtell were reasonably worth. Practically no testimony has been taken on this point. I do not feel that the allowance should be based solely on the amount of labor performed (which was comparatively small), because I am reasonably well convinced, from the evidence, that, had Mr. Axtell not undertaken the assertion of the rights of the Seaboard Equipment Corporation, no effort would have been made by that concern to do so. This feature should therefore be taken into consideration in fixing his compensation, as also the compensation fixed by the contract (Nutt v. Knut, 200 U. S. 12, 21, 26 Sup. Ct. 216, 50 L. Ed. 348), as well as the amount recovered. In the latter connection, it must be borne in mind that there are other claims for salvage against the scow upon which the cargo which produced the fund now in court was loaded, and against another scow and its cargo, as yet undetermined, and which may result in Shewan & Sons receiving moneys in addition to those to be awarded to them out of the fund now in court.

The important work in this case was the establishment of the right to salvage moneys as against the cargo in question and in thereafter effecting the settlement. See In re Johnson Lighterage Company No. 24 (D. C.) 231 Fed. 365. Mr. Axtell took no part in these proceedings, nor, except in his own behalf, in the phase of the case dealing with the right of the owner of the vessel to some part of the salvage money. I think, upon the whole, that he will be amply compensated if he is allowed for his services $1,250, as well as all moneys which he has disbursed on account of the suit. This, however, will be in full for all services in connection with the libel originally filed at his direction, and also in full for the services of the proctor whom he employed to institute and prosecute the suit in this court.

5. Before any distribution of the fund whatever is made, there must be paid to the original libelant, as well as the proctor for the Seaboard Equipment Corporation, the costs and expenses incurred by them, respectively, in respect to the filing of the libel, the seizure of the cargo, marshal's and watchmen's fees incident thereto, and any other costs and fees incident to the prosecution of either libel and effecting the settlement with the owner of the cargo. All other costs and expenses incurred in establishing the claims of the respective parties to the fund in court must be borne by each party, respectively.

A decree may be entered in accordance with these conclusions.

## In re ELIAS.

(District Court, E. D. North Carolina. March 15, 1917.)

No. 536.

1. BANKRUPTCY ⟸136(2)—POWERS OF COURT—ENFORCING ORDER—IMPRISONMENT FOR CONTEMPT.

Even if Bankr. Act July 1, 1898, c. 541, § 2 (13), 30 Stat. 545 (Comp. St. 1913, § 9587), conferring on courts the power to enforce obedience by bankrupts of all lawful orders by fine or imprisonment, and section 41 (section 9625), conferring on the judge the power to enforce obedience to lawful orders made by the referee, gave the judge power to imprison a bankrupt for contempt by way of punishment, as distinguished from imprisonment to compel obedience, for disobedience to an order to turn property over to the trustee, that power should not be exercised, in view of Bankr. Act, § 29 (section 9613), which makes it a criminal offense for the bankrupt to withhold property from his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235.]

2. BANKRUPTCY ⟸136(2)—CONTEMPT—ORDER OF REFEREE—HEARING BEFORE JUDGE.

On a hearing before the District Judge on an order to show cause why a bankrupt should not be committed for contempt for refusing to obey a lawful order of the referee to turn certain property over to the trustee, the judge is not bound by the referee's finding that the bankrupt had the property in his possession or under his control, though the bankrupt filed no petition to revise the order, and there was no showing that he had lost the power to comply with the order since it was entered.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235.]

3. BANKRUPTCY ⟸136(2)—CONTEMPT—ORDER OF REFEREE—PROCEEDINGS TO ENFORCE—EVIDENCE CONSIDERED.

In proceedings to commit a bankrupt for contempt for refusing to obey an order to turn property over to the trustee, the judge must, giving due weight to the findings of fact by the referee, examine for himself all the evidence in regard to the bankrupt's conduct, and all other relevant evidence before and since the referee's order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235.]

4. BANKRUPTCY ⟸136(2)—CONTEMPT—PROCEEDINGS—FINDINGS OF FACT—NECESSITY.

Because of the drastic character and the summary procedure in contempt cases, the law requires the court to find the facts upon which orders of imprisonment for contempt are made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235.]

5. BANKRUPTCY ⟸136(2)—RIGHTS OF TRUSTEE—PROPERTY WITHHELD BY BANKRUPT—POSSESSION—PRESUMPTION.

The fact that a bankrupt had considerable property at the time of bankruptcy, which he did not turn over to the trustee, does not create a presumption that at the time the referee made an order, 10 months later, requiring him to deliver the property to the trustee, he still had it, or the proceeds of the sale thereof, sufficiently strong to warrant his imprisonment for contempt until he obey the order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235.]

6. BANKRUPTCY ⟸136(2)—REMEDIES OF TRUSTEE—ORDER FOR DELIVERY OF PROPERTY—REQUISITES.

An order of the referee, requiring the bankrupt to deliver property to the trustee, should find what specific property is in the bankrupt's possession, and, with reasonable certainty, specify the property he is ordered

to deliver, or, if money is to be paid, specify the amount and source from which it is derived.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235.]

In Bankruptcy. In the matter of J. A. Elias, bankrupt. Proceeding in contempt against the bankrupt for failure to obey an order of the referee to deliver to the trustee property found by the referee to be in the possession or under the control of the bankrupt. Order of commitment denied.

Moe Levy, of Norfolk, Va., and W. L. Knight, of Weldon, N. C., for trustee.

T. T. Thorne, of Rocky Mount, N. C., for bankrupt.

CONNOR, District Judge. The referee certified that, after hearing the examination of the bankrupt and other evidence, on February 1, 1917, he found as a fact that the bankrupt was withholding from the trustee and concealing from his creditors $4,047.90 in merchandise, or its equivalent in money, upon which finding he made an order requiring him on or before 12 o'clock noon of February 15, 1917, to pay to A. B. Stainback, trustee, the said sum. A copy of the order and the findings of fact were served on the bankrupt, delivered to his attorneys, and certified to the judge. The bankrupt failed to comply with the order, whereupon notice was issued to and served upon him, directing that he show cause before the judge, at Raleigh, on March 6, 1917, which, at the request of his attorney, was continued until Saturday, March 10, 1917. The bankrupt appeared in person, and was represented by counsel. He filed an answer averring his inability to comply with the order of the referee, and further averring that he has not, in his possession or under his control, said sum, either in money or merchandise, or any part thereof. He says:

"The entire assets, money, and property belonging to this respondent, at the time he filed petition in bankruptcy, was, so far as he could do so, correctly set out in the schedule filed by him at the time of his adjudication as a bankrupt."

In his answer he sets out that he is a Syrian, born near Mt. Lebanon, and, until he came to America, was unable to speak the English language; that, since coming, he has learned to speak, but is unable to write, English. He further says that he was unable to keep books, or make any record of his business; that his sister, a young woman about 21 years of age, kept such books and made such records as she was able, regarding his business; that she is of very limited education. The petition in bankruptcy was filed, and respondent adjudged bankrupt, May 4, 1916. The case was referred to Jas. R. Gaskill, referee, and an examination of the bankrupt had before him (the examination and other evidence taken before him is certified by the referee). Mr. Gaskill died pending the proceedings in the cause. It was referred to Jos. B. Cheshire, Jr., Esq., referee, who proceeded to further examine the bankrupt and hear further evidence. He has made a very thorough and exhaustive examination and analysis of the evidence, such books and other papers as were furnished, and in his report he finds:

"The bankrupt conducted a general mercantile business at Weldon, N. C. His books were kept by his sister. He could not read nor write. While he has been in business for several years, his only book of record seems to run from January 1, 1916, only. He destroyed all of his invoices by burning them immediately before bankruptcy. The book shows but little, except some accounts of some peddlers. While he kept a bank account, a large part of the money taken in from his business was not deposited in the bank. During the spring, April, 1916, the bankrupt went to Lynchburg, Norfolk, Philadelphia, and New York, where he made statements to persons and firms from whom he purchased goods, showing his financial condition. In these statements he represented that he had a stock of goods on hand, March 1, 1916, amounting to about $4,000, and owed no debts. Between March 1, 1916, and May 4, 1916, it appears upon his own evidence that the bankrupt bought goods amounting to $5,500, all of which were shipped and delivered to him at Weldon and none of which have been paid for." In his petition and schedules he states that he had only $700 worth of goods on hand, and no other goods, or other property, except cash from a bank balance of $20.20, have been received by the trustee. "The goods found by the receiver are largely old stock and in very poor condition. The weekly sales, estimated by the bankrupt and his sister, including peddlers' accounts, between January 1 and May 1, 1916, are put at $300; exclusive of peddler accounts, $75."

The referee has made analytical statements, based upon the bankrupt's own evidence and estimates, showing what amount of goods he had on hand and received, what amount of sales he made, the expenses incurred, and the amount of accounts found on his books, from which he draws the following conclusions:

"The referee is clearly of the opinion that the bankrupt has defrauded his creditors. It is beyond all human possibility that a man can have on hand March 1, 1916, $4,000 in goods, buy $5,500 by May 4, 1916, and pay no creditor a cent, and have left only $900 in goods on May 4, 1916, when he voluntarily goes into bankruptcy, having only $1,794.61 due him on his books."

There appears on the book produced by the bankrupt a number of accounts for goods alleged to have been sold to peddlers, aggregating some $6,000. The book was produced on this hearing. The accounts have, from any and every viewpoint, the appearance of being "manufactured." There is evidence strongly sustaining the suggestion that they were "raised" on the books after the adjudication, and before the books were turned over to the court and its officers. The evidence amply sustains the conclusion of the referee, who says that he—

"does not believe these accounts are bona fide. It is inconceivable that anybody would sell over $6,000 of goods on a credit to men who were almost absolute strangers, many of whom he knows nothing about. If such sales were made, the bankrupt acknowledges receiving a considerable amount of cash which is unaccounted for."

The referee, in his report, makes and notes reference to the particular portions of the testimony upon which his findings are based:

"The referee therefore finds as a fact that the bankrupt, J. A. Elias, has concealed from his creditors and is withholding from the trustee of his estate $4,047.90 in merchandise, or its equivalent in money, and that the bankrupt either has this property in his possession, or under his control, and that he should forthwith turn it over to the trustee."

Upon this finding he makes the order, etc.

The bankrupt, in his answer to the rule to show cause, contends that the conclusions of the referee are based upon deductions which are not

sustained by the evidence. While it is true, as stated by the referee, many of his findings in regard to amount of sales and disposition of the proceeds are estimates, they are all based upon the evidence of the bankrupt and upon the view of it most favorable to him. The quantity and value of the goods on hand, March 1, 1916, is given by the bankrupt, in statements made during the month of April, 1916, as a basis of credit for the purpose of buying goods. It may be that he overestimated the stock. There is other evidence, from witnesses who had the opportunity of estimating in a general way the stock, which would tend to show that it amounted to as much as $3,000. There is no controversy in regard to the amount of goods purchased between March 1, 1916, and May 4, 1916. The evidence is conclusive in respect to them. If there is uncertainty in regard to amount of sales, cash receipts, and the disposition made of it, the bankrupt has no just cause to complain, as it was his duty to furnish to the court the evidence in that respect. Especially is this so when the referee has adopted such estimates as he furnishes and given to them the conclusion most favorable to him. The bankrupt concedes that his stock on hand, March 1, 1916, was worth as much as $2,250 to $2,500. He does not seriously contend that his sales were larger than found, or that he has in any manner accounted for the proceeds thereof.

The referee has been very liberal in the allowance of expenses and support of the family of the bankrupt. There can be no reasonable doubt that the bankrupt, when filing his schedules, withheld from his schedules, and from his trustee, goods and merchandise amounting to several thousand dollars. Adopting his estimate of amount on hand as being $2,250, there is a shortage of $2,297, for which he gives no account. The evidence in regard to his conduct from March 1, 1916, when he had, as he represented to those from whom he was seeking credit, $4,000, and now says $2,250, and owed no debts, until May 4, 1916, during which period he bought goods on credit, amounting to $5,500, for which he has not paid $1, is incapable of any explanation otherwise than that he concealed either the goods or their proceeds from his creditors, and had them on hand, or under his control, when he filed his schedules. The schedule shows debts, $5,149; stock on hand, $700, from which he claims his exemption of $500; open accounts, $3,500, which are fraudulent, and, if valid, worthless. The entire indebtedness was contracted between April 1, 1916, and May 1, 1916. He burned his invoices just before filing his petition. He says he did this because Mr. Gaskill, the former referee, who took a list of them, told him that he had no further use for them. Mr. Gaskill has since that time died. The manifest effort to account for goods by "raising" accounts against the peddlers is too obviously fraudulent to impose on any intelligent person. It is in evidence that the bankrupt turned over the goods allotted to him from the stock, as his exemptions, to his wife, who opened up, and is now conducting, a mercantile business in the same storehouse occupied by the bankrupt, which is owned by his mother; that one Rabill, a Syrian merchant, in Weldon, N. C., holds a mortgage on the stock of goods with which the wife is conducting business.

The power to enforce obedience, by bankrupts and others, of all lawful orders, by fine, or imprisonment, or fine and imprisonment, is conferred by Congress in section 2 (13) of the Bankruptcy Act. Collier, 18, § 41; Collier, 619. The power to enforce obedience to lawful orders made by the referee is conferred upon the judge. The procedure prescribed in that section has been followed in this case. If the bankrupt is charged with fraudulently concealing his property from his trustee, or making a false oath in relation to proceedings in bankruptcy, he is liable to indictment, and, upon conviction, punished as prescribed by section 29 of the act. This, of course, involves the necessity of finding a bill of indictment by a grand jury and conviction by the verdict of a petit jury. The present proceeding is based upon the finding by the referee that the bankrupt has, in his possession or under his control, the goods, money, or other property which he is ordered to deliver to the trustee. The procedure prescribed and followed in this case requires that the order of the referee, giving him a reasonable time within which to comply with it, be served on the bankrupt. He may, if so advised, file a petition for review of the finding of the referee, as in other cases. Bankr. Act, § 39. If he does not file such petition, or, if filed, the order of the referee is confirmed by the judge, and the bankrupt fails to comply with or obey the order, the referee certifies his findings, together with the order, to the judge, and upon a day fixed by him, of which notice is given the bankrupt, an order is made by the judge that the bankrupt show cause why he shall not be attached for contempt. This has been done here.

The questions which have given me concern are: (1) The extent to which the findings of fact by the referee are conclusive upon the judge. (2) The extent to which the question of present ability on the part of the bankrupt to comply with the order may be inquired into by the judge. The decisions made by the several federal judges, in regard to both questions, are to some extent conflicting. I do not find that the questions have been decided by either the Supreme Court or the Circuit Court of Appeals of this circuit. Because of the attitude taken by the bankrupt in his answer to the rule to show cause, and the condition of my mind in regard to both questions, I find it necessary to examine the variant decisions, and pursue such course as seems to me in accordance with a correct interpretation of the statute and general principles applicable to proceedings in contempt cases.

[1] It will be well to note the distinction, always observed, between orders attaching persons charged with contempt, by the commission of an act, in the presence of the court, interfering with its orderly procedure, or such acts, not in the presence of the court, but interfering with the enforcement of its judgments, decrees, and proceedings, and those instituted for the purpose of enforcing obedience to the decrees of the court.

In Re Chiles, 22 Wall. 157, 22 L. Ed. 819, Justice Miller, after pointing out the distinction, says that in the latter case:

"The party refusing to obey should be fined and imprisoned until he performs the act required of him or shows that it is not in his power to do it."

Assuming that the bankrupt had in his possession, at the time he filed his petition, the goods, or proceeds thereof, and withheld them from his schedule, or concealed them from his trustee, he is subject to indictment, and, upon conviction by a jury, punishment as prescribed by section 29 (1), or for making a false oath (Id. 2).

It was suggested on the argument that it was within the power of the court to punish in this case, by imprisonment, for contempt. I do not deem it necessary to discuss this phase of the case, because, if the power be conceded, I do not think that in such cases it should be exercised. Whatever distinction may have been drawn by courts in balancing arguments advanced to sustain conflicting views as to whether a contempt proceeding is civil or criminal, it is, when used as a means of punishment, for all practical purposes punitive, and, when the act complained of is made by statute criminal, the person charged should be prosecuted "by due process of law," by indictment and trial before those tribunals, grand and petit juries, with all of the safeguards which are guaranteed to the citizen by the Constitution and laws when his liberty is involved. I concur in the concurring opinion of Judge Shelby, in Stuart v. Reynolds, 204 Fed. 709, 123 C. C. A. 13, and this, I think, is sustained by the great weight of judicial opinion as expressed by our judges.

[2] In this proceeding, therefore, the question of punishment for acts committed by the bankrupt will be eliminated and left to such course as the government may see fit to take by indictment and trial according to the course and practice prescribed in criminal proceedings. The sole viewpoint in which the case will be considered is as a proceeding, provided by the statute, for the purpose of enforcing obedience to a lawful order of the referee. That he had the power to make the order is conceded. The bankrupt not having asked for a review of his findings and the order made upon them, the first question arises: What may the bankrupt now urge, and, at this state of the proceeding, what may the court consider, in opposition to the motion of the trustee that an order of committal be made? The question is very clearly stated by Judge Hand. In re Frankel (D. C.) 184 Fed. 539. Upon the first argument, the judge says that he was not clear in his mind that the referee correctly found that "at that time the bankrupt had property concealed." He denied the motion to commit him for contempt. Upon a second argument, the learned judge, for the reasons stated by himself, concluded that he was bound by the finding of the referee that the bankrupt had, at the time the order was made, the property concealed, and that the only defense open to the bankrupt, upon the motion to commit for failure to obey the order, was that "since the date of the order he had lost ability to comply with it," or that the order of the referee commanding the delivery of the property was a conclusive estoppel upon the date of its entry, and "left open to the respondent only the issue of showing what he has done with the money since that time." Judge Hand interprets the opinion of Judge Lacombe (In re Stavrahn, 174 Fed. 330, 98 C. C. A. 202, 20 Ann. Cas. 888) as so deciding.

The question does not very clearly appear to have been presented upon the record. One of the exceptions, made by the bankrupt to the action of the District Judge, was that he "erred in holding that he was bound by the order and certificate of the referee, and therefore could not consider the affidavits submitted on behalf of the bankrupt." It appears that, upon the motion to commit the bankrupt for failing to obey the order, "the record book, comprising the evidence, and all other papers, were handed up for the information of the judge. Hearing thereon, and on the two affidavits then submitted by the bankrupt, was had on February 8, 1909," resulting in the approval by him of the order. Judge Lacombe says that the court did not find in the record sufficient evidence to support the allegation that the District Court held that it could not consider the affidavits submitted by the bankrupt; that the court inferred from the record before it that the District Judge read the affidavits and "reached the conclusion that they did not meet the case presented in the moving papers." The contents of the affidavits do not appear. It is manifest that the explanation offered by the bankrupt for not complying with the order was not deemed sufficient; but it does not appear whether he offered to show that he did not, prior to or at the time the order was made, have the property, or had thereafter disposed of it.

Judge Hand's construction of the opinion was doubtless correct; at least he regarded it as of controlling force with him, although it is quite evident, from the concluding words of his opinion, that he was not fully persuaded that his first conclusion was not correct. The importance of the conclusion reached is illustrated by Judge Hand's course in the Frankel Case. Upon the second hearing, logically following his construction of the decision of the Circuit Court, he passes the order of committal upon the referee's finding that, at the time the order was made, the bankrupt had the property in his possession, without considering or passing upon the question of his "present ability to comply" with the order. This he regards as foreclosed, unless it was shown that, since the date of the order, he had lost ability to comply. It is manifest, from his language in regard to the decision in Re Davison (D. C.) 143 Fed. 673, to be noted later, that he did not think the question decided by Judge Brown, in that case, open to him. Judge Lacombe (In re Stavrahn, supra), recognized the right of the bankrupt to have notice of the motion to attach for contempt for failure to obey the order, to have his "day in court," and an opportunity to be heard, to make his defense; but the question arises: What may he say in his defense —that he did not have the property when the order was made by the referee, or only that since that time he has become disabled to deliver it?

By some of the courts it is held that, unless he asks for a review of the findings of the referee, he is estopped, upon the hearing of the motion to commit, to say that the referee was in error, and restricted to showing that, since the making of the order, he has lost his ability to deliver them. It is conceded, by all of the decisions, that before an order of commitment is made the judge must find that "the bankrupt has the present ability to comply with the order of the referee." In re

Marks (D. C.) 176 Fed. 1018. The question arises whether he may, for the purpose of showing that he has not the *present* ability, show that he did not have such ability when the referee found that he had the property and ordered him to deliver it to the trustee, or only that his inability has arisen since the order was made. In re Mayer (D. C.) 98 Fed. 839, the bankrupt filed a petition for review. Judge Seaman discusses the findings of the referee. This was manifestly correct. In Re Davison (D. C.) 143 Fed. 673, it appeared that the referee found that the bankrupt had in her possession, and concealed from the trustee, property to which he was entitled. He made an order directing her to turn over the property to the trustee. The bankrupt filed a petition for review, upon which the finding of the referee was sustained and his order approved. Thereafter the order was certified to the judge and an order of commitment asked for. In response to a notice to show cause, the bankrupt filed an answer containing "a reiteration of her denials, made before the referee, that she had concealed property belonging to the estate. It also set up that she had no property or money in her possession or control belonging to the bankrupt estate. She also averred that she "had no money, property, or means to enable her to comply with the order of the court," etc. Judge Brown says that a part of the statements are inconsistent with the findings of the referee, approved by the court, but says:

"It is not necessary, however, to decide whether, upon contempt proceedings, the bankrupt is concluded as to matters involved in a former hearing, * * * since a portion of the bankrupt's answer relates to her present ability to comply with the order of the court."

It is manifest, however, that the judge considered and discussed the question whether, at the time the order was made, she had the property in her possession or control. He gives to the finding of the referee its full probative force, but says:

"It does not seem to me that the question of the present ability of a bankrupt to comply with an order should be determined upon an artificial rule of proof, to be applied irrespective of the circumstances in a particular case."

Because he found himself "in very serious doubt as to the present ability of the bankrupt to comply with the decree" the learned judge denied the order to commit the bankrupt.

In re Goodrich, 184 Fed. 5, 106 C. C. A. 207 (C. C. A. 5), it is held by Putnam, Judge:

"It is sufficient that we apply the principle that a judgment against a person in a civil case sustains none of the issues against the same person in criminal proceedings. In the present instance the order reported by the referee, and whatever occurred before him, may, under the liberal rules we have stated (In re Cole, 144 Fed. 392 [75 C. C. A. 330]; 163 Fed. 180 [90 C. C. A. 50, 23 L. R. A. (N. S.) 255]), be referred to as having some weight pro and con; but this cannot be accepted as justifying the District Court from failing to revise, on a proceeding like this, the question involved with an open mind. That court was holden to receive all material proofs relating to what preceded the referee's report, as to what followed it."

In that case the District Judge "substantially ruled out all evidence which might have been produced before the referee, and apparently all which related to the issues tried by the referee," and confined the evi-

dence to what occurred after the referee's report. The cause was recommitted to the judge for further proceedings. It will be noted that Judge Brown sat in the hearing of this case. Judge Dodge, who made the order in the Goodrich Case, in the contempt proceeding, says:

"It must be made to appear affirmatively that when the order was made the bankrupt had power to obey it and that the failure to obey was willful."

The decision made in Re Cole, 163 Fed. 180, 90 C. C. A. 50, 23 L. R. A. (N. S.) 255, is the controlling authority in the First Circuit. In Re Marks (D. C.) 176 Fed. 1018, Judge McPherson denied the order because he found that the bankrupt was then unable to comply with the order of the referee. In Re Nisenson (D. C.) 182 Fed. 912, Judge Rellstab reviews the evidence and finding of the referee. He grants the order to commit for nonproduction of a part of the property and denies it as to the remainder. In re Cummings (D. C.) 188 Fed. 767. The question does not appear to have been definitely settled in the Third Circuit. Judge Sessions, in Re Haring (D. C. W. D. Mich.) 193 Fed. 168, says that he finds no controlling decision in the Sixth circuit. He therefore "adopts the view which seems to be more consonant with reason," saying that there are two distinct lines of decisions founded upon different and divergent conceptions of the law. He collects and cites those cases, many of which I have cited, holding that the finding of the referee that, at the time he makes the order, the bankrupt has in his possession, or under his control, property which he unlawfully withholds from the trustee, is conclusive upon the judge, and those which hold that, in proceedings against the bankrupt for contempt for failure to obey the order, the findings of the referee are given due weight, but that the judge should make a new and independent investigation, and should consider all material evidence relating to what preceded as well as what followed the referee's order, and from such evidence determine whether the bankrupt has the present ability to comply with the order and contemptuously disobeys it. For the reasons stated, the learned judge adopts the view of the decisions last cited.

[3] In this condition of the decided cases, I am compelled to resort to general principles and the reason of the thing. It is conceded that the findings of the referee, and his order, should be given very much weight upon the motion to commit for contempt. It is further conceded that no order should be made by the judge unless he finds, either by adopting as conclusive the findings of the referee, or otherwise, that the bankrupt has the present ability to comply with the order. If he is concluded by the findings of the referee, the order to commit passes as of course, unless the bankrupt can show that, since the order was made, he has become unable to comply. If this be the correct rule for the guidance of the judge, he must find, as a fact, that the bankrupt has the present ability to comply with the order, not because he believes it to be true, or has, by independent investigation of the evidence before him, reached that conclusion, but because the referee has so found, and the bankrupt is not able to show loss of ability since the time the order was made. He may, as Judge Hand did in the Frankel Case, believe that the bankrupt did not, at the date of the order of the ref-

eree, have in his possession, or conceal, the goods, and yet be compelled to find present ability to comply, because there has been no change in the ability of the bankrupt since the order was made. Of course it is clear that a judge may, in many instances, be compelled to declare the law upon a state of facts found by the trier of the fact—which he does not believe to be true. This is necessarily so in any system of procedure, in which the duty of finding the facts is imposed upon a judicial agency, and the duty of declaring the law upon another, both being constituent elements in the composition of the court. The present ability to comply with the order is a question of fact, which the judge must find before he is authorized to declare the party in contempt. I am impressed with the language of Judge Sessions, supra. He says:

"To hold that the investigation by this court of respondent's guilt, or innocence, must begin where that of the referee terminates, is to deprive this court of the discretion vested in it by law, and to confer upon the referee the power to do indirectly that which he cannot do directly"

—or, as said by Judge Brown, to give an uncontrolled power "to an artificial rule of proof to be applied irrespective of the circumstances of the particular case." It is to convert the judge into a more executive officer, with no power of investigation or adjudging in regard to the fact upon which he makes an order which deprives, in a summary proceeding, a citizen of his liberty. I am not inadvertent to the fact that the bankrupt may have the findings of the referee reviewed upon a petition therefor.

[4] Because of its drastic character, and of necessity, its summary method of procedure, the law requires the court to find, in all cases, the facts upon which orders of imprisonment for contempt are made. I am constrained to reach the conclusion that, before I can find as a fact that the bankrupt has a present ability to deliver to the trustee either goods or money, I must, by examining the evidence upon which the trustee based the order and the answer filed to the rule, find whether he had such power when the order was made. The instant case is a striking illustration of the difficulty found in adopting the other view. The respondent was adjudged bankrupt May 4, 1916. He was examined soon thereafter, but by reason of the course pursued by the referee, who has since died, no further proceedings were had until February, 1917. There is abundant, and to my mind conclusive, evidence that, at the time of filing his petition, the bankrupt had either in his own possession, or the possession of confederates, goods of considerable value in excess of that found by the referee. I am not, however, by any means certain that he had, on the day the order was made, or now has, either the goods or the money for which they were sold. If, as held by several courts, I must find, beyond a reasonable doubt, that the bankrupt has the present ability to deliver the goods or the money, I would encounter very serious difficulty in doing so. I find no evidence that his condition has changed, or his ability lessened, to do so since the order was made. He makes no pretense or suggestion to that effect. Having reached this conclusion, I have examined the findings of the referee, and the evidence sent up by him, and endeavored

to reach a conclusion satisfactory to my own mind in regard to his present ability to comply with the order.

[5] I am confronted here with equally divergent views of eminently respectable courts. It is conceded, and correctly so, that the findings of the referee are entitled to, and should be given, great weight. This I am prepared to do, because of my concurrence in the rule and my confidence in the judgment of the referee and the intelligent and eminently just manner in which he has dealt with the bankrupt. I may say, further, that I do not doubt the correctness of any conclusion reached by him, until I reach that in which he finds that the bankrupt was, at the time he made the order, February 1, 1917, "withholding from the trustee of his estate $4,047.90 in merchandise, or its equivalent in money, and that the bankrupt either has this money in his possession or under his control." He was necessarily compelled to find, in the alternative, that it was either goods or money. It is at this point that, as said by Judge Brown, I find myself in very serious doubt whether he had either, and, if either, which. Of course, if I was reasonably certain that he had the goods or money on February 1, 1917, I should have no difficulty in adopting the rule prescribed by Judge Lacombe (In re Stavrahn, supra) that it is incumbent on him to give some reasonable explanation as to why it was that he did not turn it over to the trustee in compliance with the order; it would be for him to explain how and why it was that these goods, or this money, in his possession two months ago, has disappeared. In Re Nisenson (D. C.) 182 Fed. 912, Judge Rellstab says:

"The burden is upon him to satisfactorily account for its nonproduction, but in assuming such burden he, because of the drastic means that may be invoked to enforce the order to turn over (imprisonment for contempt) is entitled to the benefit of the reasonable doubt."

In Re Marks, supra, Judge McPherson declined to order imprisonment because he could "not escape from the conclusion that the bankrupt is now unable to comply with the order."

Upon a careful examination of many of the decided cases, it would seem that the courts have no invariable rule in regard to the burden of proof, by which they are governed in such cases. It is undoubtedly true that, as a rule of law, based upon experience, when property is found in the possession of a person, a presumption of fact arises that he continues to have it; the strength of this presumption, or rather inference, is dependent upon so many conditions that it is of little value in determining the ultimate fact. There is a very strong presumption in this case that the bankrupt had the goods which he purchased during the month of April, 1916, on May 4th of the same year, when he filed his petition; but, in view of all that occurred between that date and February 1, 1917, and the character of the property, the presumption would be very weak that he had it February 1, 1917—hardly sufficient to justify an order of imprisonment to continue until he surrendered them.

A number of difficulties arise before we can, by presumption, find that he had the money February 1, 1917. There is no evidence that the goods were sold and no suggestion when, or for what sum, or to

whom they were sold whether immediately after filing his petition, or immediately before the order was made. It is difficult to do more than say "I have serious doubt" whether he now has either the goods or the money; nine months have passed since he filed his petition; the bankrupt is a very ignorant Syrian, a peddler, unquestionably a fraudulent bankrupt, and unworthy of credit, guilty of crime for which he may be punished; but non constat that he now has the ability to deliver to his trustee $4,000 worth of merchandise or its equivalent in money. There is nothing in this record stirring sympathy for him or his conduct; but I cannot, for that reason, imprison him as punishment, nor, unless I find that he has the present ability to do so, imprison him for contempt.

[6] Another difficulty confronts me in enforcing the order by imprisonment. The order may not be based upon the theory that he has other goods, or that he has sold those which he had, and used the money, and therefore owes the trustee that amount. As said by Maxey, Judge, in Samel v. Dodd, 142 Fed. 68, 73 C. C. A. 254:

"The present proceeding is one of a summary nature, and is invoked for the purpose of bringing within the reach and control of the bankruptcy court specific property found to be in the possession of the bankrupt and by him unlawfully withheld. The order should describe the property with reasonable certainty in order to assure its identity, and the command of the court to the bankrupt should be to surrender the very property sought to be recovered. * * * It is not within the power of the court, in such a proceeding, to render judgment for the value of property ascertained to be in the possession of, and contumaciously withheld by, a bankrupt, and attach him for contempt upon his refusal to pay."

In Re Reynolds (D. C.) 190 Fed. 967, Judge Jones said:

"While the evidence leaves no shadow of a doubt that the bankrupt had goods of that value ($19,722.96) for which he has not accounted, or has converted into money, and that at one time he had them under his control, I do not think the proof sustains the referee in the finding that at the time of the order, or at the time of his examination, the bankrupt still had in his possession, or under his control, either the goods or the money. After a very diligent investigation of his affairs, no proof is offered showing the disposition of any specific goods, or tracing to him the possession of any considerable sum of money, or other evidence offered of such conduct as indicates that he now has any of the goods, or money derived from their conversion, in his possession or under his control."

This language appropriately describes the conditions found in this record. The order denying committal was affirmed. Stuart v. Reynolds, 204 Fed. 709, 123 C. C. A. 13, Judge Meek saying that:

"In such a proceeding the court was restricted to ordering a return of the goods and merchandise in specie or kind, and this only when it was made clear by proof that the bankrupts were in possession or control of them."

Judge Shelby, who had given the subject much thought, as indicated in his dissenting opinion in Re Purvine, 96 Fed. 192, 37 C. C. A. 446, and concurring in Samel v. Dodd, supra, wrote an exhaustive opinion in Stuart v. Reynolds. The subject seems to have been fully considered in the Fifth circuit, and there it is well settled that the judge is required to consider all of the evidence before the referee

as well as that before himself—that no order of committal should be made unless he is fully satisfied that the bankrupt at the time the order was made, as well as at the time the case is heard upon the order to show cause, has in his possession or under his control the specific property to which the trustee is entitled. The concurring opinion is exhaustive and puts the judge's view strongly. The latest case which I have found, Epstein v. Steinfield, 210 Fed. 236, 127 C. C. A. 54 (C. C. A. 3d Cir.) holds that:

"An order, requiring a bankrupt to deliver property alleged to have been withheld from his trustee, should only be granted in case it appears that the bankrupt is physically able to deliver the property."

In that case (In re Epstein [D. C.] 206 Fed. 568) Judge McPherson says:

"I have considered the evidence, and approve the findings and order of the referee."

He, however, modified the order by stating, specifically what articles were found to be in the possession of the bankrupt and which he was ordered to deliver to the trustee. He evidently did not concur with the opinion of Judge Shelby, in respect to the burden of proof. There is not before me, nor was there before the referee, any evidence of conduct on the part of the bankrupt throwing light on the present possession or disposition of the goods since he filed his petition; nor is there any evidence that he had had, or invested, money. I thought that, probably, the purchase money of the house owned by his mother, might have come through this channel; but it is conceded that this was paid before the transactions involved in his bankruptcy. It seems also impossible to trace any other connection of his wife's business with the goods, except that he turned over his exemptions to her. It appears that one Rabill holds a mortgage on her stock, which is not very large; there is no suggestion of any fraud in that transaction. The conclusion that he had the goods or their equivalent, in money, on February 1, 1917, or at this time, is based upon the presumption or inference of his possession of them May 4, 1916. Discarding his answer and looking at the question from the reason of the thing, reasonably natural deductions based upon what is apparent, I would find difficulty in reaching the conclusion that he now has the specific goods which I feel certain he had May 4, 1916, or the specific money which he received for them, if sold. To find that he now has the money would require a presumption that he sold the goods, and a further presumption that he received $4,047.90 in money for them, and the further presumption that he had, and now has, the identical money which he received. This would violate a well-known rule of evidence which forbids the indulgence of a presumption upon a presumption.

While I can well understand the difficulty which the intelligent referee found in reaching the conclusion that the bankrupt had the specific goods in his possession, I am of the opinion that an order based upon an alternative finding cannot be made the basis of an order of

commitment for contempt. I do not doubt that if he had sold the goods and held the proceeds that he could be required, in this proceeding, to surrender the money received, or if he had taken a note for the price, or exchanged the goods for other property, which he then held, that he would be compelled to surrender either to the trustee, but that the order must be based upon a finding that he had the goods or the specific thing which he received for them. It is to be regretted that, by reason of conditions for which the trustee was in no way responsible, the proceeding was not brought to a conclusion earlier, when it is not improbable the bankrupt had the goods either in his possession, or under his control and an order of imprisonment would have been an effectual remedy to the creditors who have been defrauded by the bankrupt. However this may be, courts must not use the remedies afforded by the law for any other purpose than prescribed; a remedial process may not be used as a means of punishment, without violating first principles and constitutional guaranties, essential to the preservation of due process of law and by precedent weakening their integrity.

I have examined the cases cited by counsel for the trustee. In re Jacobs (D. C.) 147 Fed. 797, was a petition for discharge; no question of contempt was involved. In re Averick (D. C.) 170 Fed. 521, was on a petition for review of the findings of the referee; the question of present ability to comply with the order was not presented. In re Hershkowitz (D. C.) 136 Fed. 950, the District Judge ruled that he was concluded by the findings of the referee. The other cases discuss the question of power in the referee, which is conceded. In the absence of any controlling decision in this circuit, and in view of the conflicting decisions in other circuits, I reach the conclusion that, upon the motion for an order of commitment, for failure, by the bankrupt, to obey the order of the referee to turn over property, or pay over money alleged to be withheld from his trustee, the judge must find, not beyond a reasonable doubt, but by a preponderance of the evidence, that the bankrupt has the present ability to comply with the order. That in doing so he must, giving due weight to the finding of fact by the referee, examine for himself the evidence in regard to the conduct of the bankrupt and all other relevant evidence before and since the passing of the order by the referee. That the order of the referee should find what specific property is in the possession of the bankrupt or under his control, and with a reasonable degree of certainty specify the property which he is ordered to deliver, or, if money is directed to be paid, the order should specify the amount and source from which it is derived.

Guided by these principles, I am constrained to deny the order imprisoning the bankrupt for contempt.

## STILLMAN v. ÆTNA LIFE INS. CO.

(District Court, N. D. Iowa, W. D. March 14, 1917.)

No. 147.

1. INSURANCE ⟨⟩650—ACCIDENT INSURANCE—STATEMENTS IN APPLICATION—ADMISSIBILITY IN EVIDENCE.

Code Iowa, § 1741, declares that all insurance companies or associations shall upon the issuance or renewal of any policy attach or indorse thereto a true copy of any application or representation of the insured which by the terms of the policy is made part thereof or may in any manner affect its validity, but such omission shall not render the policy invalid, but forever precludes the insurer from pleading, alleging, or proving any such application or representation or the falsity thereof, in an action on such policy. What purported to be a copy of the schedule of warranties was indorsed on an accident policy, but there was nothing to indicate that it or the application was signed by the insured; the signature being omitted. *Held*, that the schedule of warranties was not admissible in evidence, and proof of the falsity of the warranties was not available in an action on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1671, 1672.]

2. INSURANCE ⟨⟩650—ACCIDENT INSURANCE—STATEMENTS IN APPLICATION—ADMISSIBILITY IN EVIDENCE.

In such case, the insurer could not, by incorporating in the policy a condition that the statements in the schedule of warranties indorsed thereon were accepted and warranted to be true by the acceptance of the policy, evade the provisions of the Code, and in that manner obviate the necessity of indorsing on the policy the application and warranties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1671, 1672.]

3. INSURANCE ⟨⟩378(2)—ACCIDENT POLICIES—KNOWLEDGE—"AGENT."

Under Code Iowa, § 1750, declaring that the term "agent" shall include any other person who shall in any manner directly or indirectly transact insurance business for any insurance company, and that any officer, agent, or representative of an insurance company who may solicit insurance, procure applications, and issue policies, shall be held to be the "agent" of such insurance company with authority to transact all business within the scope of his employment, anything in the application, policy, by-laws, etc., to the contrary, notwithstanding, an accident insurance company is charged with knowledge of its soliciting agent as to other insurance carried by the insured; such fact being communicated to the agent, though it was not communicated by the agent to the officials of the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 971, 973, 974, 977–997.

For other definitions, see Words and Phrases, First and Second Series, Agent.]

4. INSURANCE ⟨⟩265—ACCIDENT POLICIES—CONSTRUCTION.

Where a rider attached to an accident policy under the head of warranties provided that all statements made by insured in the schedule of warranties should be deemed representations, and no representation unless material or fraudulent should invalidate any claim under the policy, such provision abrogates the earlier clause, declaring, that any breach of warranty in the schedule of warranties should invalidate all claims under the policy and renders it incumbent on the insurer, if desirous of defeating the action on account of the falsity of any statement of warranty to show its materiality.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 560.]

5. INSURANCE ⟸288(1)—ACCIDENT POLICIES—REPRESENTATIONS.
Where it was not contended that accident policies were avoided by the carrying of other insurance, but only because the schedule of warranties did not show that such other insurance was carried, representations as to the carrying of other insurance are immaterial, and their falsity will not defeat an action on the policies.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 660–669.]

6. INSURANCE ⟸90—ACCIDENT INSURANCE—CONSTRUCTION.
In the absence of statute, provisions in an insurance policy that the insurer shall not be bound by any action of its agents in issuing the same unless stipulations be indorsed and signed by other officers are valid.

7. INSURANCE ⟸530—ACCIDENT INSURANCE—POLICIES—CONSTRUCTION.
An accident policy provided, in part 1, for payment of one-half of the principal sum for the irrevocable loss of the entire sight of one eye. Part 13, subsec. E, declared that, when liability was created under the provision of part 1, all insurance should thereupon immediately cease. Part 2 of the policy provided for weekly indemnities. *Held* that, in case of the total loss of an eye, all provisions as to payment of weekly indemnities were rendered inapplicable, and recovery for the amount specified for such injury could not be restricted to some pro rata share of the insured's actual weekly earnings proportionate to the weekly indemnity provided for in the policy.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1309, 1310, 1317.]

At Law. Action by Dr. Wayne L. Stillman against the Ætna Life Insurance Company. Judgment for plaintiff.

The plaintiff, Dr. Wayne L. Stillman, a citizen of Iowa, sued the defendant Ætna Life Insurance Company, a Connecticut insurance corporation doing business in Iowa, in the district court for Woodbury county, that state, to recover damages for the loss of an eye against which he was insured by two accident policies of insurance issued by the defendant to him, in each the principal sum of $10,000. The policies differ only in their date. The petition is in two counts.

In count 1 a copy of the policy (No. B–250446) is attached as Exhibit A, which, so far as applicable to the question for determination, provides:

"Ætna Life Insurance Company.

"Accident and Liability Department.

| | | | |
|---|---|---|---|
| Accumulative | Principal Sum, | First Year, | $10,000.00 |
| Accident Policy | Increasing to | | 15,000.00 |

"In consideration of the premium of sixty and no/100 dollars, and of the statements in the schedule of warranties indorsed hereon, and made a part hereof, which statements the insured makes by accepting this policy and warrants to be true, the Ætna Life Insurance Company, of Hartford, Conn., does hereby insure the person named and described in said schedule for the term of 12 months from the 4th day of March, 1913, * * * against loss, as herein defined, resulting directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means, suicide (sane or insane) not included.

"Single Indemnities.

"Part 1.

"If such injuries alone totally disable the insured, that is, immediately, continuously and wholly prevent him from prosecuting any and every kind of business pertaining to his occupation, and during the period of such continuous total disability and within two hundred weeks from the date of accident result in any one of the losses described below the company will pay the sum

specified opposite such loss, and in addition will pay weekly indemnity for the period of such disability to the date of death or other specified loss at the rate per week provided in part 11-A; or, if such injuries alone result within ninety days from the date of the accident in any of the losses described below without there being continuous total disability as above stated, the company will pay the sum specified opposite such loss.

"Loss of—

* * * * * * * * * *

"J. Entire sight of one eye, if irrevocably lost, one-half of principal sum.

* * * * * * * * * *

"Part 2.

"A. If such injuries shall not result in any of the losses provided for in part 1, but shall alone totally disable the insured, that is, immediately, continuously and wholly prevent him from prosecuting any and every kind of business pertaining to his occupation, the company will pay indemnity at the rate of fifty & no/100 dollars per week, so long as he shall suffer such total disability.

* * * * * * * * * *

"Accumulations.

"Part 6.

"If all premiums are paid annually, the original principal sum hereby insured will be increased ten per cent. in the second and each subsequent year for five consecutive years, until such increase amount to fifty per cent. of the original sum insured, and thereafter, so long as this policy is maintained in force by annual premium payments the amount insured will be the original principal plus the accumulations.

* * * * * * * * * *

"Part 13.

* * * * * * * * * *

"E. Any breach of warranty in the Schedule of Warranties indorsed hereon, or a failure to comply with any of the requirements, contained herein, shall invalidate all claims under this policy. When liability is created under the provisions of Part 1 hereof, all insurance hereunder shall thereupon immediately cease.

"F. An agent has no authority to change this policy or to waive any of its terms, nor shall notice to an agent or to any other person or knowledge of an agent or of any other person be held to effect a waiver or change in this policy or any part of it. No change whatever in this policy and no waiver of its conditions shall be valid unless an indorsement is added hereto signed by the president, a vice president, secretary or assistant secretary of the company expressing such change or waiver.

* * * * * * * * * *

"A rider attached to and made part of the policy, contains the following:

"Warranties.

"All of the statements made by the insured in the schedule of warranties or copy of application indorsed on the policy shall be deemed representations, and no representation, unless material or fraudulent, shall invalidate any claim under this policy."

It is alleged in the petition that the principal sum insured was increased 20 per cent. by the payment of two annual premiums under the policy Exhibit A subsequent to its date, and therefore amounted to $12,000, at the time plaintiff was injured as hereinafter alleged. It is then alleged that on April 14, 1915, the plaintiff while said policy was in full force sustained an injury solely through external, violent, and accidental means, which totally destroyed the sight of his left eye and necessitated the removal thereof by a surgical operation; that due proof of such loss was given by plaintiff to the defendant as required in the policy; that it has neglected to pay such loss; and judgment is asked against the defendant for $6,000, upon said first count of the petition.

The policy set forth in count 2 of the petition is the same, except that it bears date and was issued February 24, 1914; and it is alleged in said count that the principal sum of the policy was increased to the extent of 10 per cent. or to $11,000, by the payment of one annual premium after its issuance. The same allegations are made in this count as to plaintiff's injury and the proof thereof that are made in the first, and judgment is asked against the defendant upon this count for $5,500; and upon both counts for $11,500, with interest thereon.

The case was in due time removed by the defendant to this court upon the ground of diverse citizenship of the parties, and a transcript of the record has been filed herein. The defendant has answered in this court each count of the petition substantially as follows:

That it admits the issuance of the policies of insurance to the plaintiff as alleged in each count of the petition, but says that each of said policies was issued to the plaintiff upon applications made by him to the defendant therefor which contain certain representations, which were warranted to be true, and upon the faith of which each policy was issued, some of which representations are alleged to be untrue and to avoid the policy.

Upon the back of the policy Exhibit A is what purports to be a "schedule of warranties" made by the plaintiff, containing what may be called questions numbered 1 to 20, inclusive. The earlier of the questions upon this policy call for the age, weight, height, and other matters of description of the plaintiff, the person answering, that need not be stated.

The answer to question No. 11 upon Exhibit A is: "I have no other life, accident or health insurance in this company, and no application for other accident or health insurance upon which I have not been notified of the action thereon, except as herein stated." Following is written in typewriting: "Have accident insurance in the F. & C. and I. S. B. Assn." Upon Exhibit B the answer to this question is: "Have accident insurance in this company, No. B-250446."

Upon Exhibit A the answer to the question No. 13 is: "I have never received indemnity for any injury or sickness, except as herein stated." Following this is written in typewriting: "Received benefits from auto accident about a year ago." Upon Exhibit B the answer to this question is: "Have received benefits from other accident companies."

Upon Exhibits A and B the answer to question No. 19 is: "I have not received medical attention within the past five years, except as herein stated." No other question is answered in the "schedule of warranties" upon either policy, and the answers to neither of the schedules purport to be signed by any one, nor is there anything to indicate by whom the purported answers were made.

The original of the application for the policy Exhibit A is in evidence, and it is not signed by the plaintiff, but bears an indorsement which reads as follows: "I recommend the risk. [Signed] J. W. Bell, Soliciting Agent."

A jury is waived in writing, and the cause is submitted to the court upon stipulations of the facts, supplemented by a deposition of defendant's assistant secretary, Edwin C. Bowen.

H. B. Walling, of Anthon, Iowa, and Griffin & Page, of Sioux City, Iowa, for plaintiff.

Sears, Snyder & Boughn, of Sioux City, Iowa, for defendant.

REED, District Judge (after stating the facts as above). The principal defense relied upon by the defendant is that the alleged failure of the plaintiff to answer the questions in the schedule of warranties Nos. 11, 13, and 19, indorsed upon the policies, except as indicated in such answers, invalidates all claims under each of the policies.

[1] There is no dispute that plaintiff on April 14, 1915, while both policies, if valid, were in force, suffered an injury, whereby through

external, violent, and accidental means which alone totally destroyed the sight of his left eye, and unless he is barred by some provision of the policy he is entitled to recover from the defendant the sum specified therefor in each of the policies with interest thereon.

Certain provisions of the Iowa statute have a material bearing upon this question. In 1880, the Legislature of Iowa passed what are now sections 1741 and 1750 of the Code of Iowa (1897), which read in this way:

"Sec. 1741. All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section it shall forever be precluded from pleading, alleging or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

"Sec. 1750. The term 'agent' used in the foregoing sections of this chapter shall include any other person who shall in any manner directly or indirectly transact the insurance business for any insurance company complying with the laws of this state. Any officer, agent or representative of an insurance company doing business in this state who may solicit insurance, procure applications, issue policies, adjust losses or transact the business generally of such companies, shall be held to be the agent of such insurance company with authority to transact all business within the scope of his employment, anything in the application, policy, contract, by-laws or articles of incorporation of such company to the contrary notwithstanding."

The stipulated facts show that J. W. Bell, a district agent of the defendant company at Council Bluffs, Iowa, solicited from the plaintiff both of the policies in suit, received from him the first annual premiums thereon, which policies were renewed by the payment to Bell of a second and third year's premium upon Exhibit A, and a second year's premium upon Exhibit B, for which proper receipts of the company were delivered by him to the plaintiff renewing said policies respectively for said years; but no copy of the applications was indorsed upon either of the policies for such renewals.

Under section 1741 of the Code above set out, unless the insurance company upon the issuance of these policies, or the renewals thereof, attached to said policies or renewals, or indorsed thereon, a true copy of the application or representations of the assured, the insurance company is forever precluded from claiming or proving any such warranties or representations to be untrue or false in an action upon such policies. As before stated, what purports to be a copy of the "schedule of warranties" is indorsed upon each policy; but there is nothing to indicate that the application was ever signed by the plaintiff; nor is there anything to indicate by whom the alleged answers were made to such of the interrogatories as appear to be answered. Is this a compliance with section 1741 of the Code? In Seiler v. Life Ass'n, 105 Iowa, 87, 74 N. W. 941, 43 L. R. A. 537, which was a suit upon life policies of insurance issued in Iowa after the passage of the above stat-

ute, as here, what purported to be a copy of the application was set out or indorsed upon the policy, but the signature of the insured thereto was omitted from such copy, and the trial court refused to permit the introduction in evidence of the application when offered by the defendant because not a compliance with section 1741 of the Iowa Code. There was a recovery by the plaintiff of the full amount of the policy, and this ruling was made the basis of an appeal. The Supreme Court of Iowa said of section 1741 of the Code:

"This section has been often construed. For a quite recent exposition of its meaning we refer to Goodwin v. [Provident Sav. Life Assur. Ass'n], 97 Iowa, 226 [66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411]. It is urged on behalf of the appellant that all of the statements and representations made by the assured were in the copy that was attached to the policy, and that he could not have been prejudiced by the omission of his signature, for he must have known that he signed the original. But it seems to us that the very purpose of the statute was to avoid, so far as possible, any dispute as to the assured's knowledge of the contract. The requirement is that a copy of the application shall be attached. We do not understand this to call for a fac simile, but it certainly demands at least a substantial reproduction of the instrument. The signature is an essential part of the application, and all that is essential in the original should appear in the copy. It will be noted that in the alleged copy it is not stated by whom the original is signed. * * * 'We are of the opinion that the copy of the application attached to the policy, not having the copy of the name of the applicant appended thereto, cannot be said to be a copy of such application, within the meaning of the statute. The signature is the thing which gives force to the application, and, when signed with knowledge of its contents, is conclusive on the insured. We think that the signature of the party to an instrument which receives its vitality solely from such signature is such a substantial part of it that a copy of it must contain such signature.' * * * The trial court was right in holding that the application in this case was no part of the contract, that the statements therein could not be given in evidence."

The court cites with approval Dunbar v. Insurance Co., 72 Wis. 492, 40 N. W. 386, which arose under a statute of Wisconsin, the counterpart of section 1741, and where the signature of the assured was omitted from the copy attached to the policy.

In Continental Ins. Co. v. Chamberlain, 132 U. S. 304, 309, 10 Sup. Ct. 87, 33 L. Ed. 341, this construction of section 1741 of the Code of Iowa was approved; and it was also held that under section 1750 of that Code the agent who procured the insurance must be held to be the agent of the company, and the company chargeable with knowledge of such facts pertaining to the insurance that came to the knowledge of the agent when soliciting the same. Cook v. Federal Life Ass'n, 74 Iowa, 746, 748, 35 N. W. 500; Goodwin v. Assurance Ass'n, 97 Iowa, 226, 235, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411, above; Liquid Acid Co. v. Phœnix Ins. Co., 126 Iowa, 225, 229, 230, 101 N. W. 749.

[2] Notwithstanding the Iowa statute and the decisions of its Supreme Court construing it, it is the contention of the defendant that it may still show a breach by the plaintiff of such conditions of the policy as are incorporated therein to defeat recovery thereon, though the application or "schedule of warranties" is not indorsed upon the policy or attached thereto. But the trouble with this contention (admitting without deciding that it correctly states the law) is that there

are no conditions of the policy, except "the statements in the schedule of warranties indorsed thereon, which statements the insured makes by accepting this policy and warrants to be true." Section 1741 of the Iowa statute was in force when these policies were written, and it is not within the rightful authority of the insurance company to evade the provisions of the statute by a statement in the policy, "which statements the insured makes by accepting this policy and warrants to be true." The statute imposes upon the insurance company the duty of attaching to such policy, or indorsing thereon, a true copy of any application or representations of the insured, which by the terms of the policy are made a part thereof and of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy; and the omission of the company to do so shall "forever preclude it from alleging or proving any such application or representation, or their falsity in any action upon such policy." No amount of discussion can make this provision of the statute plainer or obscure its meaning. The "schedule of warranties" indorsed upon the policy Exhibit A is not therefore admissible in evidence, nor is any evidence that they are untrue or false in any particular.

[3] The application for the policy Exhibit B was made by the plaintiff by letter dated February 14, 1914, to Agent Bell at Council Bluffs, which reads as follows:

"Anthon, Ia., Feb. 14, 1914.

"Mr. Bell—Dear Sir: Will you send me the terms upon an accident policy in the Ætna which costs say $10.00 a month. My policy expires the first few days in March and I am inclined to concentrate my various accident policies into a first-class company. Either let me hear from you in this matter as soon as convenient, or if you should be up in this part of the country come in and see me.

"Yours truly, W. L. Stillman, Anthon, Iowa."

To this letter Agent Bell answered February 17, 1914, as follows:

"I am in receipt of your kind favor concerning the accident insurance proposition, and certainly thank you very much for thinking of me in this connection. I can assure you too, you would make no mistake in confining your insurance entirely to the Ætna, in fact there is no other company in the United States that treats professional and business men as well as the Ætna does. A man does not need to be so badly injured that he can't see, hear or talk to get total disability with us. Then too, as you know, our policy covers septic blood poisoning due to an accident, as well as contact with poisonous substances. You may have noticed that some of the physicians' societies have taken action against some of the companies for not covering blood poisoning due to contact with poisonous substances. They only cover septic blood poisoning due to an accident, that is, if you pricked yourself, or cut yourself, then they would cover you, but would not cover you if you happened to have a hangnail and become innoculated. You have a $60.00 policy with me now. You could double it for $120.00 which would be just $10.00 a month. That would cover you for $20,000 and $100 a week, if disabled. I would be very glad to fix you up a policy of this kind. I don't believe you would make any mistake in cutting out all your insurance and placing it that way in one company. You will have it with an agent who gives his personal attention and best judgment to handling claims of this kind, and our methods are prompt and up-to-date. If you wish to do this I will be glad to send you an additional policy, or put it all in one policy for you, which would probably be better, but in sending you a new policy for the total amount I would, of course, save the accumulations on your policy for this year. As you know, the

policy that you took last year will have 10 per cent. accumulations on it this year. I would add that, of course, to your new policy. If you paid $120 a year this would give you $20,000 and $100 a week for the ordinary accidents and would be just twice as large as the policy you have with me now. Then the policy would of course have the double-up feature and cover your wife, etc., the same as the policy you have. I am sure you will not make any mistake in doing this, doctor, and trust that you can see your way clear to do this. Trusting I may hear further from you concerning the matter and thanking you in advance with best wishes, I remain,

"Yours truly, J. W. Bell."

February 24, 1914, the plaintiff again wrote to Agent Bell as follows:

"Anthon, Iowa, Feb. 24, 1914.

"J. W. Bell, Council Bluffs, Iowa: Inclosed find check for $120. Be so kind as to renew policy B-250446 and issue another of like sort dated even date with this note.

"Yours truly, W. L. Stillman, M. D., Anthon, Iowa."

On February 25th, Agent Bell replied to plaintiff's letter of the 24th as follows:

"Council Bluffs, Ia., Feb. 25, 1914.

"Dr. W. L. Stillman, Anthon, Iowa—Dear Doctor: I am in receipt of your favor inclosing check for the premium on your policy, also in payment of a like amount of additional insurance, and certainly thank you very much. I am taking it for granted you are lapsing your other insurance and putting it all in one good company, the Ætna. I am mailing the same to the home office for approval, and as soon as the policy is returned, I will mail it to you. I am dating this policy Feb. 24th, in compliance with your wishes as expressed in your letter. I certainly think too, you show your good judgment in increasing your insurance with us, as I am sure you will not make any mistake in doing this. Thanking you very much for the favor and any good you can do, with best wishes, I remain,

"Yours truly, J. W. Bell, Agt."

On February 25, 1914 (the same day), Agent Bell wrote a letter to J. M. Parker, Jr., secretary of the defendant company, which is as follows:

"Council Bluffs, Iowa, February 25, 1914.

"Mr. J. M. Parker, Jr., Secy., Hartford, Conn.—Dear Sir: Inclosed herewith I hand you policy B-261682. Dr. W. L. Stillman, together with application, for approval. The doctor is concentrating all his accident insurance in one company and is increasing it to the usual amount he carries, lapsing his other insurance in other companies. The policy he is taking now is to replace one on the F. & C. Company. If there are any amendments to make in the policy, kindly make the same and return immediately, together with return of the application, so I can have the application signed when the policy is delivered, and greatly oblige,

"Yours truly, J. W. Bell."

The application for the policy Exhibit B bears the following indorsement:

"Accident and Liability Department.

"Ætna Life Insurance Company of Hartford, Conn.

"Those portions of policies Nos. *B-250446 and B-261682*, issued to *Wayne L. Stillman*, limiting the total amount of insurance under Accident policies of this Company, are hereby modified to extend said limit to an amount not

exceeding *twenty thousand* dollars, with *one hundred* dollars per week for weekly indemnity, except as such sums shall be increased under the provisions of the double indemnity clause, the surgical operation clause, the accumulative clause, the hospital indemnity clause and/or under the provisions of beneficiary supplements Nos. *98192 and 114130.*

"This extension of limit shall remain in force only so long as the insurance under each of said policies is continued in force. Dated at Hartford, Conn., this the *28th day of February, 1914.* Countersigned A. G. Powers, Policy Writer; J. M. Parker, Jr., Secretary."

The words of this indorsement italicized are typewritten, the rest are in print. This indorsement or slip appears to have been attached to the application at the home office of the company at Hartford, Conn., on receipt of the letter of Agent Bell addressed to the secretary of the company on February 25, 1914.

On February 5, 1915, the plaintiff again wrote to Agent Bell as follows:

"Anthon, Iowa, Feb. 5th, 1915.

"J. W. Bell, Council Bluffs: I find to-day upon my tickler a reminder that the Ætna policies are nearly due again. I have taken out in addition something like $25,000.00 in other companies. Mostly of cheaper grade, so want fact to appear in the new policies when you issue them. Send me the notice when due and I will forward check.

"Very truly yours, W. L. Stillman."

On February 8, 1915, Agent Bell replied to said letter of February 5th as follows:

"Dr. W. L. Stillman, Anthon, Iowa—Dear Doctor: I am in receipt of your favor advising me you had taken additional accident insurance, and in reply beg to advise this will make no difference to the Ætna, especially if you are not overinsured. Your premium is due the 24th of this month, could increase your insurance with this company if you wished to do so. We write up to $25,000 and of course if you wished me to do so, could raise your insurance accordingly. With best wishes I beg to remain,

"Yours truly, J. W. Bell."

From this correspondence and the additional stipulation of facts it appears that the second policy in suit, Exhibit B, was procured by defendant's agent Bell upon an application by letter from the plaintiff to him dated February 14, 1914, in response to which Agent Bell prepared an application for the policy which he (Bell) signed and forwarded to the company, and which the plaintiff never saw and never signed, though what purports to be a copy is indorsed upon the policy; and it was the duty of the defendant, under section 1741 of the Iowa statute, to attach to the policy, or indorse thereon when it was issued, a true copy of such representations or warranties, and the omission to do so forever precludes the defendant from showing such statements or warranties, if any, to be untrue, to defeat an action upon the policy. Besides, under section 1750 of the Iowa Code, the agent Bell who prepared the application for this policy collected the premium thereon and procured the policy for the plaintiff and knew from the letter of plaintiff the insurance carried by him, and defendant is chargeable with such knowledge as the agent acquired in the transaction leading to the issuance of that policy, notwithstanding anything in the policy to the contrary, and is now estopped from denying the

knowledge so acquired by its agent Bell in the transaction leading to the issuance of the policy Exhibit B, its renewal, and the renewal of the policy Exhibit A in February and March, 1915. St. Paul Fire & Marine Ins. Co. v. Sharer, 76 Iowa, 282, 41 N. W. 19; Key v. Des Moines Ins. Co., 77 Iowa, 174–177, 41 N. W. 614; Liquid Acid Co. v. Phœnix Ins. Co., 126 Iowa, 225, 229, 230, 101 N. W. 749; Kirkpatrick v. London Guarantee Co., 139 Iowa, 370, 115 N. W. 1107, 19 L. R. A. (N. S.) 102; Wilson v. Insurance Co., 143 Iowa, 458, 462, 122 N. W. 157; Continental Ins. Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341.

In Continental Ins. Co. v. Chamberlain, 132 U. S. 304, 310, 10 Sup. Ct. 87, 89 (33 L. Ed. 341), above, a suit upon a life insurance policy issued in Iowa, the Supreme Court of the United States said of sections 1741 and 1750 of the Iowa statute:

"The object of this legislation is manifest. But if any doubt on the subject existed, it is removed by the case of St. Paul Fire & Marine Ins. Co. v. Sharer, 76 Iowa, 282, 286 [41 N. W. 19, 20], in which it was said: 'The purpose of the statute was to settle, as between the parties to the contract of insurance, the relation of the agents through whom the negotiations were conducted. Many insurance companies provided in their applications and policies that the agent by whom the application was procured should be regarded as the agent of the assured. Under that provision they were able to avail themselves, in many cases of loss, of defenses which would not have been available if the solicitor had been regarded as their agent, and many cases of apparent hardship and injustice arose under its enforcement, and that is the evil which was intended to be remedied by the statute, and it ought to be so interpreted as to accomplish that result.' This statute was in force at the time the application for the policy in suit was taken, and therefore governs the present case. It dispenses with any inquiry as to whether the application or the policy, either expressly or by necessary implication, made Boak the agent of the assured in taking such application. By force of the statute, he was the agent of the company in soliciting and procuring the application. He could not, by any act of his, shake off the character of agent for the company. Nor could the company by any provision in the application or policy convert him into an agent of the assured. If it could, then the object of the statute would be defeated. In his capacity as agent of the insurance company he filled up the application—something that he was not bound to do, but which service, if he chose to render it, was within the scope of his authority as agent. * * * His act in writing the answer, which is alleged to be untrue, was, under the circumstances, the act of the company; * * * and, by force of the law of the state where such negotiations take place, is the agent of the company, and not, in any sense, an agent of the applicant."

This rule is followed in McMaster v. New York Life Ins. Co., 183 U. S. 25, 38, 22 Sup. Ct. 10, 46 L. Ed. 64, decided at the same term that Northern Assurance Co. v. Grand View Building Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, hereinafter referred to, was decided. There seems to be no doubt, therefore, that Bell was the agent of the defendant company in procuring the policy of February 24, 1914, Exhibit B, and that defendant is chargeable with all the knowledge acquired by him from the plaintiff in that transaction. In so holding there is nothing that violates the rule forbidding parol evidence to change the terms of a written contract—a question quite apart from any involved in this controversy.

[4] However, the rider attached to both policies under the head of "Warranties" provides:

**"All of the statements made by the insured in the schedule of warranties or copy of application indorsed on the policy shall be deemed representations, and no representation, unless material or fraudulent, shall invalidate any claim under this policy."**

This provision is later and inconsistent with the provisions of clause E of part 13 of the policy, which provides, "Any breach of warranty in the schedule of warranties indorsed hereon, or a failure to comply with any of the requirements, contained herein, shall invalidate all claim under this policy," and abrogates that clause, and the burden therefore is upon the defendant to prove the materiality of representations and their falsity, if material and false, of which there is no competent proof in this case; the "schedule of warranties" attached to the policy Exhibit B, not having been made or signed by the plaintiff, are not admissible in evidence, nor is any evidence or proof of their materiality or falsity admissible.

[5] The facts stipulated also show that at the time of the accident, April 14, 1915, the plaintiff was carrying other insurance than the two policies in the defendant company. But there is no issue that the policies were avoided by the carrying of other insurance, and only that they were avoided because the "schedule of warranties" did not show the other insurance carried. Nor does either policy by any of its provisions forbid the carrying of other insurance, and it is only alleged to be avoided by the failure to answer the questions in the "schedule of warranties," or a false statement therein. The stipulation as to the carrying of additional insurance by the plaintiff is therefore deemed quite immaterial.

[6] Counsel for the defendant cite numerous authorities which it claims support its contention that the knowledge by its agent Bell of the insurance carried by the plaintiff, and not shown in the "schedule of warranties," is not binding upon it under the terms of clause F of part 13 of the policy. Principal among these is the case of Northern Assurance Co. v. Grand View Building Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, above. That case, however, arose in Nebraska, and was not influenced by any statute such as that in Iowa above set out. It may be conceded that in the absence of a controlling statute it is competent for an insurance company to relieve itself from all obligations to pay its losses, by stipulations printed in its policies that it shall not be bound by any act of its agents in issuing the same unless such stipulations are indorsed thereon and signed by the president, secretary, or other chief officer of the company, and if such a case shall arise in this court it will be its duty to follow the decision of the Supreme Court in Northern Assurance Co. v. Grand View Building Ass'n, above. That case and the cases following it are therefore inapplicable to the questions involved in this case and need not be further noticed.

[7] The defendant further urges that the utmost the plaintiff is entitled to recover, if entitled to recover at all, would be some pro rata share of his actual weekly earnings proportionate to the weekly indemnity provided for in the policies. I am unable to perceive that the

weekly indemnity provision of the policy has anything to do with this case, for the total loss of the sight of an eye resulting solely from external, violent, and accidental means, as specified in each of the policies, is a fixed amount under each that the defendant shall pay for such injury, and the last clause of subsection E of part 13 of the policy, which reads, "When liability is created under the provisions of part 1 hereof, all insurance hereunder shall immediately cease," eliminates that question in all cases where a total loss arises under the policy.

A weekly indemnity is recoverable under the policies only when the insured is wholly or partly disabled because of the accident from pursuing his ordinary occupation, when the insured may recover the stipulated weekly indemnity for such disability. There is no claim for such disability to pursue an occupation in this case, but a single claim for the specified indemnity provided for the total loss of the sight of an eye in each policy. If defendant is not liable upon these policies, then seemingly the principal purpose of an insurance policy in Iowa is to enable the company to collect and retain the premiums it charges for insurance; but, in case a loss arises under the policy, to avoid the payment thereof if it shall deem it advisable to do so.

Under the issues, the terms of the policies, and the facts as stipulated, I can reach no other conclusion than that plaintiff is entitled to recover upon each of the policies in suit that part of the principal sum as increased by the accumulations specified in each for the loss of plaintiff's eye, the aggregate amount of which is $11,500, with interest at 6 per cent. from the date the amount was payable after the proofs were given to the defendant, and judgment is ordered therefor; to which judgment and order the defendant excepts, and is given 30 days from the filing of this opinion to settle and file a bill of exceptions.

It is ordered accordingly.

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## In re GEORGIA STEEL CO.

(District Court, N. D. Georgia. March 8, 1917.)

No. 402.

1. CORPORATIONS ⟸314(3)—CONTRACTS—VALIDITY—COMMISSION TO OFFICER.
The payment to an officer of a corporation of a commission on the sale of property to the corporation, which commission the vendor had agreed to pay before the agent became an officer of the purchasing corporation, and which was recorded in the minutes of the meeting of the vendor's board of directors and openly mentioned by the vendor's officers and other representatives in communications with the representatives of the purchaser, was not the payment of a secret commission, and did not render the sale either voidable or void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1397.]

2. BANKRUPTCY ⟸140(2)—SALES—FRAUD—REPRESENTATIONS AS TO VALUE—EXAMINATION BY PURCHASER.
Statements made by the president of the vendor corporation and by his son as to the value of mining lands sold by it and as to the quantity

of mineral thereon, though exaggerated, do not defeat the vendor's claim against the purchaser's trustee in bankruptcy on the bonds given for the purchase price, where the evidence showed that the representations were not knowingly false, but were believed to be true, and that the purchaser had the amplest opportunity to examine the property by its experts without objection by the vendor, and where two years afterward the purchaser, after defaulting in the interest on the bonds, made important concessions to the vendor to get the mortgage reinstated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 219.]

3. VENDOR AND PURCHASER ⊂⊃44—FRAUD—DEGREE OF PROOF.
The evidence to establish fraudulent misrepresentations in the sale of land must be clear, unequivocal, and convincing, going beyond a mere preponderance in plaintiff's favor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 69–76.]

4. BANKRUPTCY ⊂⊃228—ORDER OF REFEREE—REVIEW BY COURT.
While the findings of the referee in bankruptcy on questions of fact will not be interfered with unless clearly erroneous, the court must form its own conclusions where the referee's conclusions were drawn largely from undisputed facts and appear to be clearly erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387.]

5. BANKRUPTCY ⊂⊃308—CLAIMS—BONDS—PRIVITY.
Where a foreign corporation contracted to purchase property in excess of the amount it could legally hold and organized a domestic corporation to take the property, there was sufficient privity between the two to enable the vendors to claim against the trustee in bankruptcy of the domestic corporation on the bonds given for the purchase price secured by mortgage on the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496–507.]

In Bankruptcy. In the matter of the Georgia Steel Company, bankrupt. On petition of the Georgia Iron & Coal Company and others against O. T. Peoples, as trustee in bankruptcy, to review an order of the referee disallowing petitioner's claim against the estate. Order reversed, and claim allowed.

See, also, 224 Fed. 517.

Anderson & Rountree and King & Spalding, all of Atlanta, Ga., for bondholders and trustee for bondholders.

Chambliss & Chambliss, of Chattanooga, Tenn., Paul F. Akin, of Cartersville, Ga., and Sam. B. Adams, of Savannah, Ga., for trustee.

NEWMAN, District Judge. The matter for consideration here now grows out of an application to review a certain decision of C. D. McCutchen, referee in bankruptcy, as to the allowance of a claim made by certain bondholders and the trustee for the bondholders to prove their bonds and to have a lien on the property of the Georgia Steel Company declared in their favor. Perhaps the question here would be better stated by an order made by the referee in the case, which is as follows:

"Georgia Iron & Coal Co., Joel Hurt, Mrs. Joel Hurt, Mrs. Mabel Bickerstaff, Mrs. Eva L. Simms, H. L. Woodruff, C. E. Buek, Equitable Trust Co., of New York, Bondholders, Trust Company of Georgia, Trustee for the Bondholders under the Mortgage, vs. O. T. Peoples, Trustee in Bankruptcy.

"Proof of Claim of Secured Debt and Objections Thereto, Before Honorable C. D. McCutchen, Referee in Bankruptcy.

"The above-named bondholders and the trustee therefor having filed in the office of the referee a proof of claim against the estate of the above-named bankrupt, as a secured claim, secured by a mortgage on the property of the bankrupt in the sum of $897,000, principal, besides interest at the rate of 5 per cent. per annum from October 1, 1910; the alleged indebtedness being claimed as the unpaid purchase price of the property of the Georgia Iron & Coal Company now standing in the name of the bankrupt; and the evidence of said claimed indebtedness being said bonds of the bankrupt held by the above-named bondholders secured by a trust mortgage; and said claim, bonds, and mortgage having been objected to by the trustee in bankruptcy, and the objections having come on for hearing before me, and testimony having been offered in behalf of said bondholders and the trustee therefor in support of said claim, and by the trustee in bankruptcy in opposition thereto; and due deliberation having been had, and after hearing C. L. Anderson, D. W. Rountree, and A. C. King, Esquires, attorneys for said bondholders and the trustee therefor, in support of said claim and mortgage, and S. M. Chambliss and Paul F. Akin, Esquires, attorneys for the trustee in bankruptcy, in opposition thereto: It is ordered that the said claim and mortgage be, and the same are hereby, disallowed and the objections thereto sustained, and the several claims of each of the said bondholders and the trustee therefor are disallowed and the objections thereto sustained."

The referee, in his certificate goes thoroughly and elaborately into the questions involved in the case. On the objection of the trustee in bankruptcy, as will be seen, the referee refuses to allow the bonds to be proven. In order to reach this conclusion the referee heard a large amount of testimony, pro and con, heard extensive argument by counsel, and made a very elaborate report and opinion on the facts and legal questions involved in the certificate filed by him in the case.

The bonds were given for the purchase money of the property of the Georgia Iron & Coal Company, sold by it to the Southern Steel Company, a foreign corporation, the purchasers subsequently becoming incorporated as the Georgia Steel Company, a domestic corporation, because of the difficulty of a foreign corporation holding lands to the amount necessary to carry out the purchase and to the extent involved in the purchase.

The objections to the proof of the bonds were upon the grounds, stating them briefly and without quoting:

First, that there was misrepresentation and fraud as to the value of the property sold by the Georgia Iron & Coal Company to the vendee on the part of the vendor company; second, that there was secret commissions paid by the vendor company to certain officers of the vendee company for the purpose of bringing about the sale, which were fraudulent and rendered the contract invalid and unenforceable.

The Georgia Iron & Coal Company sold a very large amount of property, consisting of tracts of land in various counties in North Georgia, the land conveyed amounting in all to something like 50,000 acres. One part of the property sold was property supposed to contain coal, and which had been largely mined for coal, and was then being

mined. A large amount of appurtenances and outfit which are usually attached to coal mining properties were included in one part of the state, in Dade county mainly, and another part, containing iron ore, in other counties, and especially and principally in Bartow county. A full description of all this property is set out in the pleadings and the proof, and it is unnecessary to refer to it more particularly in deciding the questions which are here for determination.

It appears that in the spring or summer of 1906, the Georgia Iron & Coal Company had become considerably indebted, and its creditors were pressing it to some extent for the collection of their debts. A creditors' committee, it seems, was formed, consisting of Mr. Charles E. Currier, president of the Atlanta National Bank, Mr. Ernest Woodruff, of the Trust Company of Georgia, and Mr. Thos. D. Meador, vice president of the Lowry National Bank. Mr. Meador seems to have been intrusted by that committee, acting apparently through Mr. Currier, with the task of selling the properties of the Georgia Iron & Coal Company. Mr. Meador, from the evidence, seems to have gone about the work earnestly, and in doing so secured the services of one C. E. Buek, whom it is said, in turn secured the services of one Oakleigh Thorne, to assist him in making the sale. It is to these two last-named parties, Buek and Thorne, that it is claimed the secret commissions were improperly paid.

Mr. Meador proceeded with the work of making a sale, and finally made a sale on September 12, 1906, to the Southern Steel Company. He seems to have been dealing mainly with Moses Taylor and R. B. Van Cortland, as representatives of the Southern Steel Company. Meador made the contract for the sale of all the properties apparently for an amount and on terms which he thought would be satisfactory to Mr. Joel Hurt, who was the main representative of the Georgia Iron & Coal Company and the person mainly interested in it and in the sale. After Meador had made the sale to the Southern Steel Company and when Mr. Hurt heard of the sale, he very earnestly objected to the sale and refused to carry it out, declining positively, it seems, to execute the contract, claiming that Meador did not have the authority to make the sale, and that the terms agreed upon were not satisfactory to him.

It appears clearly from all the evidence that Hurt protested vigorously against the sale made by Meador. It seems that Hurt, at the time he heard of the sale by Meador, was in Cincinnati, and he says in his testimony that when he heard of it he wired Meador at his hotel in New York, protesting against any attempt of a sale of these properties by him. He says also:

"I wired George (that is, his son George Hurt) to follow up Woodruff and Meador and protest to both of them against any interference on their part with the sale of these properties; that I was then negotiating at a price I had no idea they would obtain, no such price, I think, is my recollection. I sent several telegrams to him and to Mr. Meador, all protesting. At the same time I sent a telegram to Mr. Currier, asking him if he had given Meador any authority to withdraw it, because I would not permit such a sale to go through. Meador wired me finally that he had perfected a sale, and I wired him back to notify the parties that I would not allow them to receive the property, and protested that he hadn't the authority. I wanted him to notify them—to do me that much service to notify them I wouldn't consent to a

sale of the property, and he wired me that he had notified the parties but that it was after he had made the sale. So we met in Atlanta."

Mr. Hurt then, in his testimony, described a visit to Mr. Currier and his protesting against the sale and the authority he was supposed to have given Meador.

Mr. George Hurt, in his testimony, says that he was in New York at the time his father heard of the sale by Meador, and says his father wired him to put Mr. Meador on notice that such a trade as proposed would not be consummated, and Mr. Meador had better not bind himself to it. He says that was on September 10, 1906, and that he saw Meador and notified him as requested, and says that Mr. Meador told him, on September 12th, that he had made the trade. George Hurt's testimony shows that he protested earnestly to Mr. Meador, and also to Mr. Ernest Woodruff, who seems to have been in New York assisting Mr. Meador, against the trade being consummated and against their right to consummate it.

At this time Mr. C. P. Perin, at the instance, it seems, of the Southern Steel Company, came to Atlanta for the purpose of inducing Mr. Hurt to accept and comply with the contract of sale made by Mr. Meador with the Southern Steel Company, and after a number of interviews and considerable discussion and negotiation, such changes were finally made in the proposed contract of sale as resulted in Mr. Hurt's agreeing to the sale, and on October 10, 1906, an agreement was entered into between Hurt, president of the Georgia Iron & Coal Company, and the Southern Steel Company, in pursuance of which the bonds which are the subject-matter of this litigation were issued.

During these negotiations there were two letters written, that are now in evidence, which, it seems to me, throw light on this whole matter, one written from Atlanta by Mr. Meador, who had then returned from New York where this sale was made, to Mr. Moses Taylor, in New York, and the other from C. P. Perin, who was, as stated, then in Atlanta, to Mr. Taylor, in New York. They both show one outstanding fact that is to me very material in the consideration of this case and the two questions involved. This fact which is so prominent and to a large extent controlling here is that Hurt was not sufficiently anxious for the sale made by Meador to be consummated to have induced him to become a party to any misrepresentations or fraud, but his unwillingness to accept and consummate Meador's trade is inconsistent with the idea of his using the means to bring about the sale which are attributed to him. The letters to which I refer are as follows:

"Atlanta, Ga., Sept. 16, 1906.

"Mr. Moses Taylor, New York, N. Y.—Dear Sir: Carrying out the notice to me, which I read to you over the phone before leaving New York. Mr. Joel Hurt says that the trade for the iron properties had been made without his consent and that he will not allow it to go through as agreed to by me and Mr. Currier.

"He claims, that notwithstanding he signed authority to Mr. Currier, for the Georgia Iron & Coal Company, and that said authority was confirmed by the board of directors of said company, that notwithstanding he agreed at the directors' meeting to have a stockholders meeting called, in case the attorney of the company deemed it necessary for the purpose of confirming

this authority to Mr. Currier, as a matter of fact he failed to do so, and the stockholders have not authorized the authority to Mr. Currier.

"Mr. Hurt now claims that he will recommend to the stockholders not to confirm the sale, and if they fail to confirm it, it cannot be made legally. Considering these objections of Mr. Hurt, and the difficulties they bring about, I have taken it up with Mr. Hurt, to see if I could not satisfy him, and find the objections to apply to the royalty, sinking fund, the land titles and the live stock, and he consents that if the contract is made to read, viz.:

" 'Royalty brown ore 25 cts. per ton for first 150,000 tons.

" 'Royalty brown ore 50 cts. per ton for balance.

" 'Royalty manganese 10 per cent. of market price, and applied to sinking fund for bonds each year, the minimum of which shall be for:

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| First five years | $25,000 each year. |
| Second five years | $50,000 each year. |
| Balance of life of bonds | $62,500 each year. |

" 'Land titles shall be delivered to attorneys at once, and such as the company holds shall be accepted, or the whole declined by October 1, 1906.'

"That the live stock belonging to company shall be taken as part of quick assets, and paid for cash.

"It is important that possession should be taken at once to preserve the organized labor, and he also requires that all improvements on property shall be charged to the purchaser from date (September 12), and that possession should be taken by October 1, 1906, and that with a further agreement about commissions which I will take up with Mr. Buek, he will consent to closing the trade.

"The difference in the agreement which I signed and this, as I understand it, amounts only in actual money to the concession of the value of the live stock: the difference in royalty being applied to sinking fund being only a question of an advance payment on the bonds.

"The question of the land titles, since the company has full abstracts of titles, can be easily considered by attorney within the time prescribed. The live stock is largely used on the company's farms, and is really not a part of the mining outfit. The question of paying for improvements is important for the reason that the force of mechanics and other operatives would become scattered and disturbed if they were to stop these improvements.

"I wish you to understand that so far as Mr. Currier is concerned, he stands in good faith by the authority given me in the telegrams which I exhibited to Mr. Wickersham, to make the agreement from, and so far as I am concerned, I stand by the trade according to the authority detailed to you at the time the agreement was made.

"Considering the importance of this transaction, I feel that the difference is so small that it is better to yield than to undertake to enforce the agreement by litigation. The cost of lawyers would be more than the money involved, and since you are buying the property at a low price, you can afford to be liberal in closing it up. I think Mr. Hurt should indorse my agreement without objection, but since he will not do so, the matter is submitted to you, and I trust it can be arranged by wire in direction to Mr. Buek to come here and close it up.

"I very much regret having to make such a report to you."

"Very truly yours, Thos. D. Meador.

"Please wire me that a majority of your board has agreed to vote for this purchase at next meeting.

"I mail copy of this to Mr. Buek."

"Atlanta, Ga., Sept. 21, 1906.

"Moses Taylor, Esq., President, 30 Pine Street, New York City—Dear Sir: Since last Monday I have been with Buek and Schuler either at Chattanooga, Gadsden or Birmingham. On receipt of Mr. Meador's letter, we thought it best to come here and try our hand upon Mr. Hurt. We have wired you per inclosed copy, and I hope you will be able to start a man in this direction as early as possible to examine the titles.

"If Strong and Cadwalader have no one available for this work, I suggest your employing King, Spalding & Little, 1403 Empire Bldg., Atlanta, Ga.

"We have gone over Mr. Hurt's objections in the presence of Mr. Meador, and I am convinced that Mr. Currier would have a good deal of difficulty in proving his authority to execute the contract in the face of Mr. Hurt's protest. As Mr. Hurt owns 80 per cent. of the stock, a legal ratification by the stockholders of the action of the board of directors in selling the property could not be obtained without his consent.

"Mr. Hurt is to hand me this evening, which I will mail at the earliest possible moment, the form of contract which he is willing to sign. The essential feature of his modification of contract is first an increase in the payments into the sinking fund; second, payment for the live stock, which amounts to about $7,000.00; third, the increase in the royalty upon the manganese ore from 5 cts. per ton to 10% of the selling price.

"This last feature is immaterial as the manganese mines can be leased at $1.00 per ton royalty.

"Hurt evidently has some bona fide firm in Cincinnati who are prepared to reorganize his company. I judge Rogers, Brown & Company have found the capital for him. After looking over the ore situation at Bartow, where I shall spend the next two days, I can advise you as to the advisability of making any concession. Buek and I feel that we should have this ore, if it can be secured. Fortunately there are very few contracts out for the sale of ore. The furnace, however, is sold for the next six months at figures which they state are the top of the market. They will submit their contracts this evening for both ore and pig iron.

"I shall leave Cartersville for Birmingham Sunday night, spend Monday in Birmingham, and will be in New York on Friday. Mr. George Schuler will attend the meeting and wishes to bring up the question of working capital for the three furnaces plants.

"I am, yours very truly, [Signed] C. P. Perin."

"P. S. The Schulers are not in favor of the Ga. purchase. C. P. P."

In the letter from C. P. Perin to Moses Taylor, it will be seen, he says:

"Hurt evidently has some bona fide firm in Cincinnati who are prepared to reorganize his company. I judge Rogers, Brown & Company have found the capital for him."

[1] This brings us naturally and logically to the consideration of the question, first, as to whether the matter of the commissions paid by Meador, or through Meador to Buek and Thorne, are sufficient to vitiate this sale and render invalid the bonds and the deed of trust given to secure the same.

In the first place, these commissions were arranged for by Meador entirely, so far as the evidence shows, without the knowledge of the officers of the Georgia Iron & Coal Company, and especially without the knowledge of Mr. Hurt, the one mainly interested in the same. It seems that Meador first arranged with Buek, and Buek, according to the claim here, with Thorne. Now, the arrangement that Meador had with Buek, according to Meador's testimony, was some time before the trade was consummated. Meador says that he and Buek negotiated for quite a while working up the trade. He did not remember exactly when they had a definite understanding about commissions.

Looking first at whether or not these commissions were secret, let us see what occurred. The first time the commissions were mentioned, I find, is in the letter from Meador to Moses Taylor, on September 16th. Of course this was after Meador's sale had been made, but be-

fore the final sale by Hurt was made. In that letter he says, after stating that Mr. Hurt wanted certain things done, "and that with a further agreement about commissions which I will take up with Mr. Buek, he will consent to closing the trade." This shows an utter lack of desire to keep the matter of commissions a secret. On the contrary, it shows that it was being treated by Mr. Meador as a matter about which there was no secrecy at all, and which there was no harm in mentioning to Mr. Taylor, the purchaser. It could mean only one thing, it seems to me, and is sufficient, of itself, to show the entire publicity of the matter, so far as Meador was concerned, at least. In addition to that, it seems that in 1908, some question arose about deferring the payment of the interest on certain bonds, and George Hurt, the son of Joel Hurt, wrote to Mr. Chambliss, in Chattanooga, and in his letter spoke of certain bonds as having been given to Buek as commissions in the matter. George Hurt was representing his father in the matter, and was well known to be connected with the whole matter of the managing of the properties and of the sale of the same. It is unnecessary to go into the matter treated of in the letter from George Hurt to Chambliss. It is sufficient to say that George Hurt, in his letter, made no secret of the matter at all, but spoke of it as if it was a well-known and well-understood thing that Buek had received certain bonds in connection with the sale of the property.

In addition to all this, the whole matter was placed on the minutes of a meeting of the board of directors of the Georgia Iron & Coal Company held on January 3, 1907, as follows:

"Resolved, that the president of this company be, and he is, hereby authorized and directed to deliver to C. E. Buek as commission for aiding and effecting sale of the properties of this company as per contract of Oct. 10, 1906 with the Southern Steel Company, 45 of the first mortgage bonds of the Georgia Steel Company, which are to be received by this company in part payment for said properties, said 45 bonds to be numbered 956 to 1000, inclusive, and delivery of same to said Buek to be whenever this company shall have arranged with the holders of the same as security for their surrender to this company."

There is very little testimony as to whether the bonds supposed to go to Thorne really went to him. As I understand it, Buek stated to C. P. Perin, a representative of the Southern Steel Company, that he did not intend to keep his bonds. It may be stated right here that Perin knew about the matter, and was satisfied with Buek's statement about it.

When they came to close up the sale after it had been effected in October, 1906, Meador called Hurt's attention to this commission, or at least it came up between them, and Hurt protested that $60,000 was too much, and finally agreed to pay $45,000 in bonds, and the $45,000 in bonds seems to have been delivered. Exactly how they were delivered is a little doubtful, but it would seem that Meador's were probably delivered to him in person, or delivered to him through a representative of the Trust Company of North America, who undoubtedly received the bonds for Buek and Thorne, as it seems from the testimony.

It is perfectly clear from the evidence that the negotiations between Meador and Buek occurred long before Buek became connected, as an

officer, with the Southern Steel Company. That he subsequently became an officer of the Southern Steel Company would hardly be sufficient to annul this whole transaction.

What impresses me most with reference to the insufficiency of this matter of secret commissions to void the transaction is the entire openness of the whole matter, as I have indicated, the entire lack of any concealment about it being to me clear evidence that nothing wrong was intended, or supposed to be attached to this part of the transaction. The referee says:

"I am forced to the conclusion that the commissions paid were of such character that, under the law, the payment would render the contract voidable if not void."

I am wholly unable, after the most careful consideration, to agree with him about this. I do not believe that they were "secret commissions" in any proper view of that term.

[2] The next question is whether there was such conduct in reference to the value placed upon the property sold as would justify the referee in taking the view he did of the transaction. The referee quotes sections 4113 and 4114 of the Code of Georgia of 1910, and says his finding is made on each of the grounds of misrepresentation as to the property. These sections are:

"Sec. 4113. Fraud may exist from misrepresentations by either party, made with design to deceive, or which does actually deceive the other party; and in the latter case such misrepresentation voids the sale, though the party making it was not aware that his statement was false. Such misrepresentation may be perpetrated by acts as well as words, and by any artifices designed to mislead. A misrepresentation not acted on is not ground for annulling a contract.

"Sec. 4114. Concealment of material facts may in itself amount to a fraud—

"1. When direct inquiry is made, and the truth evaded.

"2. When, from any reason, one party has a right to expect full communication of the facts from the other.

"3. Where one party knows that the other is laboring under a delusion with respect to the property sold or the condition of the other party, and yet keeps silent.

"4. Where the concealment is of intrinsic qualities of the article which the other party, by the exercise of ordinary prudence and caution, could not discover."

The case of Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678, seems to me to state the law applicable to and really controlling in this case. It was a case of the sale of a mine and an attempt to set aside the sale. While the referee here, doubting his authority to make a decree of rescission, only refused to allow the collection of the balance due on the bonds under this mortgage, still he held that the sale was invalid in such way as that a court of equity, under a proper proceeding, would have decreed a rescission. The rule laid down in the Silva Case is:

"In order to rescind a contract for the purchase of real estate on the ground of fraudulent representation by the seller, it must be established by clear and decisive proof that the alleged representation was made in regard to a material fact; that it was false; that the maker knew that it was not true; that he made it in order to have it acted on by the other party; and that it was so acted upon by the other party to his damage, and in ignorance

of its falsity and with a reasonable belief that it was true. Statements made by the seller of a speculative property like a mine, at the time of the contract of sale, concerning his opinion or judgment as to the probable amount of mineral which it contains, or as to the character of the bottom of the ore chamber, or as to the value of the mine, if they turn out to be untrue, are not necessarily such fraudulent representations as will authorize a court of equity to rescind the contract of sale. The fact that a representation made by a seller was false raises no presumption that he knew that it was false. When the purchaser of a property undertakes to make investigations of his own respecting it before concluding the contract of purchase, and the vendor does nothing to prevent his investigation from being as full as he chooses, the purchaser cannot afterwards allege that the vendor made representations respecting the subject investigated which were false."

These are quotations from the headnotes of the case, but the court says in the opinion that:

In a case like this "the burden of proof is on the complainant; and, unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character the complainant must show by clear and decisive proof: First, that the defendant has made a representation in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not actually believed by the defendant, on reasonable grounds, to be true; fourthly, that it was made with intent that it should be acted on; fifthly, that it was acted on by complainant to his damage; and sixthly, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

[3] Now, the evidence to establish these must be clear, unequivocal, and convincing proof, going beyond a mere preponderance in the plaintiff's favor necessary to establish actual fraud. Atlantic Delaine Co. v. James, 94 U. S. 207, 24 L. Ed. 112; Maxwell Land-Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; Marsh v. Cortis, 150 Fed. 121, 80 C. C. A. 75; Thurston v. Reed (D. C.) 229 Fed. 737, 745.

I do not know exactly what view of the law the referee had. In his certificate he cites the Silva Case as having been brought to his attention, but says it is distinguished in Kell v. Trenchard, 142 Fed. 16, 73 C. C. A. 202. Speaking of certain statements made by Silva, in the Silva Case just referred to, in the opinion by Mr. Justice Lamar, it is said:

"Such statements are not fraudulent in law, but are considered merely as trade talk, and mere matters of opinion, which is allowable. Gordon v. Butler, 105 U. S. 553 [26 L. Ed. 1166]; Mooney v. Miller, 102 Mass. 217."

Any statements made by Hurt would not be false or fraudulent in the referee's own view of the matter, according to what he says of him in his certificate, even as modified and explained in his amended certificate. In his certificate, in speaking of Joel Hurt and George Hurt, the referee says:

"Their testimony negatives all idea of any intention on their part to deceive, or to make or permit to be made any representations that they did not believe to be justified by such belief. A careful reading of the testimony clearly develops the fact that both these witnesses base their confidence in the property largely upon theory, and they have to a large extent disregarded the

proven results of actual experience with the property. They show unbounded confidence in the existence of vast quantities of mineral still existing in the property and not yet exhausted, and this belief seems to amount to an obsession. Their testimony, viewed in the light of all the other proven facts in the case, leads forcibly to the conclusion that this mental attitude has had a tendency to blind them as to the force and weight which must be given to the negative results of the investigations made on the property and actual experience in operating it."

The referee further says:

"There is very forcible evidence of a keen desire on the part of the management of the Georgia Iron & Coal Company to obtain the most advantageous price possible for the property, and, coupled with the findings of fact elsewhere set out, what amounts to very strenuous "puffing" of the property. This is particularly true as to the coal property, and to somewhat less degree to the iron ore."

There is no doubt whatever from the evidence that the Southern Steel Company had the amplest opportunity to examine this property. They had experienced experts to go over it, and there seems to have been not the slightest objection to their making a very full examination and to giving them all the facts connected with the property.

The Silva Case has not been reversed or criticized in any way by the Supreme Court, and, taking it as authority upon the legal question at issue here, is the proof in this case sufficient to justify the conclusion of the referee? I have stated the rule as laid down in that case and the extent to which the proof must go. It must be beyond a mere preponderance of the evidence, to justify the rescission of a contract such as this. It must demonstrate the facts necessary to justify a rescission.

If the Hurts had the unbounded belief in the value of this property which must be accorded to them, what else was done by them, or by their corporation, or what was omitted to be done which should have been done, under the evidence, sufficient to justify a rescission of this contract, or to justify even what the referee did in refusing to pay the balance of the purchase money? They furnished to the people investigating this property, apparently, or they were furnished by their employés, various reports on these coal properties and ore properties, all of them made, apparently, by men of experience and ability in their profession, some of them unusually able men, and all of them men of ample qualifications, at least judging from the evidence. Men buying property like this, or representing corporations buying properties such as this, are held to a reasonable degree of care and diligence themselves, to look into papers, reports, and statements made to them. I do not understand the rule to be that they can blindly go on and make a trade and then claim that things were not as they thought them to be, although at every stage of the proceeding they had the fullest opportunity of ascertaining the truth or falsity of what they heard connected with the property.

I have not attempted, and shall not attempt, to go into details as to all the testimony of all the witnesses, or into details as to the minute questions raised in the case. The two great questions are: First, whether there were secret commissions given to the officers of the

Southern Steel Company to effect the sale; and, second, whether there was such misrepresentation and lack of fairness on the part of the Georgia Iron & Coal Company and its officers as to the value of the property, to justify the finding of the referee.

It is a serious thing to set aside a sale which has been entered into and consummated, certainly between people on both sides of high intelligence and extensive experience with the matters with which they are dealing, on the ground that one has cheated the other, or unfairly or illegally outwitted the other in the trade. Conclusions of that sort will not be reached except upon the amplest and fullest evidence regarding the same.

[4] I wish to say right here that the referee who had this case and who decided it is one of the ablest referees in the service in this district. He is a lawyer of ability and a gentlemen of the highest standing and character. He has been a joy to me as an official ever since he has been in office, for some 18 years now, and I have no doubt that he reached his conclusions after the most careful consideration, but I am unable to agree with him. The rule that the findings of the referee on questions of fact will not be interfered with unless clearly erroneous is fully recognized by me—I have stated that many, many times—but in this case if his findings are erroneous at all, they are clearly and manifestly erroneous. The conclusions reached by the referee are drawn largely from undisputed facts, and as to these the court must form its own conclusions as well as the referee. Besides, the conclusions I have reached are clear to me, and consequently my duty is plain.

I think it is unnecessary to hold that the trustee and the parties he represents are estopped from objecting to the proof of the bonds and the establishment of the lien of the mortgage in this case because of their agreement to reinstate the mortgage when it was being foreclosed in 1908. I do think, however, that goes in as very persuasive evidence that they, after the fullest opportunity to examine the property, were entirely satisfied with their trade. Concessions were made by the representatives of the Southern Steel Company in order to have the mortgage reinstated after they had defaulted in the payment of interest, and at that time they must have considered the trade all right and were satisfied with it. If there was any real merit in the questions which are now being raised as to the validity of this sale, it does seem that they would have been known at that time to the Southern Steel Company and its officials, and to have gone on and re-established the mortgage voluntarily after full negotiations about it, assisted by very able counsel, shows that they were perfectly satisfied with the matter long after they ought to have ascertained what the truth about the whole transaction was.

[5] I think that as to the question of privity between the vendor company and the Georgia Steel Company there can be no question at all. I have stated that the Georgia Steel Company was organized because of the prohibition of foreign corporations owning more than 5,000 acres of land in Georgia (Parks Code of Georgia, § 2206), and there is no doubt that the trade with the Southern Steel Company was

made with the understanding that it would result in the forming of a domestic corporation. I do not think there is anything in the question raised here by the bondholders as to that.

It is unnecessary for me to determine whether the vendee company and its trustee are barred by laches from making the question it has here, as I think the objections made to the proof of these bonds and the establishment of the lien of the trustee are without merit. Perhaps if I should hold upon it, I should be disposed to hold that they have waited too long to make the question, when they must have had full knowledge of all the facts, certainly as to the value of the property, and, from the testimony here, full opportunity to ascertain about the commissions claimed to have been paid to Buek and Thorne.

Consequently I am unable to agree with the findings of the referee in this case, and I shall decline to confirm the same. On the contrary, I find that the bondholders and their trustee are entitled to a finding establishing their bonds to the extent that they have proven the same and the rights given them by their trust deed of a lien and priority of payment. A proper order may be entered to this effect.

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NEVADA-CALIFORNIA POWER CO. v. HAMILTON, County Treasurer, et al.

SAME v. FRANKLIN, County Treasurer, et al.

(District Court, D. Nevada. March 21, 1917.)

Nos. A-31, A-32.

1. TAXATION ⟸376(1)—AUTHORITY OF STATE—PROPERTY WITHOUT STATE.

A corporation, whose power plant and water rights were located in California, but the greater part of whose transmission lines were in Nevada, where most of the current was sold, cannot be taxed in Nevada on an assessed valuation in the ratio of its transmission lines in Nevada to its transmission lines in California, on the theory that that proportion of its income was derived from its property in Nevada, even though California has assessed its valuation only in the ratio of its California transmission lines to its total transmission lines.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629–631.]

2. TAXATION ⟸376(2)—ASSESSMENT—MODE OF TAXATION—INTANGIBLE PROPERTY.

A hydro-electric power company can be assessed on its franchise value, or on its value as a going concern, provided the value of the whole property, as determined by capitalizing its net earnings, is in excess of the sum of the values of its constituent units. Such a valuation may be obtained by subtracting the sum of the values of its several parts from its capitalized value. In determining what is a reasonable return on the property, the court should take into consideration the hazards of the business, taxes, operating expenses, and depreciation. No allowance can be made for depreciation in the case of water rights which are appreciating in value.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 625.]

In Equity. Separate suits by the Nevada-California Power Company against Joseph Hamilton, as Treasurer and ex officio Tax Receiv-

er of the County of Esmeralda, in the state of Nevada, and others, and against Nathaniel K. Franklin, as Treasurer and ex officio Tax Receiver of the County of Nye, in the state of Nevada, and others. On final hearing. Decree directed, restraining the collection of taxes on an assessed valuation in excess of the correct valuation as found by the court.

See, also, 235 Fed. 317.

John R. Dixon, of Denver, Colo., and Newman Jones, of Riverside, Cal., for plaintiffs.

George B. Thatcher, Atty. Gen., and H. H. Atkinson, Dist. Atty., of Tonopah, Nev., for defendants.

FARRINGTON, District Judge. The Nevada-California Power Company, a Wyoming corporation, for more than nine years has been engaged at Bishop Creek, Inyo county, California, in the business of generating electric current, which it transmits to and sells in Southern Nevada. All the Nevada property of the company is situated in Nye and Esmeralda counties.

June 24, 1914, the full cash value of plaintiff's property in Nevada was fixed by the tax commission at $1,492,815. Following a uniform rule applied to all similar property in the state, 60 per cent. of this amount was taken for the purposes of taxation, making the assessed value $895,689, of which $328,689 was apportioned to Nye county, and $567,000 to Esmeralda county. In finding this value the commission took into consideration both physical and nonphysical elements, and included therein overhead charges incurred during the period of construction, as well as the franchise. (Tr. p. 8.)

In October, 1914, the power company appeared before the commission, complaining that this assessment was excessive and illegal. Instead of reducing the valuation, the commission raised it to $3,700,713, 60 per cent. of which, or $2,220,427, was fixed as the value for the purposes of taxation. The effect of this change was to increase the Nevada tax of plaintiff from $21,850.29 to $53,517.82. The power company then brought the present suits, both of which have been tried together, and will be decided as one case, though a decree in accordance with the following opinion will be entered in each.

In each bill the plaintiff prayed that it be adjudged that the full cash value of its property in Nevada at any time during the year 1914 did not exceed the sum of $1,220,843; that the valuation fixed for that year by the Nevada tax commission was and is unjust, inequitable, and, in so far as it exceeds 60 per cent. of the said amount, is wholly void and of no effect; that plaintiff be granted writs of injunction, both temporary and permanent, restraining the enforcement of the valuation or orders of the Nevada commission as against plaintiff, or from commencing or prosecuting any actions at law for the enforcement of said values or orders, or for the collection of any tax claimed thereunder, and that the treasurer of Nye county be directed to accept and receive $6,321.25, and the treasurer of Esmeralda county $11,382.60, or such other sums as the court may adjudge, in full payment of all taxes levied or assessed against the plaintiff in said counties for the year

1914. June 19, 1916, an injunction was issued in both cases, restraining the collection of taxes on any valuation in excess of the assessment of June 24, 1914. The cases were tried January 25, 26, and 27, 1917.

About 85 per cent. of plaintiff's transmission lines are in Nevada; the remaining 15 per cent., as well as the generating plant, water rights, dams, ditches, and flumes, are in Inyo county, Cal. The gross income of the company for the fiscal year ending June 30, 1914, about 95 per cent. of which was received from sales of electric current in Nevada, was $992,928. During the same period the operating expenses were $339,115, and the taxes for the previous year were $18,435. Within the state of Nevada on the 31st day of December, 1914, "the company owned a total of 246.2 miles of three-phase, 60,000-volt transmission line on wooden poles, seven substations, two switching stations, six distribution systems, with transformers, meters, service connections, etc., a small amount of municipal street lighting system, a concrete office building at Goldfield, and a considerable amount of minor property of various sorts." (Tr. p. 86.)

During that year the physical value of plaintiff's property in Nevada, including overhead charges, as estimated by the engineer for the commission, was $895,000. The physical value of its property in California, exclusive of water rights, was about $2,300,000. The water rights are appraised by plaintiff's engineers at $1,400,000, making a total of $4,595,000 for the entire plant. Mr. Black, appraisal engineer employed by the power company, testifies that the Nevada property in 1914 was worth $1,188,888; Mr. Poole, the chief engineer, says $1,200,000. Mr. Poole also testifies that the properties, exclusive of the water rights, cost $3,500,000, and he estimates the reconstruction cost in 1914 at $3,150,000, and for that portion of the property which is in Nevada $1,080,000. Measured by the market price of its stocks and bonds, the entire property of the company was $5,432,000, but it was admitted during the argument that $1,000,000 worth of the company's property was not used in supplying Southern Nevada with electricity.

The valuation of $3,700,713, fixed by the tax commission on the property in Nevada, was ascertained by ascribing 85 per cent. of the net earnings for the year ending June 30, 1914, to Nevada, and capitalizing the result on a 10 per cent. basis. In detail, the calculation as testified to by Mr. Shaughnessy, chairman of the commission, was as follows:

> "I have given gross earnings for the fiscal year ending June 30, 1914, $992,928. Thereafter the following deductions were taken: Operating expenses, $339,115; taxes, $18,435; annuity or return on the property, 4 per cent. on $5,000,000; total plant valuation claimed, or $200,000—making total deductions $557,550. Taking that amount from gross earnings leaves net income of $435,378. Taking 85 per cent. of that as creditable to Nevada gives $370,071.30, and that capitalized at 10 per cent. will give $3,700,713. Sixty per cent. of that, which was taken for assessment purposes, gives $2,220,427." (Tr. p. 20.)

No witness has given a higher valuation than $1,200,000 for the company's tangible properties, including overhead charges, in Nevada. The difference between this amount and $3,700,713, the value fixed in October, 1914, is $2,500,713. The real character and source of this

increment is disclosed, not only in the method by which it was calculated, but by the reasons given in its justification. The following is from the testimony of Mr. Shaughnessy:

"Mr. Dixon: Q. Now, will you please state to the court just why you ascribed 85 per cent.; in other words, was it because 85 per cent. of the lines of the company were in the state of Nevada, and 15 per cent., as you estimated them to be, in California? A. Yes; that was the basis. * * * We also had in mind, I don't know that I should say it had controlling importance, * * * that in California the assessment taken by the authorities on a basis of a 4.6 per cent. factor, applied to the portion of the gross earnings measured to California on the ratio of the (transmission line) mileage within California to the total mileage, * * * gave them a valuation on the physical property of approximately $600,000 or $650,000, and that, in contradistinction to the fact there was something like three million some odd thousand dollars worth of the physical properties of your company actually situate in California. It necessarily followed that the state of California left the balance of the earnings I have used to the state of Nevada for assessment. * * * Q. Yes; but is it or is it not a fact, Mr. Shaughnessy, that in ascribing 85 per cent. you used as the basis for so doing the mileage of the company in this state as contrasted with that in California? A. That was one of the elements. Q. And the other was what you have just explained, of California leaving something to Nevada? A. That is just it exactly." (Tr. p. 27.)

Mr. Shaughnessy testifies that:

The $3,700,713 "was reached by taking into account the physical value of the property, plus the overhead charges, and plus the capitalization of the franchise value, as determined by the net earnings of your company." (Tr. p. 18.) "The franchise, as we understand it, * * * would be the use value of the property, measured by its earnings, and whatever that might capitalize out for in excess of the physical value—that is, in excess of the physical value and overhead costs—would represent the franchise value; but, as stated before, we did not pursue that method at the January meeting of capitalizing out your net earnings, and undertaking to assign them, as we did at the equalization period in October." (Tr. p. 16.)

[1] The taxes paid in California in 1914, on more than two-thirds of this property, were about $6,600, while the Nevada authorities, on less than one-third of the property, attempted to collect $53,517.82. It is difficult to indulge the idea that the existence of $2,500,713 of use value, or franchise value, or intangible value, can be proven by the mere circumstance that 85 per cent. of the transmission lines are in Nevada, or that 95 per cent. of the company's income was derived from sales in Nevada of electric current manufactured wholly in California, or by the further fact that California authorities had imposed a very low valuation on the company's property in that state. One might with equal propriety attribute 100 per cent. of the net income to the water rights because they are located wholly in California, or to the power plant because it produces all the electric current. But obviously all such methods are merely ascribing values to one portion of the plant which are taken from another. They have no tendency to demonstrate the existence or nonexistence of intangible or use value. If all the company's property had been in Nevada, no such manipulation of values would have been dreamed of.

If there be such a $2,500,713 use value peculiar to the transmission lines in Nevada, it should manifest itself in some evidence that the

transmission lines possess a greater earning power than any other portion of the plant. It is easy to understand why one man who manages and superintends such a business can earn more than a common laborer, but why $100 put into a dynamo in Inyo county should be less productive of profit to the company than an equal sum put into copper wire and transformers in Nye county is hard to explain or demonstrate. The water power, the power plant, and the lines, when combined and working to one end, constitute an industrial organism, each member of which is necessary to the success of the whole. We have here a plant the value of which, ascertained by capitalizing its net earnings at 10 per cent., is $4,353,378. It is owned and operated as a unit. If a constituent portion which has a tangible value of less than $1,200,000 is valued at $3,700,713, by what process of reasoning can it be demonstrated that the remainder of the plant, which has a tangible value of more than $3,000,000, is worth less than $660,000? If there be a franchise value, it must show itself in earnings above those necessary to cover operating expenses, to provide for depreciation, and pay a reasonable return on the fair value of the property as a going concern.

There is no evidence that the property is earning enough to pay expenses, depreciation, and a return on $2,500,713, in addition to an adequate return on a value of $4,353,378. Furthermore, it does not appear that the commission sought any such evidence; it has resorted to a device, the effect of which is to subject property beyond its jurisdiction to taxation in this state. It is true that in other cases the property of interstate corporations has been apportioned between two adjoining states on a mileage ratio, and in many instances such a method not only operates fairly and justly, but has been approved by the courts. If the property in this case were homogeneous, that is, if it consisted entirely of one transmission line, if it were a telephone line, a telegraph line, or a railroad, it would be proper to pursue the method which has been used by the commission; but in the present case more than two-thirds of plaintiff's property is located across the line in California, and less than one-third is within the boundaries of this state. If the state can take 85 per cent. of the total value of the property simply because 85 per cent. of the transmission lines are in Nevada, it would be justified in taking the whole value of the California property for purposes of Nevada taxation, if the generating plant were situated so near the boundary between the two states that the entire transmission line were in Nevada. This phase of the case was fully discussed in the decision rendered herein, awarding an injunction pendente lite, reported in 235 Fed. 317. With the conclusion announced in that opinion I am still satisfied.

The valuation, $1,492,815, fixed by the tax commission in June, 1914, is attacked on the ground that it includes intangible values, whereas the company had no such values in Nevada at that time. In order to sustain this position, plaintiff has introduced testimony tending to show that its net income at the time was insufficient to cover depreciation and operating expenses, and to afford a fair return on the reasonable value of its physical property devoted to the service of the people in Southern Nevada, and consequently there could be no intangible value. Mr.

Shaughnessy testifies that the amount, $1,492,815, was intended to cover the values of physical properties within the state, the overhead costs ascribable thereto, and the intangible values other than franchise:

"Mr. Jones: Q. In other words, you did not attempt to tax the primary franchise, or right of the company to be and exist as a corporation? A. Not at all; not in that sense; no. Q. And you did not undertake at that meeting to tax, and did not assess any tax against, the right or franchise of the Nevada-California Power Company to conduct and carry on its interstate business within this state? A. Not at all; no such intention. Q. And you did not at that meeting, or at any meeting, undertake or in fact assess any tax upon the Nevada-California Power Company on account of its special franchise to occupy and use public streets and highways within the state of Nevada? A. Not at all, sir." (Tr. p. 17.)

[2] As to the physical value of the transmission lines in Nevada and the plant on Bishop creek, there is no dispute. The only difference is as to the water rights. These I shall appraise at $1,200,000. Plaintiff is entitled to a fair return on the reasonable value of the property which it devotes to the public service. What is a fair return depends largely on the hazard of the investment. If there be no hazard, an annual return of 5 or 6 per cent. is ample. The power company has water rights for which it paid $225,385. It is claimed that in the year 1914 these rights were worth not less than $1,400,000, and it is safe to predict that before the next 15 years have expired, their value will have advanced to $5,000,000. Water power between Bishop creek and the Mexican border is extremely scarce. The growing industries of Southern California are demanding more and more electric current, and as nearby and available coal deposits and oil fields are exhausted, there will be a still greater demand for the power which can be supplied by plaintiff's plant on Bishop creek.

On the other hand, every investment made in a mining camp is hazardous; sooner or later the mines are exhausted. Plaintiff's witnesses testify that the future productive life of Goldfield and Tonopah will not exceed five years. Certain it is that, unless other mines are discovered in that vicinity, the time is not far distant when plaintiff's transmission lines in Nye and Esmeralda counties will have only a salvage value. Hence plaintiff is entitled to a larger rate of income on its Nevada property than on its power plant and water rights in Inyo county. For the same reason it is entitled to no allowance for depreciation on its water rights. There is no evidence that they will ever wear out, decay, or become obsolete. The probable life of the perishable portions of the power plant is not less than 30 years. Hence, I find that 6 per cent. per annum is a fair return on the value of plaintiff's generating plant and water power devoted to the public use in Southern Nevada, and that an annual allowance of 3 per cent. on the value of the power plant is ample to cover its depreciation. I also find that 10 per cent. per annum is not an unreasonable return on the fair value of the company's property in Nevada, and for the purposes of this case I shall assume that it is entitled to an allowance of 10 per cent. per annum for depreciation of the Nevada property.

If these rates are applied to plaintiff's gross income for the year ending June 30, 1914, it will appear that a considerable income has been

realized in excess of what would be a fair return on the aggregate value of its physical properties, including overhead charges. This may be regarded as a return for intangible values. It has frequently been considered that the sum of the values of each distinct part of a great industrial plant is much less than the value of all the parts, assembled together and working as one machine. The water rights, the power plant, and the transmission lines had an added value in 1914 by reason of their union and joint operation as one system, which, if it is evidenced by an income in excess of a fair return on the purely physical value of the separate parcels of property, may be properly assessed for the purposes of taxation.

The gross income for the year ending June 30, 1914, was $992,928; the operating expenses were $339,115; taxes, $18,435; depreciation, 10 per cent. on $1,200,000, the value of the Nevada transmission lines, $120,000, and 3 per cent. on $2,300,000, the value of the power plant, or $69,000. Subtracting the total deductions, $546,550, from the gross earnings, the remainder is a net income of $446,378. A 6 per cent. return on the generating plant valued at $2,300,000, and the water rights valued at $1,200,000, is $210,000. A 10 per cent. return on $1,200,000, the value of the company's Nevada property, would be $120,000. Deducting $330,000, the sum total of reasonable returns, from the net income, $446,378, there will be a balance of $116,378, which is income in excess of what I have found to be a reasonable return on the value of the physical elements of the property, plus overhead charges. If this is capitalized on a 10 per cent. basis, the result, $1,163,780, will be intangible value. No satisfactory reason has been shown why this added value should be attributed to one portion of the property rather than to another. If $1,163,780 is apportioned ratably, $297,131 may be added to the physical value of the Nevada property, making $1,497,131. This amount exceeds $1,492,815, the value fixed by the commission June 24, 1914, by only $4,316. A slight change in the rates which I have assumed to be reasonable returns on the property, or in the amount allowed for depreciation, would render the result thus obtained substantially the same as the amount arrived at by the commission.

The testimony is not sufficient to warrant this court in changing the valuation fixed by the tax commission at its meeting in June, 1914. Decrees will be prepared and entered in accordance with the foregoing opinion. The injunctions issued herein September 16, 1916, will be made permanent. I must add that the attempt to try these cases in the newspapers, while they were pending in this court, is a regrettable incident, and peculiarly reprehensible, because of the unworthy attitude in which the state of Nevada was thus placed.

## In re AMSDELL-KIRCHNER BREWING CO.

(District Court, N. D. New York. March 29, 1917.)

1. MORTGAGES ⟸277—ASSUMPTION BY PURCHASER.
A purchase of land subject to a mortgage creates no personal liability except a liability for purchase money to the vendor, hence a corporation which acquired land subject to a mortgage did not for that reason assume liability on the mortgage.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 726, 727.]

2. CORPORATIONS ⟸415—AGENTS—POWERS OF.
It is not within the power of a corporate officer to obligate the corporation to assume liability to discharge a mortgage on property acquired by the corporation subject thereto.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1664–1669.]

3. CORPORATIONS ⟸590(5)—CONSOLIDATION—CONTRACTS—VALIDITY.
One of the incorporators of a proposed corporation acquired land, executing a mortgage for a part of the purchase price. Thereafter the corporation acquired the property but entered into no contract to assume payment of the mortgage. The property subsequently passed to a second corporation with which the original company was consolidated. Claimants, second mortgagees, who on foreclosure acquired the first mortgage, the mortgagee having secured a deficiency judgment against the individual mortgagor, asserted that the consolidated company assumed payment of such mortgage. *Held* that, while an agreement by the consolidated company to pay a debt for which the original company was liable would have been an original undertaking which need not be written to be binding, yet, as the original company did not assume payment of the mortgage, or in any way bind or obligate itself to claimants, they cannot take advantage of any oral agreement between the original company and the consolidated company.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2366, 2367.]

4. BANKRUPTCY ⟸339—CLAIMS—ASSERTION.
Where a claim against a bankrupt corporation was based on the theory that it had assumed payment of a mortgage, claimant, it appearing that there had been no such assumption, cannot sustain his claim on another theory; there being no evidence to support such theory, and it being contrary to the allegations contained in the claim.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526.]

In Bankruptcy. In the matter of the bankruptcy of the Amsdell-Kirchner Brewing Company. Petition by Lona F. Crounse and another to review an order of Edwin A. King, Referee in Bankruptcy, disallowing their claim and expunging it from the record of claims. Order affirmed.

Visscher, Whalen & Austin, of Albany, N. Y., for claimants.
Muhlfelder & Illch, of Albany, N. Y., for trustee in bankruptcy.

RAY, District Judge. In 1906, Gustavus C. Sniper purchased from Dorothy Kirchner or the Kirchner estate a parcel of real estate in the city of Albany, N. Y., for the sum of $40,000, and took the deed in his own name. He paid $20,000 in cash, and gave back his personal bond for $20,000 for the balance of such purchase money, and exe-

cuted and delivered a mortgage on the property to secure the payment of such bond and interest. At that time, Mr. Sniper says he purchased the property for his own uses and purposes. Subsequently he sold and conveyed the property (then subject to the lien of the mortgage) to the Kirchner Brewing Company. At the time Mr. Sniper purchased this real estate, the said Kirchner Brewing Company had not been organized. The formation of such a corporation was then in mind, and Mr. Sniper purchased the property intending, if such corporation was formed, to turn it over to it if the corporation when formed saw fit or decided to take it. It was then contemplated by Sniper and others to form a corporation to be known as Kirchner Brewing Company. Sniper and the other persons who subsequently became incorporators of that company contributed or furnished the $20,000 paid in on the purchase of this property, and subsequently the company was formed and incorporated under that name, and Sniper became its president and remained such until such corporation was consolidated with the Amsdell-Kirchner Brewing Company, the now bankrupt. It is evident that Sniper contemplated that the property would be subsequently deeded to the corporation when formed. After the formation and incorporation of the Kirchner Brewing Company, Sniper deeded the property to the corporation. Sniper then told the incorporators that he had purchased this property for $40,000, $20,000 cash paid, and had given his bond secured by a mortgage on the property for the balance, $20,000. Each incorporator who had contributed to the said fund of $20,000 received stock in such corporation to the amount he had paid in. When the deed was given by Sniper to the Kirchner Brewing Company, the property was subject to the lien of the said mortgage, and Sniper was liable on his bond; but the corporation, the grantee, did not in its deed assume the payment of such bond and mortgage or either of them or of such debt. The corporation passed no resolutions then, or at any subsequent time, assuming or agreeing to assume or pay such bond or mortgage or the debt secured thereby. The Kirchner Brewing Company never in writing assumed or agreed to pay such bond or mortgage or the debt secured thereby.

Mr. Sniper testifies that, when he purchased the property and took the deed and paid in the money to the vendor, he was acting for himself alone individually; that the formation of a corporation was contemplated; that it was the understanding and agreement, when the money was paid in by those who contributed to the fund mentioned, $20,000, that they were to receive stock in the corporation when formed. There was no agreement, so far as appears, that there was to be any joint ownership in this property, or that this or any specific property was to be purchased. The following is an extract from Mr. Sniper's testimony:

**By counsel for the claimants: "Q. Is it not a fact that at the time of the purchase of this property and the delivery of the mortgage in question you were acting as the representative of yourself and the other incorporators of the Kirchner Company? A. Only for myself when I first took the action. Q. At the time you purchased and paid the cash? A. At that time it was all settled, yes. Q. You were acting as the representative of all the incorporators?**

A. I was acting as representative for myself. Q. At the time of the payment of the price? A. At that time I was buying the property for myself, but I had arranged to form a company. Q. You, in acquiring this property, paid for it with a bond and mortgage and the cash of yourself and the other incorporators of the company? A. Yes. Q. And at that time you were acting for yourself and the other incorporators? A. When I purchased it, I acted for myself alone. Q. I am speaking of the time this (money) was paid over and the deed delivered. A. No sir; I was acting for myself at that time. Q. How is it that the other incorporators contributed a portion of their money if you were not acting for them? A. They had subscribed for stock for a company to be formed and had paid their money in. Q. So it was the company's money, then, this $20,000? The Kirchner Brewing Company's money with your own? A. No, it did not get to the company yet. Q. They had subscribed and paid their money? A. Yes. Q. Money of the Kirchner Brewing Company to be organized? A. Yes. Q. And it was that money that purchased the property? A. Yes."

[1] When the property was deeded over to the corporation thereafter, it knew of the mortgage, but each incorporator received his stock certificate, and hence had no interest in this real estate except such as the ownership of a stock certificate in the corporation would give. When the corporation, Kirchner Brewing Company, accepted the deed, it, of course, expected to keep the property and pay off the mortgage, and such action on its part would have extinguished the liability of Mr. Sniper on the bond; but there was no assumption of the payment of the bond or mortgage or of the debt represented thereby. It has been steadily held that the mere purchase of real estate subject to a mortgage given to secure the payment of a bond, or of a debt, does not make such purchaser personally liable for the bond or debt. Such purchase of the real estate creates no personal liability except a liability for purchase money to the vendor. The corporation mentioned could not contract prior to its organization and incorporation. Thereafter it could not become liable for the indebtedness of the original purchaser on the bond unless it thereafter in some way assumed the debt.

Subsequent to all this, the Amsdell-Kirchner Brewing Company, a corporation, the now bankrupt, was formed and incorporated, and there was a consolidation of the two corporations. Assuming that the now bankrupt corporation took over all the property and the debts and obligations of the Kirchner Brewing Company, how did it become liable for the debt secured by such bond and mortgage?

Later a suit upon the said bond and a foreclosure of the said mortgage was commenced and prosecuted by the then owner of the bond and mortgage against the said Amsdell-Kirchner Brewing Company and others, but no money judgment or judgment for deficiency was asked against such company. There is no evidence of any such judgment or decree. However, a judgment for $11,737.13 deficiency was obtained in that suit against Sniper. It may be well to state that prior to such foreclosure the bond and mortgage became the property of Thomas Hurst, as committee of one George M. Lockwood, who commenced such foreclosure. A Mr. Anglin was an officer of the bankrupt, and at his request Ada Frederick and Lona F. Crounse, who then owned a second mortgage on this property, became the owners of the bond and mortgage then in process of foreclosure and given

by Sniper as above stated. After such purchase by Ada Frederick and Lona F. Crounse, the foreclosure proceedings were held in abeyance for some considerable time, and the now bankrupt corporation paid to them the interest on such bond and mortgage. There is no evidence that the now bankrupt corporation ever assumed or agreed to pay such indebtedness represented by such bond, or the bond, or to become liable for any deficiency arising on such foreclosure proceedings unless the facts already stated constitute such assumption.

Mr. Loucks, who represents Frederick and Crounse, testifies:

> That at the time they purchased the bond and mortgage, or shortly before, Mr. Anglin, who had been an officer of the company, told him Mr. Hurst had threatened the foreclosure of the mortgage. That "Kirchner Brewing Company at the time of the transfer or the consolidation (of the corporation) had agreed to assume that mortgage; that that was part of the consideration of the consolidation, and at different times, about a year and a half ago, I should say it was, he told me that they were prodding him on that mortgage and threatening foreclosure, and asked if our clients, Mrs. Crounse and Miss Frederick, would not take up the mortgage, that it was a first mortgage and was absolutely good, Miss Frederick and Mrs. Crounse at that time holding a second mortgage on the same property, and the first mortgage being a $20,000 mortgage, and the amount of the second mortgage being then $12,000 with accrued interest, and I told him that I would see Miss Frederick and Mrs. Crounse about it. Finally, Mr. Hurst, as the committee holding the mortgage, began a foreclosure action, and then Mr. Anglin came to me and asked if we would not take this over, that the Amsdell-Kirchner Company had assumed the payment of the mortgage, and that the Kirchner Brewing Company had promised the payment of it at the time it was delivered to Gustavus Sniper, the original mortgagor, who was, as I am informed, the principal stockholder of the Kirchner Brewing Company before the consolidation."

Assuming that Anglin made these representations to Mr. Loucks, although he denies such representations, there is no evidence that he had authority to make them or bind the now bankrupt corporation. He also testified:

> "Mr. Sniper told me, at the time he sold the property, or the property was transferred by him to the Kirchner Brewing Company, that the Kirchner Brewing Company would agree to assume the obligation on the bond and mortgage."

Mr. Anglin says he had no definite conversation with Mr. Loucks, but that he "assumed" the corporation was liable on the bond and mortgage.

> "I don't know if we were or not. I assumed we were. I never made any definite promises in regard to the matter, nor did I ever bring it up before the board of directors."

There is no evidence that the question of assuming the payment of this bond and mortgage, or of the debt represented thereby, was ever brought to the attention of the directors of either corporation or to the attention of the managing officers of either.

[2] The claim, so far as material, is as follows:

> "That the said Amsdell-Kirchner Brewing Company, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly, indebted to this

deponent (meaning the claimants) in the sum of $11,737.13; that the consideration of said debt is as follows: Deficiency of judgment in mortgage against property of the defendant taken over from former mortgage by the claimant herein at the request of said bankrupt and on its promise to pay the same with interest."

Strictly speaking, this is not a claim based on any original liability of the Kirchner Brewing Company growing out of the purchase of the property by Sniper or any assumption of the debt by that company, or any assumption of that debt by the Amsdell-Kirchner Brewing Company on the consolidation, but one based on an alleged promise of the now bankrupt company to pay the deficiency arising on a foreclosure of the mortgage in consideration that the claimants, Lona F. Crounse and Ada Frederick, would purchase, take, and hold the said bond and mortgage. It is not a claim for damages for false or untrue representations. But from either standpoint I do not see how the claim can be sustained. It was not within the province or power of Anglin to assume in behalf of the corporation the payment of the debt, or any part of it, or of the deficiency if one arose, and, moreover, such an agreement on his part is not established by sufficient evidence. The evidence will not sustain a finding that either corporation ever assumed or agreed to pay the debt or any part of it, or any deficiency, if one arose, or that either corporation became liable because of its purchase of the property with this mortgage thereon outstanding and unpaid.

[3] The claimants' counsel asserts in his brief that they were not allowed to show that at the time of the consolidation the now bankrupt corporation assumed the payment of the bond and mortgage. The record and return does not sustain this contention. The claimants' counsel asked:

"Was it stated by Mr. Sniper to you, and to the other stockholders, or directors, that this property (that of Kirchner Brewing Company) would be turned over on the assumption by the Amsdell-Kirchner Company of the bond and mortgage, or liability under it? * * * I ask if it was stated at that time."

This was objected to, and the referee sustained the objection, saying, "Unless it can be made to appear that that statement took the form of writing." The attorney for the claimants then pursued his inquiry as to writings, and then asked this question and received this answer without objection:

"Q. Was there anything said then, or at any other time, about the assumption of the bond and mortgage given by Mr. Sniper? A. No, the question never came up."

But suppose the now bankrupt corporation at the time of the consolidation had agreed orally with the Kirchner Brewing Company to assume the payment of the bond (the debt of Sniper), and mortgage, how could the oral agreement inure to the benefit of these claimants or sustain their claim as made and presented? A mere promise of one person to pay the debt of a third person does not necessarily inure to the benefit of the promisee of such third person. There was

no liability to Sniper or to these claimants on the part of the Kirchner Brewing Company, and it is not claimed that Sniper or the then holder of the bond and mortgage was a party to such agreement if made. Sniper owed the amount of the bond and the debt represented thereby to the holder thereof. The Kirchner-Brewing Company had not assumed it or agreed to pay it, and I do not see that the then holders of it or their assignees can avail themselves of any mere verbal promise made by the Amsdell-Kirchner Brewing Company made to the Kirchner Brewing Company to pay that debt. If the consolidated corporation then received property from the Kirchner Brewing Company, and so became indebted to it therefor, and the Kirchner Brewing Company was then obligated to the holder of the bond and mortgage, that is, was liable to such holder for the amount thereof, or for any part thereof, and in consideration of such transfer of property to it the consolidated corporation, now the bankrupt, promised to pay the obligation owing by such promisee, Kirchner Brewing Company, or the debt for which it was liable, it was an original undertaking, and no writing was necessary, and perhaps the holder of the bond and mortgage could avail itself of such promise. See Davis v. Patrick, 141 U. S. 479, 487, 488, 12 Sup. Ct. 58, 35 L. Ed. 826; Emerson v. Slater, 22 How. (U. S.) 28, 37, 38, 43, 44, 16 L. Ed. 360; Mallory v. Gillitt, 21 N. Y. 412, 423, 433; Justice v. Tallman, 86 Pa. 147; Fosha v. O'Donnell, 120 Wis. 336, 97 N. W. 924; Mine & Smelter Supply Co. v. Stockgrowers' Bank, 173 Fed. 859, 862, 863, 98 C. C. A. 229.

The difficulty is that, unless the Kirchner Brewing Company was liable, it had no interest in the payment of the debt; and, secondly, the agreement of the now bankrupt to pay such debt is not established by evidence. Such an agreement cannot be established by proving the oral statements made by Anglin and Sniper. But, even if it could be, their statements as sworn to do not come up to the mark of proving such an agreement by the corporation.

[4] It is urged that the deficiency judgment arose in part, if not mainly, by reason of the accrual of water rents while the property was in the possession of and used by the now bankrupt. There is equity in this contention, but the trouble is a claim was not presented based on such facts, and no such claim was litigated even indirectly, and there was no request to amend. If the now bankrupt corporation incurred indebtedness for water rents and was liable therefor, I do not see why it is not still liable. If claimants should purchase such claim, it could present it in this court. But I find no evidence in the record bearing on this question.

I think the order of the referee must be affirmed, and it is so ordered.

## DANIEL et al. v. A CARGO OF LUMBER.

## In re ST. PAUL FIRE & MARINE INS. CO.

(District Court, S. D. Alabama, S. D. February 22, 1917.)

No. 1624.

SALVAGE ⇐11—RIGHT TO COMPENSATION—INCIDENTAL SALVING OF CARGO.

Libelants, under a contract with the owner of a lumber laden schooner, which had been turned over and sunk in a storm and was lying upside down on the bottom, righted the vessel and raised her, together with such of the lumber as was below the deck or was still fastened upon the deck, which was saved to the insurer, to which it had been surrendered. *Held*, that the saving of the cargo was a salvage service, for which libelants were entitled to compensation, but as a service of a low order, since it was incidental to the salving of the vessel.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 21.]

In Admiralty. Suit by F. M. Daniel and F. B. Annan against a cargo of lumber; the St. Paul Fire & Marine Insurance Company, claimant. Decree for libelants.

H. T. Pegues, of Mobile, Ala., for libelants.
Rickarby & Austill, of Mobile, Ala., for claimant.

ERVIN, District Judge. This is a libel filed claiming salvage of a lot of lumber formerly loaded on the schooner Emma S. Lord, of Bangor, Me. The great bulk of this lumber was loaded in the schooner under her decks, and a portion of the lumber was loaded above decks and fastened down, as is customarily done. It appears that the schooner loaded in Mobile and started out, when the storm of July 5, 1916, caught her in the lower bar and blew her out of the anchorage, blowing her masts off and turning her over in about 13 feet of water.

The cargo of lumber has been turned over to the insurance company by the shipper and is now claimed by the St. Paul Fire & Marine Insurance Company. The vessel was lying upside down, with her decks resting upon the muddy bottom, when a contract was made between libelants and J. M. Scott, the owner of the vessel, under the terms of which the libelants agreed—

"to proceed immediately to work upon said schooner where she now lies, to turn same over and get her afloat, and to save all of her appurtenances and equipment that can be practicably saved, and deliver said schooner, with the salved appurtenances, righted at some dry dock in the city of Mobile, Ala. Second parties further agree that, if said vessel can be pumped out after being righted by making temporary repairs at a cost not exceeding $50, they will do so; but if said schooner cannot be pumped out without incurring expenses above said amount, first party will accept her in Mobile full of water. * * * It is understood that the parties of the second part shall not be held responsible for such damage as may occur to said schooner in the conduct of salvage operations, but are to be paid the agreed sum of $3,500 upon delivery of said schooner in Mobile in her present condition, reasonable and necessary damage incurred in salving excepted, but shall be entitled to no compensation unless such delivery is made; it being understood that this is a salvage contract, contingent on success."

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The proof further showed that there had been a previous contract between J. M. Scott and one Roberts under the terms of which Roberts agreed to float the vessel for an agreed compensation, and that Roberts after entering upon the performance of his contract abandoned the same without floating the vessel. That Daniel, one of the libelants, was employed as a diver by Roberts and made an examination of the vessel for Roberts, going all around her and examining her condition under the water, and was present when Roberts pumped air into the vessel to see if she could be raised to some extent thereby, and that she was raised some six or eight inches while he was present. Roberts' theory was that he could raise the vessel by pumping air into her and so float her out to deeper water where she could be turned over. Later on, when Daniel was not present, Roberts undertook to raise the vessel in this manner and failed and then abandoned his contract. Thereafter Daniel and Annan entered into the contract above referred to with Scott.

It was shown that both Daniel and Annan knew before entering into the contract that the vessel had been lumber laden. It was further shown that Daniel, when examining the vessel as a diver, ascertained that much of the lumber with which she had been laden was lying on the bottom near the vessel, and some of the lumber was partially under the vessel as she lay upon the bottom. It was further shown that libelants dredged a hole alongside of the vessel and tried to turn her over into this hole which had been so dredged. Upon the first and second attempts the tackle employed by libelants broke. It was claimed by libelants that the increased weight of the vessel by reason of the cargo of lumber in her was what caused the breakage of their tackle and that such tackle would have turned the vessel over, had she not been loaded. Upon the third attempt, the vessel was turned over into the hole and then pumped out and towed to the city of Mobile and delivered to Scott. It was further shown that, when the vessel was turned over, a part of the deck load was still fastened upon her deck, and this, together with the load stored under decks, was brought to Mobile and is the cargo now libeled for salvage.

Both libelants and L. A. Scott, who made the contract for and in the name of J. M. Scott, testified that the cargo was never mentioned specifically during these negotiations. It was testified by one of the libelants that, after the vessel had been righted, he asked J. M. Scott what should be done with the lumber on board, and that J. M. Scott replied that he was not concerned with the cargo, but only with the vessel, and so far as he was concerned they might as well throw it overboard. This testimony was denied by J. M. Scott, who swore that this matter was never mentioned to him or by him. The only other conflict in the testimony is where both L. A. and J. M. Scott testify to inquiries made by them of Daniel as to the condition of the vessel before she was turned over, they claiming that they asked Daniel whether the cargo of lumber had swollen sufficiently to spring or break the vessel, and Daniel stated that this had not happened. Daniel denies these conversations. These are the only two conflicts in the testimony.

The proof showed that the cargo had been surrendered to the insurance company, who accepted and paid for the loss, and that this company sold the lumber to the Moraques Lumber Company, after it had been unloaded, for $2,000, and that the cost of unloading and stacking the lumber upon the wharf, together with the storage on the same was $460, so that the net proceeds of the lumber amounted to $1,540. It was further shown that the insurance company had paid to J. M. Scott their pro rata of the cost of saving the vessel, but that the libelants were not aware of this fact.

It is claimed in this case that no recovery can be had because it is claimed the vessel was raised in her home port. The Emma S. Lord seems to have been from Bangor, Me.; but, regardless of this fact, I think the service was a salvage service. It is further claimed that there can be no recovery in this case because the cargo was inside of and fastened on the deck of the vessel, and that the saving of it was done under a contract which obligated the salvors to save the vessel for a given consideration, and that the vessel could not have been saved without saving the cargo, and this presents to my mind the only real question in the case.

I have examined it with some care, and I have not found any case of exactly the same character. It is undoubtedly true that most of the cargo was loaded in the vessel, and the remainder on deck was saved because it was fastened to the decks and was brought up when the vessel was turned over. Therefore the cargo must have been saved or thrown out at some expense and labor to the salvors. The saving of the cargo cost them absolutely nothing, and under the terms of the contract with Scott, the owner of the vessel, they were to get nothing for saving the vessel unless he saved her, and he could not save the vessel without also saving the cargo. The question therefore arises, whether the cargo saved with the vessel under these conditions can be made to pay salvage, when it was saved with the vessel and without any special independent effort on the part of the salvors.

In the case of The Camanche, 75 U. S. (8 Wall.) 448, 19 L. Ed. 397, I find that the cargo and boat had been turned over to the insurance companies upon its sinking at the wharf, and a contract was made with the insurance companies to save the cargo, and that the cargo was saved as contracted for. It appears that the cargo was valued at about $400,000, and that the insurance covered $34,000, so the owner held a proportion of $60,000, as against the $400,000 valuation. The salvors, having salved the whole cargo and being paid by the insurance companies, filed a libel against the owner to require him to pay for the saving of his proportion of the cargo. The case was litigated, and the Supreme Court held that the owner should pay for saving his proportion of the cargo. It was certain that the cargo could not have been saved under the terms of the contract, without saving the proportionate interest of the owner in such cargo, and hence the proposition in that case and in this one seems to me in principle to be the same.

Looking at the matter from a practical point of view, I cannot see any reason why a cargo should not pay when it has been saved, and it has no concern with the question of whether the salvors had been

paid for saving the boat. The question here is: Did the libelants save the cargo, and it is no answer to say that they saved the cargo while saving the boat, and have been paid for saving the boat. I am therefore of the opinion that libelants should recover. I find, however, that the service rendered was of a very low order, there being no particular risk assumed by the salvors, and I am further influenced to fix the amount at a low figure by reason of the fact that no effort was made to save any part of the cargo, except that which was fastened to the vessel, and necessarily brought up with the vessel when she was turned over; the remainder of the cargo being left on the bottom of the bay, without any effort being made to save the same.

I therefore fix the amount to which libelants are entitled at $150, for which a decree will be entered.

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## UNITED STATES v. KLAUDER.

(District Court, N. D. New York. March 31, 1917.)

1. POST OFFICE ⊜31—OFFENSES—NONMAILABLE MATTER.
Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1129) § 211, as amended by Act March 4, 1911, c. 241, § 2, 36 Stat. 1339 (Comp. St. 1913, § 10381), declaring that every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character shall be nonmailable, and whoever shall knowingly deposit or cause to be deposited for mailing or delivery anything declared to be nonmailable shall be punished, written matter which is merely abusive, scandalous, scurrilous, improper, vulgar, or even libelous, does not fall within the prohibition of the statute; but, if the language used must have or may have an immoral effect upon those into whose hands it may come, it is within the statute.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52.]

2. POST OFFICE ⊜31—OFFENSES—NONMAILABLE MATTER.
For matter to be nonmailable it is not essential that the entire contents of the writing fall within the statute.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52.]

3. POST OFFICE ⊜50—OFFENSES—NONMAILABLE MATTER.
A paper charging priests with many and varied sexual immoralities, which described the amorous exploits of one priest, cannot as a matter of law be *held* to fall without the statute so as to be mailable; the paper by its descriptions tending to provoke libidinous thoughts in the reader, this being so, the purpose of the article was merely to attack the character of the priests.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87-89.]

4. INDICTMENT AND INFORMATION ⊜150—DEMURRER—QUESTION CONSIDERED.
On demurrer to an indictment charging defendant with sending through the mails nonmailable matter, the court can only decide whether the matter is so clearly innocent that the question should not be submitted to the jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 497.]

At Law. Alexander L. A. Klauder was indicted for violating Cr. Code, § 211, as amended by Act March 4, 1911, § 2 (Comp. St. 1913,

§ 10381), in sending through the mails nonmailable matter. On demurrer to the indictment. Demurrer overruled.

Demurrer to indictment charging that the defendant deposited in the mails of the United States knowingly for mailing a certain printed paper or publication alleged to be obscene and lewd. The defendant demurs on the ground the articles contained in such printed paper or publication alleged to have been sent through the mails and filed with and as a part of the indictment are not obscene or lewd and fails to show the commission of the crime charged, or any crime.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y.
R. M. Moore, of New York City, for defendant.

RAY, District Judge. The paper in question of which the defendant was editor and manager was quite extensively circulated through the mails by the defendant, and same is clearly scandalous and libelous and unfit for circulation or to be read in any family. It is an attack upon certain bishops and fathers of the church and an attorney of this court also. The question is whether or not any part of the article, which seems to be a continuous statement, attacking first one and then another by name and repeatedly charging illegitimate sexual acts and immorality, is within section 211 of the Criminal Code as amended by the Act of March 4, 1911, c. 241, § 2 (Comp. St. 1913, § 10381), and which declares that:

"Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office, or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable * * * shall be fined," etc.

[1] It has been repeatedly held that written letters or printed or written matter which are merely abusive, scandalous, scurrilous, improper, intemperate, unjustifiable, offensive, vulgar, or highly reprehensible, or even libelous, are not within the prohibition of this statute. See Swearingen v. U. S., 161 U. S. 446, 16 Sup. Ct. 562, 40 L. Ed. 765; U. S. v. O'Donnell (C. C.) 165 Fed. 218; People v. Eastman, 188 N. Y. 478, 81 N. E. 459, 11 Ann. Cas. 302.

If the language used must have or may have an immoral effect, in a sense relating to sexual impurity, upon those into whose hands it may come, it was held in U. S. v. Benedict (C. C.) 165 Fed. 221, that the paper is within the statute. In Burton v. U. S., 142 Fed. 57, 73 C. C. A. 243, it was held that, where the acts described and the ideas conveyed in a book were calculated to deprave the morals of the reader by exciting sensual desires and libidinous thoughts, the book was obscene. In U. S. v. Musgrave (D. C.) 160 Fed. 700, it was held it is sufficient, if the reading would in the opinion of reasonable persons tend to deprave or corrupt the morals of reasonable persons, and would suggest to the minds of either sex thoughts of an impure or libidinous character.

[2] It is not essential that the entire contents of the paper be within the statute. Demolli v. U. S., 144 Fed. 363, 75 C. C. A. 365, 6 L. R. A. (N. S.) 424, 7 Ann. Cas. 121; U. S. v. Harman (D. C.) 38 Fed. 827.

[3] Omitting names and places, it may be well to quote some of the language found in the printed paper sent out through the mails by the defendant:

"Now ——— is a well known dyed-in-the-wool criminal priest. * * * Then he is charged also with the seduction of a young girl. * * * He has been free to drink, to rape and to rob at his heart's content with the odds of being simply transferred to another charge in substitution of some sick or absent pastor. * * * At ——— where he substituted for a while, he assaulted a young married woman, annoyed her with his frequent visits and lecherous attentions and was constantly trying to fix dates with her. At ——— he annoyed another married woman as well as her daughters, all handsome young women, until the father ordered him from the house. * * * He finally left there with his old reputation of leaving a helpless pregnant girl behind him."

Again:

"But at the same time to find a place for ———, the criminal priest of ———, who was thrown out of the house of a married woman by her aggrieved husband, has assaulted another woman in the confessional. * * * He has the reputation in the village of being a monster of unnatural and unmentionable vices. The worst stories of his solicitation and assaults upon young men are told in his community. With this man young boys are not considered safe. * * * His house is famous for its nocturnal orgies where a company of young men and boys are accustomed to smoke, drink and play cards with the zealous pastor. His bed associations are the vile talk of the shops and stores."

Again:

"Two brilliant and popular men, yet with a reputation of common rakes and debauchees. If ——— has his mistresses, and his nocturnal visits in ——— are well known and scored by the citizens of that city, the exploits of ——— go his master even one better. Transferred from ——— to ——— as an absolute necessity on account of his scandalous associations with the opposite sex; his well-known visits to the tenderloin, where the most obscene talk follows his orgies there; his life at ——— is again assailed on account of the female company he keeps there in his very rectory against the statutes of the diocese and the plain demands of ecclesiastical discipline and propriety. And now he takes the same young woman, who has been the occasion of so much talk, with him to ——— and the history of his irregular and erratic exploits follow him from parish to parish. The mother of this young woman is heart-broken over ——— intimacy with her daughter and pleaded in vain with her not to accompany him to ———. * * * He himself gave away the criminal alliance of his immediate predecessor with a married woman to be accused himself of a similar scandal. He knows that adultery, rape, abortion and even murder are laid to the door of his rectory. * * * A local druggist has since confessed that he had sold more drugs for the prevention of childbirth to that priest than to any other customer."

And again:

"On another occasion he paid a visit to a summer resort up in the ——— mountains. It happened in this way: One evening a woman, unattended, called at the hotel. She claimed that her husband was a traveling man and would be along the next day. The next day, sure enough, the would-be husband and traveling man arrived. But the clerk whispered to the proprietor that the man was neither a married man nor a traveling man. 'Why,' said he, 'that is Father ——— of ———. I live in the same village and know him well.' The following day when ——— came to pay his bill he was told that

it would be $15.00. M——— made eyes and protested against the exorbitant charge. But the proprietor informed him of the kind of place he kept and that those who abused it would have to pay a fine or be exposed. When the woman came along she was also soaked to the tune of $15.00. M——— paid the $30.00 without further protest and was glad to get away with the feeling of a korkscrew pulling at his gizzard and with the hope that the luckless exploit would never get any further. * * * A hackman of ——— tells the tale how M——— came to him one evening with two young priests and told him to give the poor young fellows a good time. How he was directed to the house of some young girls whom the priests took to a halfway house and spent the rest of the night with them there."

Again:

"His continual nocturnal absence and late morning returns were liable to make the impression that the poor man (referring to a father of the church) was out day and night looking after the sick and the care of souls. But later developments in the study of his career explain this mystery of his nocturnal activities and of his limp and exhausted condition following his nocturnal avocations."

These are some of the many statements. It seems to me clear that, while these statements printed in the paper referred to and circulated through the mails are of a nature to create a feeling of disgust with some, they are at the same time clearly calculated and worded by their frequent reference to illicit sexual intercourse to fix the mind and thought of very many of the readers on such matters and excite sexual thoughts and desires. If some of these statements are not obscene and lewd and of an indecent character, it is difficult to imagine or describe what would be. True, vile and nasty words are not used; but the offense condemned by the statute is, not the use of nasty or filthy words or expressions, but the use of obscene and lewd or lascivious words and phrases.

One paragraph above quoted after referring to the "continual nocturnal absence and late morning returns" of the priest referred to, and stating that this might give rise to the thought that he was out looking after the spiritual welfare of some of his parishioners, plainly negatives that such was the purpose of such nightly absences and as plainly indicates and charges that such nocturnal absences were for the purpose of illicit sexual intercourse and that the person referred to had indulged therein. If this is not lewd and obscene, what is? Was it necessary that the printed article go more into detail?

In U. S. v. Clark (D. C.) 38 Fed. 732, a "lewd book, pamphlet, or paper" is defined as one which describes dissolute, unchaste acts, the reading whereof by reason of its contents is calculated to excite lustful and sexual desires in those whose minds are open to such influences. See, also, Burton v. U. S., 142 Fed. 57, 63, 73 C. C. A. 243. The description of the visit of the woman to the hotel under false pretenses, of the coming of the priest under an assumed name, the exorbitant charge made by the proprietor because of the purpose of the overnight visit of the two plainly indicated and suggested, and the reluctant payment of such charge by the man concerned, suggest to those whose minds are that way at all inclined the feasibility of such transactions and suggest and necessarily awaken libidinous thoughts and sexual desires. The minds of all readers are fixed on that subject for the

time being. Reading such articles does not improve or benefit any one, and with very many the effect is seriously harmful. It seems to me unnecessary to comment on the other quotations. The most of the printed matter in the paper complained of is quite different from that found set out in full in People v. Eastman, 188 N. Y. 478, at pages 482, 484, 81 N. E. 459, 11 Ann. Cas. 302.

In Tyomies Pub. Co. et al. v. U. S., 211 Fed. 385, 390, 128 C. C. A. 47, 52, it is said:

"The words 'obscene, lewd, and lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity"—citing Swearingen v. U. S., 161 U. S. 446, 16 Sup. Ct. 562, 40 L. Ed. 765; U. S. v. O'Donnell (C. C.) 165 Fed. 218; U. S. v. Benedict (C. C.) 165 Fed. 221; Konda v. U. S., 166 Fed. 91, 92 C. C. A. 75, 22 L. R. A. (N. S.) 304.

The quotation from the paper set out as a part of the indictment in this case repeatedly refers to and plainly describes and charges illegitimate sexual acts and intercourse. In truth, from the beginning to the ending of the paper the mind of the reader is kept upon that subject. The sexual indulgences of the priests referred to by name are made to stand out glaringly. See, also, MacFadden v. U. S., 165 Fed. 51, 91 C. C. A. 89.

I am unable to see that the paper referred to in the indictment and from which the quotations given are taken is not within the condemnation of the statute. At least, the language quoted presents a question of fact for a jury. It is true that the purpose of the writer and mailer of the articles in this paper was to scandalize the persons mentioned, and not to awaken sexual thoughts and desires; but the statute does not concern itself with motives.

[4] On demurrer the court has only power to decide whether the book or paper or letter is so clearly innocent that a jury should not pass on it at all. U. S. v. Kennerley (D. C.) 209 Fed. 119. That cannot be said in this case.

The demurrer is overruled.

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## UNITED STATES & MEXICAN TRUST CO. et al. v. KANSAS CITY, M. & O. RY. CO. et al.

(District Court, D. Kansas, First Division. February 21, 1917.)

No. 1262.

1. RAILROADS ⇐194(6)—FORECLOSURE SALE—LIABILITY OF PURCHASER—CLAIMS AGAINST RECEIVER.

A State Corporation Commission had made an order reducing certain rates, from which a railroad appealed, giving bond to repay to the shippers the excess of the old rates over the new collected pending the appeal if the order should be sustained. Shortly thereafter a receiver was appointed for the railroad, and he collected the old rates from the shippers during his operation of the road. When he took possession the amount of cash on hand was less than the amount then due for operating expenses, and there had been no net income received by the road since the appeal from the Commission's order was taken. The railroad property was sold

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

under a decree of foreclosure, one clause of which provided that the property should be sold free and clear of any lien to secure the payment of the outstanding receivers' certificates, which lien should be transferred to the money paid into court, but subject to a lien to secure the payment of any other indebtedness or liability incurred by the receivers in the operation of the railway properties. Another clause provided that the purchaser should hold the property as fully and completely as the defendant had theretofore held it, and should be entitled to have the premises free and discharged from all liens, claims, and charges of the defendant railway company and of all persons claiming under it. Thereafter the Commission's order was sustained, and the commission intervened in the receivership proceedings and asked to have the amounts collected in excess of the new rates repaid to it for the benefit of the shippers. *Held*, that under the terms of the decree the amount so collected by the receiver during the operation of the railroad, liability for which was conceded, should be charged against the property in the hands of the purchaser, not against the purchase money.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 651.]

2. RECEIVERS ⟸158(1)—CLAIMS—PREFERENCES OVER BONDS—COLLECTION OF EXCESSIVE RATES.

The Commission was also entitled to a priority for the excessive amount collected by the railroads before the receiver was appointed, over the claims of the bondholders, notwithstanding the fact that there was no diversion thereof to the benefit of the bondholders, since it was a claim incurred for the operation of the railroad during the period just prior to the receivership, and therefore entitled to a preferential equity.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301, 302.]

3. RAILROADS ⟸194(6)—FORECLOSURE SALE—LIABILITY OF PURCHASERS.

Since the payment of the excess collected by the railroad before the appointment of the receiver was not specially provided for in the foreclosure decree and the property was not expressly burdened therewith, and since the payment thereof by the railway company prior to receivership would have decreased the cash which came into the hands of the receivers and was employed in protecting the property, the amount thereof must be paid out of the proceeds of the sale not charged against the property in the hands of the purchaser.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 651.]

In Equity. Suit by the United States & Mexican Trust Company and others against the Kansas City, Mexico & Orient Railway Company and others, in which the Corporation Commission of Oklahoma intervened. On petition by the intervener to have the amounts collected by the railroad company before and after receivership in excess of the rates fixed by the Commission repaid to it for the benefit of the shippers. Payment to Intervener ordered.

Ball & Ryland, of Kansas City, Mo., for Corporation Commission of Oklahoma.

John A. Eaton, Dudley W. Eaton, Hyden J. Eaton, Haff, Meservey, German & Michaels, and Lathrop, Morrow, Fox & Moore, all of Kansas City, Mo., for Kansas City, M. & O. R. Co.

Krauthoff, McClintock & Quant, of Kansas City, Mo., for individual bondholders.

POLLOCK, District Judge. The facts are, before receivers were appointed for the defendant railway company in this suit, the Corpora-

tion Commission of the state of Oklahoma (hereinafter called "Intervener") had established by its orders certain rates of carriage for commodities transported between points in that state by all railway companies doing business in the state, including defendant company. Defendant railway, being desirous of testing the validity of said orders in the Supreme Court of the state as by law authorizing the making of the same permitted, took and perfected an appeal from said orders of Intervener to the Supreme Court of the state, and in so doing gave supersedeas bonds executed by itself as principal and the United States Fidelity & Guaranty Company as surety, conditioned, as follows:

"Now, therefore, if the said the Kansas City, Mexico & Orient Railway Company shall refund to the Corporation Commission of the state of Oklahoma, for the parties entitled thereto, all charges which said company may collect or receive, pending said appeal, in excess of those fixed or authorized by the final decision of the Supreme Court of the state of Oklahoma on appeal, and that if pending said appeal the said the Kansas City, Mexico & Orient Railway Company shall comply with the requirements by said Commission and prescribed to be incorporated in this bond, which said requirements are attached hereto as Exhibits A and B, then this obligation shall become null and void, otherwise to remain in full force and effect."

Thereafter said orders were finally in all things adjudged and determined by the Supreme Court of the state of Oklahoma to be valid and binding on defendant railway company, by reason whereof defendant company and its surety on its said supersedeas bonds became liable to pay the difference between the rates established in the orders of Intervener and the rates charged and collected shippers of commodities by the railway company during the pendency of said appeals. Meanwhile, defendant railway company in this suit passed into hands of receivers, who continued to charge and collect the same rates of carriage theretofore charged and collected by defendant railway company until the validity of said orders of Intervener were finally adjudicated and determined in the Supreme Court of the state. The total of said excess rates of carriage so charged and collected by defendant railway company prior to the date on which its property passed into the hands of receivers appointed in this suit is the sum of $3,683.74; and the aggregate amount of such excess rates charged and collected by receivers after the property of the railway company came into their hands, and before the validity of said orders were finally determined and adjudged in the Supreme Court of the state, is the sum of $4,980.-34. The intervention in this suit is for said amounts to be paid the Intervener for the use and benefit of the shippers illegally charged and held to pay the same in contravention of valid and binding orders of Intervener.

On the hearing the United States Fidelity & Guaranty Company, not having paid as surety on the supersedeas bonds given, was dismissed from this suit.

The defenses made to the allowance of said demands and against orders for their payment are interposed by the Kansas City, Mexico & Orient Railroad Company, the purchaser of the property of defendant railway company at the foreclosure sale made in pursuance of the decree of foreclosure entered in this suit, and on behalf of the mort-

gage bondholders of defendant railway company who are not participating in the purchase of the property made under the decree of foreclosure, but who took their pro rata share of the purchase price of the property sold.

[1] In so far as the amount of the excess freight rates charged and collected by the receivers of the road is concerned, there appears to be no serious contention but that the same must be refunded at the suit of Intervener. So much seems conceded. But the contention on this branch of the case arises over who shall be held to the payment of the same. Whether said amount shall be paid out of the purchase price of the property deposited in court awaiting distribution to the bondholders, or by the purchasing company now in possession of the property. This contention, of course, arises out of and must be determined by a construction of the foreclosure decree under which the rights of those contesting are fixed and determined.

Turning now to said decree, it is seen the property sold thereunder was comprised in two lots designated as A and B. Lot A, comprising the great bulk of the property, was sold for the sum of $6,000,000. Lot B was sold for $1,000. Paragraph 18 of the decree states the "manner, terms, and conditions" on which the property was sold. So much of said paragraph as pertains to the question here presented reads, as follows:

"The said property designated as lot A shall be sold free and clear of any liens or charges to secure the payment of the outstanding receivers' certificates and receivers' notes as aforesaid, such lien or charge being transferred to the money to be paid into court to pay off and discharge said certificates and said notes and interest thereon as hereinafter provided, but subject to a lien to secure the payment of any other indebtedness, obligation or liability which shall have been duly and lawfully contracted or incurred by the receivers in the operation of the railway properties in their custody and control, and also subject to the rights and claims of the trustees of the International Construction Company of Delaware, the International Construction Company of Texas and the Union Construction Company of Delaware, as set forth or referred to in the intervening petitions of the trustees in bankruptcy of said companies on file in this case, in so far as they are prior in right of ownership or lien, or superior in equity, to the mortgage foreclosed herein. Such rights and claims of the said construction companies may be prosecuted, established, and enforced in so far as they shall finally be determined to be prior in right of ownership or lien, or superior in equity, to the lien of the mortgage herein foreclosed on the said railway property to be hereunder sold, in the hands of the purchaser thereof at said sale or his successor or assigns."

Again, paragraph 22 of the decree, in providing the form, condition, and legal effect to be given the special master's deed, among other matters, provides as follows:

"The purchaser or purchasers, or his or their successors or assigns, shall, after the delivery of the premises and property purchased, hold, enjoy and possess the same and an absolute indefeasible title thereto, together with all the rights, privileges, immunities and franchises thereto appertaining, as fully and completely as the defendant railway company has heretofore held, owned or enjoyed, or now holds, owns and enjoys the same; and the purchaser or purchasers, or his or their successors or assigns, shall thereupon be entitled to have and to hold the said premises and property so purchased and conveyed free and discharged from all the liens, claims and charges of the defendant railway company, and of all persons claiming under it, except as in this decree expressly reserved."

However, as paragraph 18 above quoted expressly charged the property purchased under the decree with the lien of and with payment of all indebtedness, obligations and liabilities lawfully contracted or incurred by the receivers in the operation of the property save such demands only as are excepted therefrom, it follows the purchaser took the property purchased under the decree burdened with the payment of the excess freight charges received by the receivers in the operation of the property from shippers represented by Intervener, and that said amount is not payable out of the purchase price, for such is the terms and intent of the decree.

As to the demand of Intervener for the amount of excess freight charges coming into the hands of the railway company before receivership, the purchasing company and the nondepositing bondholders make two contentions: First, jointly against Intervener, that said amount is not superior in equity to the rights of the mortgage bondholders, and hence is payable to Intervener neither out of any part of the purchase money now in the hands of the court, nor should it be required to be paid by the purchaser as any part of the burden on it imposed by the decree; second, as between themselves the contention is, if said demand is entitled to priority in payment over and above the bonded debt which the property was primarily sold to satisfy, whether the purchaser shall be held to payment of the same under the terms of the decree of foreclosure or whether it shall in equity be paid out of the purchase price.

[2] Coming now to a consideration of the first contention, it is to be noted there was in this case no diversion of income of any kind or nature whatever by defendant railway company prior to receivership, and this for the all-sufficient reason there was no net income received over and above the expenses of operation; hence no claim to priority of payment based on any such ground is tenable in this case. And had the surety company making the supersedeas bond with defendant railway company been compelled to pay the claim presented by Intervener, it would not have been entitled to a decree for preferential payment (Martin Metal Mfg. Co. v. United States & Mex. Trust Co., 225 Fed. 961, 141 C. C. A. 85; United States Fidelity & Guaranty Co. v. United States and Mex. Trust Co., 234 Fed. 238, — C. C. A. —), unless such right to preferential payment inheres in the very nature of the claim itself presented in this suit. That the right to preferential payment does inhere in the nature of the demand presented by Intervener is the principal contention presented in its support. The case relied upon to justify this contention is that of Love v. North American Co., 229 Fed. 103, 143 C. C. A. 379, which arises out of what is commonly called the Frisco receivership and involved freight charges arising out of the precise orders of Intervener as those above stated in this case. However, as against the conclusiveness of the above decision on the facts here presented, it is urged, as shown by the opinion in the Frisco case, there came into the hands of the receivers on their appointment and qualification more than $600,000 in cash, and that company earned the year prior to receivership about $13,000,000, of which the excess rates there in dispute formed a part, whereas, in

this case, as has been stated, there were no net earnings of the railway company over and above operating expenses, even including the excess freight rates charged and collected which are involved in this suit. Further, there came into the hands of the receivers in this matter on their appointment and qualification only the sum of $12,300.21, all of which sum was then due for operating expenses unpaid. Such differences in point of fact would afford ample ground to distinguish the Frisco controversy from that here presented, were it not a reading of the opinion in the Frisco Case, 229 Fed. 103, 143 C. C. A. 379, discloses, while preferential payment was in that case decreed on the above-stated facts, among other things, which differentiates it from this case, yet the opinion in the Frisco Case goes much further, as the following language clearly shows:

"(2) There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When those rates were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers. It was a public duty owing to the state whose orders had been superseded. It is a duty which this court and the Supreme Court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity, that has taken over the business of the public carrier by means of a receivership, ought to be equally careful to enforce.

"(3) Petitioners' claim also comes within the rule which underlies the right to a preferential payment. Freight rates are the lifeblood of a railroad operation. It will not be contradicted that, if there were no freight rates paid in the United States, not a wheel would turn on any road. What does the law say in regard to the allowance of preferences? We accept the law as established by the Supreme Court of the United States, and by this court, as follows: The class of claims which under the decisions of the Supreme Court may lawfully receive an equitable preference in payment out of the income or out of the corpus of the property of a mortgaged railroad over the bondholders secured by a prior mortgage is limited to claims incurred for the current expenses of the ordinary operation of the mortgaged property in the usual course of the business of the mortgagor. The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the ordinary operation of the property of the mortgagor incurred in the usual course of its business, for labor, supplies, and like things, necessary for the operation of the railroad, within a limited time, usually not exceeding six months anterior to the appointment of the receiver, the claim may be preferred in payment, otherwise it may not be. Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 124, 129, 44 C. C. A. 389, 390, 395, 52 L. R. A. 481; Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co., 154 Fed. 629, 632, 83 C. C. A. 403, 406; Blair v. R. R. Co. (C. C.) 23 Fed. 523; Whiteley v. Central Trust Co., 76 Fed. 74, 75, 77, 22 C. C. A. 67, 34 L. R. A. 303; Gay v. Hudson River Electric Power Co. (C. C.) 182 Fed. 904, 907, 909; Penn. Steel Co. v. New York City R. Co. (C. C.) 165 Fed. 485; Farmers' Loan & Trust Co. v. Northern P. R. R. Co. (C. C.) 68 Fed. 36, 41, 42; Fordyce v. Omaha City & E. Ry. Co. (C. C.) 145 Fed. 544, 556, 557; Chicago & A. R. Co. v. U. S. & Mex. Trust Co., 225 Fed. 940 [141 C. C. A. 64]; Martin Metal Mfg. Co. v. Same, 225 Fed. 961 [141 C. C. A. 85].

"We think that what has been heretofore said establishes that the claim of the shippers is a claim incurred 'for the current expenses of the ordinary operation of the railroad in the usual course of business of the road.' On principal it cannot be distinguished from payments to sureties who have signed bonds to stay the execution of judgments and claims for holders of unused tickets for refunds, and many other like charges which are habitually allowed, and have been allowed in the receivership of the Frisco Company.

"We are aware that, when a surety company signs a bond for an independ-

ent consideration, it will not be subrogated, when subrogation would prejudice the rights of persons having independent equities. That is not the case here. The principle stated, however, in our judgment, ought never to be applied as against the creditors on whose behalf the bond is given. The bondholders of the Frisco Company have no equity that is superior to that of the surety company.

"The judgment appealed from is therefore reversed, and the cause remanded to the district court, with instructions to allow the claim of the Fidelity & Guaranty Company in the sum of $12,124.51, with legal interest from the date that the surety company paid the same, and also to allow the claim of the Corporation Commission, for the benefit of the people entitled thereto, in the sum of $76,627.35, with legal interest from December 5, 1912, as preferred claims, as against the claims of the bondholders and other general creditors of the Frisco Road."

In view of the foregoing language appearing in the opinion in the Frisco Case, which is controlling here, and giving to it the weight of additional reasons why the claims there presented should be allowed as preferential, there appears in this case no sufficient reason why Intervener shall not be allowed to recover the amount of excess freight charges which came into the hands of defendant railway company prior to receivership.

[3] The only remaining question is, Out of what fund, or by what person, under the terms of the decree of foreclosure, shall payment of this demand be made? As the payment of demands of this character was not specially provided for in the foreclosure decree, and as the property is not expressly so burdened with the payment of the same, and as the payment of said demand by the railway company prior to receivership would have decreased the cash which came into the hands of the receivers on their appointment and qualification, and was by them employed in protecting the property, and as the holding of the court in the Frisco Case, as seen, is that such a demand from its very nature requires its preferential payment out of the corpus of the property itself, I am of the opinion this portion of the demand of Intervener must be paid out of the fund now in the hands of the court awaiting distribution.

It is so ordered.

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UNITED STATES & MEXICAN TRUST CO. et al. v. KANSAS CITY, M. & O. RY. CO. et al.

(District Court, D. Kansas, First Division. February 21, 1917.)

No. 1262.

1. RECEIVERS ⇐146—RETURN OF BONDS—PERSONS ENTITLED.

Where the holders of railroad bonds loaned them to the company to enable it to pledge them as collateral to secure the purchase price of equipment, and during receivership in a suit to foreclose the deed of trust securing the bonds the indebtedness for equipment was satisfied and the bonds delivered into court, the original holders are clearly entitled to such bonds as they can identify by serial number as the actual bonds loaned by them.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 253–256.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. RECEIVERS ⟸146—RETURN OF BONDS—PERSONS ENTITLED—IDENTIFICATION.
Where the original holders could not identify all the bonds by serial number, but it appeared that all bonds issued were for the same amount and could be distinguished only by the serial number, that more bonds were delivered to the court by the seller of the equipment than were claimed to have been loaned to the railroad company, and that there was no other claimant for any of those bonds, the holders are likewise entitled to bonds in an amount equal to those loaned by them above number they could actually identify.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 253–256.]

3. RECEIVERS ⟸146—RETURN OF BONDS—CONTRACT FOR DELIVERY—PERFORMANCE DURING FORECLOSURE.
Where a railroad company had made a contract with two construction companies, whereby the latter agreed to advance money to the railroad to pay interest on prior outstanding bonds and the railroad agreed to issue to them other bonds equal in amount to the interest advanced, and, after the construction companies had paid a large amount of interest for which they had received no bonds, a receiver was appointed in proceedings to foreclose the mortgage securing the bonds which the construction corporations were to receive, and a number of bonds were delivered to the court after the payment of an indebtedness which they had been pledged to secure, which bonds were claimed by no one except the construction companies under their contracts, equity and justice required that the bonds be delivered to the construction companies; the railroad being insolvent so that in no other way could the companies be reimbursed for their payment of interest.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 253–256.]

4. RECEIVERS ⟸146—RETURN OF BONDS—CONTRACT FOR DELIVERY—OBJECTIONS—OTHER BOND HOLDERS.
The holders of the other bonds of the same issue cannot object to the delivery of such bonds to the construction company, since they are entitled only to share equally with all other bonds of that issue in the proceeds of the sale of the mortgaged property, and that right is not diminished by the delivery of the bonds in accordance with the contract.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 253–256.]

5. JUDGMENT ⟸735—ESTOPPEL—ISSUES CONCLUDED.
An action by the construction companies in which they recovered judgment for the amounts advanced to them does not estop them from claiming the bonds in the foreclosure proceedings, where it appeared that that suit was brought on behalf of the railroad company and conducted by its attorneys to obtain the judgments as a basis for a suit for the appointment of receivers, that the railroad company's judgment therein, and that the issue of the right of the construction companies to the bonds under their contract was not presented in any way in that action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265.]

In Equity. Suit by the United States & Mexican Trust Company and others against the Kansas City, Mexico & Orient Railway Company and others to foreclose a mortgage given to secure corporate bonds in which a receiver was appointed and a decree of foreclosure and sale entered. On petition in intervention by Charles A. Young, as trustee in bankruptcy of the Union Construction Company, and another, to be declared entitled to certain bonds secured by the mortgage and in possession of the court. Petition granted.

Frank P. Sebree and Krauthoff, McClintock & Quant, all of Kansas City, Mo., for petitioners.

Haff, Meservey, German & Michaels and Lathrop, Morrow, Fox & Moore, all of Kansas City, Mo., for respondents.

POLLOCK, District Judge. The facts out of which this controversy arises, briefly stated, may be summarized as follows:

As pleaded in the bill of complaint filed for foreclosure in this case by the trustee for the first mortgage bondholders, the trustee had theretofore certified and there was outstanding entitled to participate in the security afforded by the first mortgage sought to be foreclosed 24,538 bonds of the denomination of $1,000 each, and in the decree of foreclosure heretofore entered the mortgage debt is estimated and stated to be, exclusive of interest, $24,538,000. However, as a controversy existed as to the exact amount of said mortgage indebtedness outstanding in good faith at the date of the entry of the decree, and, further, a controversy as to the ownership of certain of the first mortgage bonds certified and outstanding, said matters were at the date of the entry of the decree known to be reserved for future determination. In pursuance of such known reservation, and for the purpose of the determination of said questions, and the further question of what outstanding bonds might lawfully under the terms of the decree entered be employed in payment of the purchase price, Hon. H. C. Sluss was appointed special master to take the proofs and report to the court on said questions. In the taking of proofs and the making of said investigation, the following state of facts developed:

Of said 24,538 first mortgage bonds certified and outstanding, 2,930 bonds had been theretofore pledged as collateral security by the railway company to its promissory notes given in the purchase of equipment necessary to the continued operation of the railway, title to said equipment being retained under conditional sale contracts entered into between the parties by the concerns furnishing said equipment. Thereafter and during the pendency of the receivership, under orders of the court, said equipment claims were compromised and discharged by the payment of cash and the giving of the obligations of the receivers, which said obligations of the receivers, under the decree entered, were discharged out of the purchase price of the road, thus leaving said 2,930 bonds free in the possession of the receivers to be dealt with by the court as equity might require.

Subsequent to the receivership of the railway company, the Union Construction Company, being wholly insolvent, was duly adjudged a bankrupt, and Charles A. Young was made its trustee in bankruptcy. The International Construction Company, also being insolvent and wholly unable to pay its debts, was in due form of law adjudged a bankrupt, and intervening claimant Charles S. Jobes was duly elected trustee in bankruptcy of the property and estate of said bankrupt, all as by the National Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, provided.

The contentions here presented arise over the equitable ownership of 1,362 of said 2,930 bonds only, the remaining 1,568 of said bonds

having been heretofore, by consent of all parties, canceled and retired by order of the court. As to said 1,362 bonds, the claims of the trustees in bankruptcy of the construction companies intervening herein are as follows:

At the time the pledge of collaterals was made with the equipment companies by the railway company, it borrowed from the Union Construction Company 80 of said bonds so pledged, and from the International Construction Company it borrowed 491 of said bonds. As to the remainder of said 1,362 bonds, the claims of the trustees of the construction companies are as follows: By virtue of certain contracts duly entered into between the railway company and said construction companies, it was agreed the construction companies should pay the interest maturing on certain bonds of the railway company theretofore issued and outstanding, and in return for so doing the railway company promised and agreed to turn over to the construction companies for each $1,000 of interest so paid one of its first mortgage bonds of the denomination of $1,000 and certain other property rights. In pursuance of said agreements, the Union Construction Company did pay interest accruing on bonds of the railway company outstanding to holders thereof in amount $94,380; hence that company became entitled to receive from the railway company 94 of its said first mortgage bonds at the date of the receivership herein. The International Construction Company did pay, in pursuance of its said agreement to so do, interest maturing on first mortgage bonds issued by the railway company and outstanding in amount $697,691, and was at the date of the receivership entitled to have and receive from the railway company in repayment of its first mortgage bonds 697. As the railway company is and was at the date of the receivership herein wholly insolvent and unable to respond in damages for its failure to deliver said bonds undelivered under said contracts, but now has in its possession the bonds in controversy herein, it is asserted by claimants equity will regard that as having been done which of right should have been done, and will decree payment in the manner provided in the contracts between the parties from the only source possible to be performed.

After taking of the proofs, on full hearing and consideration thereof, the able special master found and recommended the entry of an order upholding the claims of the trustees in bankruptcy of the construction companies so made to the 1,362 bonds now in dispute. To the reports of the master exceptions were filed by the trustee for the bondholders and by the Kansas City, Mexico & Orient Railroad Company, for which company the property was purchased by a purchasing committee at the sale made under the foreclosure decree. Thereafter, before hearing of said exceptions, by leave of court, the construction companies filed herein supplemental intervening petitions based on the grounds heretofore stated and prayed decrees awarding to them the 1,362 first mortgage bonds of the railway company out of the 2,930 bonds coming into the possession of the receivers of the railway company as heretofore stated, which said bonds are now in the possession of the clerk of this court; the remainder having by consent of all parties been canceled and retired.

To said intervening petitions the trustee for the bondholders, complainant herein, and the railroad company, purchaser at the sale, have answered, and the matter stands submitted for decree, and on exceptions filed to the reports of the special master.

It thus appears the claims of the trustees of the construction companies presented involve the ownership, beneficial use, and right to possession of first mortgage bonds made, executed and issued by the railway company, duly certified by the trustee for the bondholders, and lawfully outstanding at the date of the receivership, comprised in three classes, namely: (A) 274 of said bonds claimed by the International Construction Company, definitely identified by their several serial numbers, which said bonds were borrowed by the railway company from said construction company for the purpose of pledging the same with the equipment companies to secure an indebtedness of the railway company thereto, which said indebtedness has been fully paid, the pledged bonds released, and now held free in the hands of the court to do therewith as equity may require. (B) 80 like bonds borrowed by the railway company from the Union Construction Company, and 217 bonds borrowed by the railway company from the International Construction Company pledged, released, and now free in the hands of the court, under like conditions in every respect as the bonds falling in class A save and except the same are incapable of identification by their several serial numbers. (C) 792 bonds free in the hands of the court to either cancel as unclaimed by any one or to award to the construction companies in settlement of their demands made, as heretofore stated, if in equity and good conscience it should be so decreed.

Coming now to the merits of the above claims and the defenses interposed thereto, it may be said:

The facts in so far as the merits of the matters presented are concerned are wholly undisputed. In so far as any defense interposed by the trustee for the first mortgage bondholders may go, it is manifest said trustee has no personal interest whatever in the controversy; it occupies merely a representative capacity. It is trustee for the bonds here in dispute as well as for all other bonds duly made and certified under the mortgage placed by the railway company on its property. All it asks, or can in justice demand, is that the court do equity to all.

In so far as the railroad company defending is concerned, it stands in the shoes of the parties who bought the property at the foreclosure sale as a purchasing committee. All it can ask is to be permitted to pay for the property purchased under the foreclosure decree and receive the same in the way and manner stipulated in the decree. Neither the bondholders' committee, with which the holders of the first mortgage bonds of the railway company desiring to participate in the purchase of the property deposited their bonds for such purpose, nor any other party in interest, if any, has appeared to contest the rights of claimants save and except as above stated.

[1] Coming now to the merits in so far as the 274 bonds comprising class A definitely identified by serial numbers are concerned, there

can be but little controversy these bonds were the absolute property of the International Construction Company loaned by that company and borrowed by the railway company for a special purpose. That purpose having been subserved, the bonds released, returned to the receivers of the railway company, and now in the hands of the court, must go to the trustee in bankruptcy of the owner as part of the assets of the estate in bankruptcy.

[2] As to the 80 bonds borrowed by the railway company from the Union Construction Company, and the 217 bonds borrowed by the railway company from the International Construction Company incapable of definite identification by the serial numbers thereon, or otherwise, except in so far as they are conclusively shown to be a portion of the 2,930 bonds pledged by the railway company in the purchase of the equipment, the question presented is this: Does the fact that claimants are unable to specifically identify these bonds by serial number preclude recovery by them? As has been seen, no one claims to own these bonds save the trustees in bankruptcy for the construction companies which loaned them to the railway company for the purpose of consummating its purchase of equipment. The indebtedness of the railway company to the equipment companies having been satisfied, and the bonds having been returned to the officers of this court, and being free in the hands of the court, shall they be canceled and the claims of interveners be denied merely because of the inability of the representatives of the owners to identify them more nearly than as a part of the mass of 2,930 bonds? That all of said 2,930 bonds, and in fact all of the 24,538 bonds made by the railway company, certified by the trustee and outstanding for value at the date of the receivership, are identical in terms, denomination, and secured by the same mortgage, is conceded; the only point of difference, and the only identifying marks thereon, being the serial numbers placed thereon. In such case, I am of the opinion further proof of identification than that they form a part of the mass of 2,930 bonds is not indispensable to a recovery by the true owners.

This proposition is conclusively established by recent decisions from the Supreme Court. Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981; Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047; Duel v. Hollins, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143. Indeed, the precise and pivotal question ruled by the Supreme Court in Gorman v. Littlefield, supra, was this question of identification of corporate paper. It is there said:

"It is therefore unnecessary for a customer, where shares of stock of the same kind are in the hands of a broker, being held to satisfy his claims, to be able to put his finger upon the identical certificates of stock purchased for him. It is enough that the broker has shares of the same kind which are legally subject to the demand of the customer. And in this respect the trustees in bankruptcy are in the same position as the broker. Richardson v. Shaw, supra.

"It is said, however, that the shares in this particular case are not so identified as to come within the rule. But it does appear that at the time of bankruptcy certificates were found in the bankrupt's possession in an amount greater than those which should have been on hand for this customer, and

the significant fact is shown that no other customer claimed any right in those shares of stock. It was, as we have seen, the duty of the broker, if he sold the shares specifically purchased for the appellant, to buy others of like kind and to keep on hand subject to the order of the customer certificates sufficient for the legitimate demands upon him. If he did this, the identification of particular certificates is unimportant. * * *

"The ground upon which the Circuit Court of Appeals decided the case seems to have been that the certificates were notes sufficiently identified; but, as we have said, they were on hand to an amount claimed by the appellant and more, and were not claimed by any other customer."

Thereafter a kindred matter of identification of corporate paper arose in the Hollins matter. The trial court, Judge Hough presiding, ruled as follows:

"This claim is the legitimate aftermath of Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, if that decision logically follows Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, and Sexton v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995. That there is such logical sequence Justice Day's opinion asserts, and it seems to me plain enough. All these controlling cases fully accept the 'grain elevator' doctrine respecting stocks, so that a customer who finds any stock of the kind he bought on his broker's premises can claim what he finds, for it is 'unnecessary * * * to put his finger on the identical certificates purchased for him.' This right is helped out by that 'presumption in favor of fair dealing' so much dwelt on in the higher courts, though said presumption is productive of cynic smiles even in counsel advancing the same in courts nearer real life—as it is seen in stockbrokers' shops." In re H. B. Hollins & Co. (D. C.) 212 Fed. 319.

From this decision an appeal was taken to the Circuit Court of Appeals and the holding of the trial court reversed. 219 Fed. 544, 135 C. C. A. 312. However, on appeal to the Supreme Court the decision of the Circuit Court of Appeals was reversed and that of the trial court upheld.

In Duel v. Hollins, supra, Mr. Justice McReynolds, delivering the opinion of the court, says:

"When the bankruptcy which occasioned Gorman v. Littlefield took place, the broker's box contained certificates, not specifically allotted, for 350 shares of the designated stock, and the appellant's claim for 250 was the only one presented by a customer. We held that under the circumstances no more definite identification was essential, and approved his contention. * * * The District Court properly awarded to appellants their pro rata parts of the 100 shares."

In the light of the foregoing decisions controlling here, it must be held the trustee in bankruptcy of the Union Construction Company is entitled to receive of the 2,930 bonds now in the hands of the clerk of this court 80 bonds in lieu of the 80 bonds loaned the railway company, and the trustee in bankruptcy of the International Construction Company 217 of said bonds in lieu of the 217 of like bonds loaned by it. This disposes of all the bonds in class B as above stated.

[3] Coming now to a consideration of the claims of interveners to the 792 bonds comprising class C, as above stated, as has been seen neither party defending against the rights of claimants have any interest in said bonds. Interveners are the only claimants thereto. Hence they must be either canceled and disallowed any participation

whatever with other outstanding bonds in the purchase of the property, or in the proceeds of the sale of the property in the hands of the court, or must be awarded to claimants under the contracts made between the construction companies and the railway company, which said contracts provided, among other things, as follows:

"Second. That the construction company will promptly pay all of the interest coupons which mature August 1, 1911, on any of said bonds of the railway company which it, the construction company, may sell or dispose of for cash or otherwise without detaching the coupons therefrom, to the end that the railway company will not be called upon to provide the money to pay any coupon maturing prior to and on August 1, 1911, on any of the bonds which the construction company may sell or otherwise dispose of.

"Third. That the railway company will sell and cause to be issued and delivered to the construction company enough of the first mortgage bonds of the railway company at par to reimburse the construction company for any interest maturing prior to and on August 1, 1911, which the construction company may pay on any of the bonds so sold by it, and will cause to be issued and delivered to the construction company with each bond five shares of preferred and five shares of the common stock of the railway company as fully paid, that is to say, for every thousand dollars ($1,000) of interest that the construction company may pay on said bonds so sold by it, the railway company will sell and deliver to the construction company one of its said first mortgage bonds of the denomination of one thousand dollars ($1,000) and five shares of its preferred and five shares of its common stock fully paid, and all money so paid by the construction company on account of any of said interest coupons shall be treated and considered in all respects as an additional cost of construction under the construction contract between it and this company."

A like contract existed between the railway company and the International Company.

That the construction companies did in performance of said contracts, and in reliance on receiving from the railway company bonds in return for the money so paid, is conceded. That the bonds now claimed were lawfully outstanding at the date of the receivership, and were at said date due and owing from the railway company to the construction companies, and are now free in the hands of the court to employ in satisfaction of the just claims of interveners, is not disputed. That there are no other claimants to said bonds, and that the railway company being insolvent in no other way can the just demands of claimants against the railway company be met, in whole or in part, is further conceded. Therefore why should not such disposition of that portion of the bonds claimed by interveners be made.

[4] In so far as other first mortgage bondholders, whether they are participating in the purchase of the property or are taking their pro rata share of the purchase price, they are not here resisting save through their trustee complainant in this suit, and, so far as they are concerned, it seems well settled the security afforded them by the property included in the mortgage foreclosed and heretofore sold is in proportion as the bonds by each of them held bear to the entire amount of first mortgage bonds outstanding for value in good faith at the date of the receivership.

In Claflin v. South Carolina R. Co. (C. C.) 8 Fed. 118, Mr. Chief Justice Waite says:

"The question is thus distinctly presented whether bonds then in the hands of the company, or which afterwards got there, could be issued or reissued so as to carry with them a lien under the first mortgage as against the second, This, as it seems to me, is a question of intention to be gathered from the language of the instrument, considered with reference to the surrounding circumstances and the subject-matter of the contract. I am aware that, ordinarily, a debt once paid is extinguished, and that, as a mortgage is but an incident of the debt it secures, if there is no debt there can be no mortgage. But here the point of the inquiry is whether the parties intended to apply this rule in all its strictness to the prior mortgage, about which they were contracting. Certain it is that, before the mortgage can be cancelled, the debt it purports to secure must be shown never to have been created, or, if created, extinguished within the meaning of the contract for security expressed in the mortgage. As against other bondholders secured by the same mortgage, I cannot believe there is a doubt of the power of the company to put out and keep out the entire issue up to the time the bonds become due. The contract with the individual bondholder is no more than that he shall have his due proportion of the security the mortgage on its face implies."

It is true the amount of cash required to be paid into court to satisfy the bid made by the purchaser at the foreclosure sale does depend on the number of bonds employed in making payment of the purchase price under the provisions of the foreclosure decree, but the right to employ outstanding bonds in making payment of the purchase price is a right of the bondholders themselves, and not a right of the purchaser. Its obligation is to pay cash for the property except in so far as the bondholders may elect to employ their bonds for the purpose of retaining an interest in the property sold instead of taking their pro rata share in cash.

Under the circumstances of this particular case and in view of the defenses interposed, without doing inequity to any party in interest, I am of the opinion justice may be done claimants by turning over to them the 792 bonds comprised in class C as above stated. That is to say, by turning over to the trustee in bankruptcy for the Union Construction Company as part of the assets of said estate 94 of said bonds, and by turning over to the trustee in bankruptcy of the International Construction Company 697 of said bonds, unless a matter to be further considered precludes recovery of any of the bonds involved in this controversy by claimants.

[5] It is the further contention of the parties defending against the relief prayed by intervening claimants, they are estopped from asserting the claims here presented, specific performance of the contracts made between the railway company and the construction companies for that said construction companies elected to proceed against the railway company in certain actions at law, and did recover judgments at law for the same indebtedness represented by the specific bonds sought to be recovered in this proceeding.

Examination of the petitions filed by the construction companies against the railway company in the law action shows that of the Union Construction Company to be in one count, based on a claim for money had and received by the railway company from plaintiff therein. The petition of the International Construction Company to be in two counts, the first founded on a promissory note made to plaintiff therein by

the railway company, and the second based on a claim for money had and received by the railway company from the plaintiff therein. No claim for the enforcement of the contracts made by the construction companies with the railway company for specific payment in bonds, or for borrowed bonds, was in issue in said case, as shown by the record. Conceding the right of one pleading and relying upon the doctrine of estoppel by election to show dehors the record what matters were actually put in issue, litigated, and determined in such action, yet the proofs in this matter leave no room for the application of such principle in this suit, for it is now clearly shown by the proofs the purpose of obtaining the judgments at law, which were confessed by the railway company in favor of the construction companies, was to form the groundwork for a suit in equity brought for the appointment of receivers for the railway company at the specific direction of the railway company. The same attorneys who usually represented the railway company also represented the construction companies. The bringing of the law actions by the construction companies was directed and caused to be carried on by counsel for the railway company. The construction companies had neither choice in the matter nor opportunity for exercising their own volition or election through independent officers or counsel. All done was dominated and controlled by those representing the interests of the railway company.

It follows from all the proofs, the defense of estoppel is inequitable and not made out.

It further follows, the exceptions of complainant trustee for the mortgage bondholders, and the Kansas City, Mexico & Orient Railroad Company, purchaser at the foreclosure sale, interposed to the reports of the special master, must be and are overruled and denied; that said reports, in so far as they deal with the subject-matter of this suit, be confirmed.

It further follows, the claims of intervening petitioners to the 1,362 bonds involved in this suit be allowed and confirmed; that decree enter awarding Charles S. Jobes, trustee in bankruptcy for the International Construction Company of Delaware, as part of the assets of said estate in bankruptcy, the 274 first mortgage bonds of the railway company bearing serial numbers 19,847 to 20,122, both inclusive. Also, further awarding to said trustee out of the 2,930 first mortgage bonds now in possession of the court 914 of said bonds, to be selected out of the 2,930 bonds by the clerk of this court, the serial number of each of said bonds so selected to be by the clerk kept and preserved of record; that the decree entered herein bear said serial numbers.

It is further ordered, the decree, out of said 2,930 bonds, award to the trustee in bankruptcy of the Union Construction Company, Charles A. Young, 174 of said bonds, to be selected by the clerk in like manner and on same conditions as is provided for the selection of bonds awarded the trustee of the International Construction Company. The bonds so awarded to be by the clerk of this court turned over and delivered to claimants on the entry of decree herein.

It is so ordered.

## UNITED STATES & MEXICAN TRUST CO. et al. v. KANSAS CITY, M. & O. RY. CO. et al.

### In re VOLKER.

(District Court, D. Kansas, First Division. February 26, 1917.)

No. 1262.

RAILROADS ⟸195(1)—FORECLOSURE SALE—PAYMENT OF PURCHASE PRICE—INTEREST.

Where a railroad in the hands of a receiver was sold under a decree of foreclosure which provided that on the acceptance of a bid the bidder should, within 10 days after the entry of an order directing such payment, pay in cash to the special master the amounts necessary to pay the expenses of the receivership and certain other expenses therein enumerated and to pay pro rata the bonds of bondholders who elected not to join in the purchase, the amount of which payment could not be determined until some time after the sale, so that the order for payment was not made for more than two years, during which time no application for an order for a cash payment was made by any one, the purchaser need not pay interest on the bonds of nonparticipating bondholders between the date of the sale and the time of its payment into court, though as a general rule a judgment at law or decree in equity for the payment of money, which makes no express provision regarding interest, bears interest at the legal rate until paid.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 656, 658.]

In Equity. Suit by the United States & Mexican Trust Company and others against the Kansas City, Mexico & Orient Railway Company and others, for the appointment of a receiver and the foreclosure of mortgage given to secure the bonds of the railway company. On application by William Volker as a bondholder for an order to require the purchaser of the property to pay interest on the unpaid purchase price. Application denied.

Krauthoff, McClintock & Quant, of Kansas City, Mo., for William Volker.

John A. Eaton, Dudley W. Eaton, Hyden J. Eaton, Haff, Meservey, German & Michaels and Lathrop, Morrow, Fox & Moore, all of Kansas City, Mo., for Kansas City, M. & O. Ry. Co.

POLLOCK, District Judge. The facts are, under the foreclosure decree entered in this case, the railway property covered by the mortgage foreclosed was, on the 6th day of July, 1914, sold to a purchasing committee of the bondholders desiring to participate in the purchase of the property for the sum of $6,001,000. Under the terms of the decree the purchaser was obligated to pay out of the purchase money underlying claims evidenced by receivers' certificates and notes, preferential demands, etc., in the sum of more than $2,500,000. Further, under the form of the decree entered the first mortgage bonds on certain terms and conditions were applicable to the payment of the purchase price. Again, at the date of the sale there existed certain undetermined matters regarding the right to apply certain outstanding bonds toward the payment of the purchase price and other disputed questions,

rendering the amount of cash required to be deposited to make good the bid uncertain and incapable of definite ascertainment. Hence it transpired the purchaser made no payment of cash into court required to complete the bid made until October 9, 1916, or for a period of more than two years after the sale was made and confirmed and possession of the railway property delivered to the purchaser. In this condition of the case one William Volker, the holder of five first mortgage bonds undeposited with the Bondholders' Committee, and on which he elects to take his pro rata share of the purchase price after deduction of the amount required to meet demands of a preferential nature, applies for an order requiring the purchaser of the property to pay interest on that portion of the purchase price payable to the holders of bonds not employed in making good the purchase money bid for the property. The matter stands submitted for decision.

Without in any manner controverting the correctness of the general proposition urged, that a judgment at law which in terms makes no provision for the payment of interest after its rendition bears interest at the legal rate until paid; or that a decree in equity, requiring the payment of a specifically named sum of money entered under like circumstances, bears interest in like manner; or that, as a usual thing, one who purchases and receives property sold under a foreclosure decree, but who fails or neglects to make payment of the purchase price to complete the bid in equity, should pay interest on the unpaid purchase money from the date of the sale until payment made; yet, under the form of the decree and the special facts of this case, I am of the opinion the order requested must be denied for the following reasons:

The decree in regard to the payment of the purchase price reads as follows:

"Upon the acceptance of any bid for lot A, the person or persons making the same shall, after the application thereto of any amounts theretofore deposited by him or them in cash, make payment in cash to the special master, within ten days after the entry of an order of the court directing such payment, of such amount as shall be necessary to pay and satisfy the costs of this cause and the allowances that shall be made to the complainant, the trust company, for its services and disbursements and the services and disbursements of its counsel, the unpaid services of the receivers and their counsel, and the sums which may be allowed by the court in this cause, if any, to any other party to this case, or its, his, or their solicitors, and any taxes which may be a lien upon the mortgaged premises; and such purchaser shall also, upon confirmation of the sale, deposit in such banks or trust companies as may be approved by the court the sum of $2,707,400, being the principal and interest to date of maturity of the outstanding receivers' certificates in the aggregate principal sum of $2,142,000, with interest thereon from January 1, 1914, to July 1, 1914, at 5 per cent. per annum, and receivers' notes heretofore executed by the receivers in the aggregate principal sum of $475,000, all maturing July 1, 1914, with interest thereon at 6 per cent. to maturity amounting to $36,850, such deposit to be evidenced by certificate of deposit to the order of the judge and clerk of this court or otherwise, as the court may direct, which amount shall be and constitute a trust fund for the payment of said receivers' certificates and said receivers' notes with interest thereon, respectively, at the maturity thereof; and upon the deposit of said sum of money as herein provided the lien of said receivers' certificates and of said receivers' notes shall be released and discharged as to the property to be sold hereunder as herein provided and shall attach to the said money so deposited for the benefit of the holders of said receivers' certificates and receivers' notes, and shall be used to pay, satisfy, and discharge said notes and certificates with interest thereon at the maturity

thereof, and shall be disbursed for that purpose upon the joint order of a judge of this court and the clerk thereof.

"In case any bidder or purchaser shall fail to make good his bid, upon its acceptance by the special master, by making any of the payments as hereinbefore provided in consummation of his purchase, then the sums paid or deposited by such bidder or purchaser shall be forfeited as a penalty for such failure, and shall be applied toward payment of the expenses of a resale and toward making good any deficiency or loss in case the property shall be sold at a less price upon such resale, and for any other or further purposes that the court may direct.

"Any of the complainants, or any holder or holders of said first mortgage bonds, may bid and purchase at any sale had under this decree. If any sale for which a deposit has been made shall not be confirmed by the court, such deposit shall be returned to the purchaser, and the deposit of any unsuccessful bidder shall be returned to him, when a bid other than that made by him has been accepted.

"The balance of the purchase price of lot A not hereinbefore required to be paid in cash may be paid either in cash, or the purchaser may satisfy and make good the balance of his bid, in whole or in part, by turning in to be paid and canceled, or to have payment on account credited thereon, first mortgage bonds and coupons, and such purchaser shall be credited therefor on account of the purchase price with such sums in cash as would be payable on such bonds and coupons out of the proceeds of sale if the whole amount of the purchase price were paid in cash.

"The amount payable upon the acceptance of a bid for lot B shall be payable in cash, any moneys deposited to qualify the purchaser to bid being first applied thereon.

"Any deposit or payment required by the terms of this decree to be made in cash (other than the deposit to be made for the purpose of paying and discharging the outstanding receivers' certificates and receivers' notes, with interest thereon at maturity as provided in paragraph 19 hereof, which shall be made in the manner therein provided) may be made by the delivery of a certified check or checks, or certificate or certificates of deposit, upon or issued by any bank or trust company, in favor of or to the order of said special master and satisfactory to him.

"The special master may, in his discretion, accept, temporarily, instead of bonds and coupons, the certificate of Columbia-Knickerbocker Trust Company of New York, or of any other trust company which he may approve, that it holds first mortgage bonds or coupons issued under said first mortgage of the defendant railway company dated February 1, 1901, subject to the order of the special master, and will deliver them to him on demand for cancellation or other disposition, according to the terms of this decree.

"The court reserves the right to retake and resell the property, upon such notice as the court shall direct, in case the purchaser shall fail or omit to make any payment on account of the purchase price as hereinbefore required.

"Upon any sale made hereunder, the entire amount of the principal of said bonds secured by said first mortgage, to wit, the sum of $24,538,000, will become and be due and payable."

While there has been in this case very great delay in making payment, yet much of such delay was occasioned in working out the questions necessary to be determined before the cash required to make good the bid could be ascertained, and no order of the court was ever applied for or made under the terms of the decree ordering the purchaser to pay into court the cash necessary to complete the bid, which order became imperative, until the 9th day of October, 1916, at which time, in pursuance of an order made, there was a cash payment made on account until other matters then undisposed of could be determined. The failure to order cash payment under the terms of the decree to be paid in by the purchaser and user of the property arose from the failure of

those entitled to receive their pro rata share in cash to apply for such order. Whether there is as yet in the hands of the court an amount sufficient to make the cash payment required under the terms of the decree complete has not been determined. Hence, as at no time in the past the precise pro rata share the applicant and other nonparticipating bondholders similarly situated are entitled to demand and receive from the hands of the court could be determined or paid, I am of the opinion the demand for payment of interest thereon, when definitely ascertained, must be denied.

It is so ordered.

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GENESEE VALLEY TRUST CO. et al. v. KANSAS CITY, M. & O. RY. CO. et al.

(District Court, D. Kansas, First Division. February 28, 1917.)

No. 178-N.

1. REMOVAL OF CAUSES ⊜45—ACTIONS REMOVABLE—STATUTE.

A suit brought in the state court by some of the bondholders of an insolvent railroad company against the reorganized corporation, which purchased the property at the sale under a decree of foreclosure rendered by the federal court, the original corporation, the bondholders' committee and others, to have determined the interest which plaintiffs acquired in the property purchased partly through the use of their bonds, cannot be removed by the purchaser, which was incorporated under the laws of the state in which the suit was brought, even though the question was involved in the receivership suit, so that the prosecution of the suit in the state court could be restrained, since the right of removal is statutory and the cause does not come within any of the classes of suits which may be removed under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [Comp. St. 1913, § 1010]) § 28.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 89.]

2. REMOVAL OF CAUSES ⊜48—GROUNDS FOR REMOVAL—SEPARABLE CONTROVERSIES.

The controversy involved in that suit arose between plaintiffs and all the defendants, and was not separable between plaintiff and the removing defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 93, 94.]

In Equity. Suit by the Genesee Valley Trust Company and another against the Kansas City, Mexico & Orient Railway Company and others, begun in the state court and removed by one defendant into the United States District Court. On plaintiff's motion to remand. Motion granted.

Krauthoff, McClintock & Quant, of Kansas City, Mo., for the motion.

John A. Eaton, Dudley W. Eaton, and Hyden J. Eaton, all of Kansas City, Mo., opposed.

POLLOCK, District Judge. [1] This is a suit by plaintiffs, holders of first mortgage bonds of the Kansas City, Mexico & Orient Railway Company, who deposited their said bonds with the Bondholders' Com-

mittee, attempting a reorganization of the railway property sold under foreclosure decree entered in a former suit in this court. It is brought against the railway company, the maker of the mortgage foreclosed, the Kansas City, Mexico & Orient Railway Company of Texas, which constructed that portion of a continuous line of railway extending from the city of Wichita to the city of Granada, Tex., lying within the state of Texas; also, against the Kansas City, Mexico & Orient Railroad Company, which is organized under the laws of this state, to take over and operate the property purchased at the foreclosure sale; the officers and directors of said railroad; the individuals composing what is styled the "Bondholders' Committee"; and said committee; the holders of certain notes issued by the Kansas City, Mexico & Orient Railroad Company secured by the pledge of collaterals, and many other corporations and individuals citizens of this state, of foreign states and aliens. The prayer of the petition is for general relief only. The purpose of the suit, in so far as can be ascertained from the very voluminous petition filed, would seem to be to procure a decree defining precisely what interest plaintiffs have obtained or will obtain in the property purchased partly through the use of the first mortgage bonds of the railway company by them held and owned which were deposited with the Bondholders' Committee and by said committee employed in making payment of the purchase price of the road heretofore sold under the foreclosure decree. At the time the petition was filed in the state court there was also filed an application to that court for the appointment of a receiver of the property now in the hands of the railroad company, but said application stands withdrawn, to be renewed only on application to this court. The Kansas City, Mexico & Orient Railroad Company, now in possession and operating said property, alone has appeared and removed the controversy into this court. Plaintiffs move to remand.

The ground on which the removal is taken is that all matters placed in issue by the petition are and were at the date of the commencement of this suit involved in the former suit in this court in the foreclosure proceeding in which the decree was entered under which the railroad company purchased the property; hence this court has exclusive jurisdiction in such former suit of all matters now attempted to be drawn into controversy in this suit. Wherefore it is contended this case is properly removable by way of preserving the jurisdiction of this court first obtained in the foreclosure suit.

The question, therefore, is, can one of many defendants, a citizen of this state, and codefendant with other citizens of this state and of foreign states and aliens (a portion of said codefendants being citizens of the same state with plaintiff), remove this controversy into this court in preservation of its jurisdiction over matters in issue in a former suit pending and undisposed of, or to prevent a court of the state from taking jurisdiction to litigate and determine matters in issue in a former suit in this court?

The right of removal of a suit from a state to a federal court is purely a creature of statute. While it is generally true when a federal court has first acquired jurisdiction over a matter in equity, and it

is or becomes necessary to the doing of complete justice among parties that such jurisdiction shall be maintained and preserved, parties litigant will, on application to such court, be restrained from presenting and litigating such issues in another forum or jurisdiction. More especially is this true if the res has been first brought within the custody or grasp of the federal court for disposition. But does this form the basis for the removal of a controversy from a state into a federal court? If it be conceded plaintiffs by the deposit of their bonds with the Bondholders' Committee and the use of said bonds by the committee in the purchase of the property in such manner as to make plaintiffs joint purchasers of the property with others, and, as purchasers plaintiffs became parties to and bound by the foreclosure decree and all other proceedings in the former suit in this court, yet, would such concession justify the removal here taken?

As has been seen, the removing defendant is a corporate citizen of this state. The plaintiffs are citizens of the state of New York. The subject-matter of this suit involves the interest of plaintiffs in the property purchased at a foreclosure sale through their representatives and in part by the use of their property rights; hence is a controversy arising out of the general principles of equity, and is not one over which the Judicial Code confers original jurisdiction on this court. Can a citizen of this state, when proceeded against in a court of the state by citizens of a foreign state, remove such a suit into this court?

Section 28 of the Judicial Code (Comp. St. 1913, § 1010) makes provision for the removal of three classes of controversies from a court of the state into a federal court, substantially, as follows:

(1) Any suit or action of a civil nature arising under the Constitution, laws, or treaties of the United States over which the Judicial Code gives the federal courts original jurisdiction may be removed by the defendant or defendants therein; (2) any other suit or action over which the federal courts are given jurisdiction by the Judiciary Act may be removed into a federal court by the defendant or defendants therein if nonresidents of the state in which the suit or action is brought; (3) when in any such suit or action there arises a controversy wholly between citizens of different states which controversy can be fully determined as between said citizens of different states without the presence of other parties, in such case any one or more defendants interested in said controversy may remove the controversy into a federal court.

Making application of the foregoing classifications to the present controversy, it may be said: As has been seen, the subject-matter of this suit is not one over which the federal courts are by the Judicial Code given original jurisdiction; hence it does not fall within the first classification above made.

[2] Whatever controversy is presented by the petition of plaintiffs in this suit is one arising between plaintiffs and all defendants over the extent of the interest or property rights of plaintiffs in the railway property purchased at the foreclosure sale of the Kansas City, Mexico & Orient Railway Company's property, and is not a separable

controversy arising between plaintiffs and removing defendant; hence this controversy does not fall within the third classification.

The subject-matter of this controversy is one over which federal courts of equity have general jurisdiction concurrent with courts of the state; hence falls within the second classification above made in so far as its subject-matter alone is concerned. But, as has been seen, removing defendant is a resident of this state and is not a nonresident as required by that classification.

It follows, the suit was improperly removed by a resident defendant, and must be remanded.

It is so ordered.

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DOWNEY v. GOOCH et al.

(District Court, E. D. Oklahoma. May 15, 1914.)

No. 2055.

1. MINES AND MINERALS ⟸73—OIL AND GAS LEASE—RIGHTS OF LESSEE—INJUNCTION.

The lessee under a valid oil and gas lease, which does not grant the lessee any estate in the oil and gas, but simply a right to prospect therefor, is nevertheless entitled to equitable relief to prevent the removal of the oil and gas by a subsequent lessee.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 201, 210.]

2. SPECIFIC PERFORMANCE ⟸61—OIL AND GAS LEASE—EQUITABLE RELIEF—SURRENDER CLAUSE.

In an oil and gas lease, a clause entitling the lessee to surrender the lease at any time, but providing that the clause shall cease immediately and concurrently with the institution of any suit by the lessee to enforce the lease, or any of its terms, does not prevent a court of equity from granting relief to the lessee in the nature of specific performance, since, as soon as the suit was begun, the surrender clause became ineffective, so that the lease was no longer a unilateral contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 183–187.]

3. MINES AND MINERALS ⟸73—OIL AND GAS LEASE—EQUITABLE RELIEF—EQUITY OF LEASE.

An oil and gas lease of lands within a district not yet developed, where there was little likelihood of the oil being drained through wells on adjoining lands, for a term of one year, and so much longer as oil and gas were produced in paying quantities, which required the lessee to commence operations within 45 days, and to drill to a depth of 2,800 feet unless oil or gas was found in paying quantities at a less depth, is not so inequitable against the lessor as to deprive lessee of his right to injunction to restrain removal of oil and gas by a subsequent lessee, nor does an extension for 6 months of the time within which to commence operations render it inequitable.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 201, 210.]

4. MINES AND MINERALS ⟸75—OIL AND GAS LEASE—EXTENSION—CONSIDERATION.

Where the lessor extended the time for commencing an oil and gas well, under the lease, 6 months after the expiration of the time originally fixed,

in consideration of $1 and of the lessee's agreement to drill first on adjoining land leased to him by the lessor's wife, the extension was valid, and founded on sufficient consideration.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 200.]

5. COURTS ⊜365, 367—RULES OF DECISIONS—DECISIONS OF STATE COURT—RULE OF PROPERTY—EQUITABLE PRINCIPLES.

Decisions of a state court, construing oil and gas leases, in so far as they establish rules of property, are binding on the federal court, but in so far as they announce the court's view on equitable principles they are persuasive, but not binding.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 958, 959, 969–971.]

In Equity. Suit by F. C. Downey against C. B. Gooch and others. On complainant's application for temporary injunction against the defendants. Application granted.

Haskell B. Talley, of Tulsa, Okl., for complainant.

James C. Denton, of Muskogee, Okl., and John Q. Adams and Richard H. Wills, both of Claremore, Okl., for defendants.

CAMPBELL, District Judge. This matter now comes before the court upon complainant's application for a temporary injunction against the defendants. On January 22, 1914, Charles A. Bates, owner of the land in controversy, executed to H. B. De Ford an oil and gas lease thereon for the term of one year and as long thereafter as oil or gas should be produced. The consideration for the lease was $1 paid at the execution thereof, one-eighth of the oil produced, and $200 per year in advance for each gas well. The lessee agreed to complete a well on said premises within 4 months from the date of execution, and, if oil was found in paying quantities to continue development. A further provision of the lease was:

"The party of the second part [lessee] further covenants and agrees to commence operations within 45 days from the date of this lease, and drill to a depth of 2,800 feet, unless oil or gas is found in paying quantities at a lesser depth. Otherwise this lease becomes null and void."

Another provision of the lease was:

"The party of the second part, its successors or assigns, shall have the right at any time on the payment of ——— dollars, to the party of the first part, his heirs, or assigns, to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine: Provided, this surrender clause and the option therein reserved to the lessees shall cease and become absolutely inoperative immediately and concurrently with the institution of any suit in any court of law or equity by the lessee to enforce this lease or any of its terms, or to recover possession of the leased land or any part thereof against or from the lessor, his heirs, executors, administrators, successors, or assigns, or any person or persons."

On the same date that the above-mentioned lease was entered into, the lessor's wife made a similar lease to the said De Ford, covering her lands adjoining those covered by her husband's lease; this latter lease being in all respects similar in its term to the former, except that operations were to begin within 60 days and the first well was to be completed within 6 months. Operations were not commenced under the

first-mentioned lease within 45 days from its execution, that time expiring on March 8th; but on March 21st De Ford and Bates went upon the land and agreed upon a location for a well, which location was made, and on the 23d of March Bates in writing agreed to an extension of the time within which to begin operations, reading as follows:

"Contract entered into this 23d day of March, 1914, between Charles A. Bates, of Catoosa, Oklahoma, and H. B. De Ford: That the time to commence operations specified in a certain oil and gas lease, made in favor of H. B. De Ford, of which this is made a part thereof, shall be extended for a term of six months from the 23d day of March, 1914.

"[Signed] Charles A. Bates."

As a consideration for this extension De Ford paid Bates $1 at the time of its execution. He also testifies, as do several other witnesses, that a further consideration for this extension was the agreement on his part to immediately put down a second well upon the land covered by the lease of Mrs. Bates before beginning operations upon Bates' lands; the first well having already been completed on her land. This second well on Mrs. Bates' land was completed on April 28th, and on the same day De Ford moved some casing upon Bates' land, placing it at the point where the location was previously made on March 21st; it being, as he claimed, his intention to proceed immediately with a well on Bates' land. On April 27th, however, Bates executed an oil and gas lease, covering the same land, to the defendants, who, shortly after De Ford had moved the casing upon the land, entered thereon and threw the casing off the land, and undertook by force to hold it for themselves. De Ford secured a restraining order against them in the state court, but within a few days dismissed that suit, and immediately thereafter this action was commenced; Downing having acquired the lease by assignment. Bates, while admitting that he signed the 6-months extension above quoted, contends that it was the verbal understanding that the extension was to be but 30 days, instead of 6 months, and that he signed it believing that it so provided, and it was on the theory that this 30-day extension had expired that he made the lease to the defendants on April 27th. It appears from a preponderance of the evidence, however, that his contention in this respect must fail. It also appears that, while he may have told the defendants, at the time they took their lease, that his understanding was that the extension of the De Ford lease was only for 30 days, they at the time knew that as written it provided for an extension of 6 months' time.

[1] It is held by the Supreme Court of this state in Kolachny v. Galbreath, 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451, that a lease of this character does not vest in the lessee the oil and gas, and is not a grant of any estate therein, but is simply a grant of a right to prospect for oil and gas; no title vesting until such substances are reduced to possession by extracting the same from the earth. It is also held in the same case that ejectment will not lie to recover possession of land covered by such a lease against a lessor or his grantee, when the lessee has never been in possession under the lease. But, unless for reasons to be hereafter noticed this lease is invalid or void,

or contains provisions which preclude equitable relief, certainly the lessee is entitled to protection in his right to explore for oil and gas. The bill alleges, and the proof shows, that if the defendants are not enjoined they will proceed under the terms of the lease they hold to take the oil and gas from these premises, having already, pending this suit, sunk a well several hundred feet. Certainly, if plaintiff's lease is not invalid or void, or does not contain provisions precluding equitable relief, he is entitled to an injunction restraining this destruction of the very corpus of the property to which the right given by his lease pertains. Big Six Development Co. v. Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332; Brewster v. Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213; Logan Natural G. & F. Co. v. Great Southern G. & O. Co., 126 Fed. 623, 61 C. C. A. 359; Allegheny Oil Co. v. Snyder, 106 Fed. 764, 45 C. C. A. 604.

[2] It is urged that this is in effect a suit for specific performance of the plaintiff's lease, and that, because of the surrender clause above quoted, it is a unilateral contract such as will not be specifically enforced, citing Kolachny v. Galbreath, supra. It is true that a court of equity will not ordinarily specifically enforce a contract unilateral in its terms, for the reason that it would be doing a vain and useless thing to render a decree settling the rights of the parties which one of them might set aside at will; but it will be noted that that objection cannot be urged to the clause referred to in this lease, because it is specifically provided that that clause and the option therein reserved becomes absolutely inoperative immediately and concurrently with the institution of such a suit as this. By the very terms of the lease this surrender clause is now no longer available to the lessee, and of course the plaintiff, as assignee of the lease, now stands in the original lessee's shoes and is bound by this provision. For all future considerations, the lease now stands as though that clause had never been inserted.

[3] In Kolachny v. Galbreath, supra, and Superior Oil & Gas Company v. Mehlin, 25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942, lessees holding oil and gas leases were refused specific performance thereof, for the reason that they were inequitable and unfair in their terms, and because by the terms of their surrender clauses they were unilateral in their nature, and the lessees, after decree in their favor, could have abandoned the property. These cases are relied upon by the defendant as authority for denying relief in this case. But it will be noted, from an examination of these cases, that the leases there involved differed from the lease now being considered in this: That there, in the one case, there was absolutely no provision for early commencement of operation, the term of the lease being for 15 years, and providing that operations should commence within the term of the lease, or, in case of failure to do so, to pay an amount not stipulated. In the other, it was provided that, in case no well was drilled within 2 years, the lessee might continue the lease in force from year to year by the annual payment of $24. Of course the effect of such a lease is to place it within the power of the lessee to hold the prop-

erty, neither developing it himself nor permitting any one else to do so, thus depriving the lessors of the benefits of production and enabling the adjoining properties to drain the land in the meantime, all for merely nominal consideration paid the lessor. Such a contract is manifestly inequitable. But the lease in controversy here is a very different contract. As originally drawn, it bound the lessee to begin operations upon the property within 45 days and to complete a well on the premises within 4 months. At the time the lease was entered into, the land was unproven or "wildcat" territory. It seems to me that the undertaking to commence a well within 45 days and to complete it within 4 months, to a depth of 2,800 feet, unless oil and gas be found at a lesser depth, was, under the circumstances, a very fair proposition from the standpoint of the lessor. Nor does the extension of 6 months within which to commence operations upon the property, under the facts as presented at the hearing, appear to me to necessarily inject an inequitable feature into the contract. The plaintiff and his wife had each given leases upon their adjoining lands. The proof is that the lessee had, within about 3 months from the execution of the leases, sunk two wells upon the wife's property; the second being sunk upon the wife's rather than upon the husband's at his request. Presumably the husband was interested in the development of the wife's property, as well as his own. Their interests were more or less identical. The evidence indicates that the lessee was proceeding in the utmost good faith and with reasonable diligence to explore this property for oil and gas. There was no pipe line in that vicinity to take the oil. There was no great necessity for immediate development to prevent drainage by other wells.

[4] The testimony of Bates indicates that as a matter of fact the understanding with De Ford, at the time the leases were first executed, was that he was to have 60 days, rather than 45 days, to begin operations on Bates' land, and 45 within which to begin on his wife's land, but that, in drawing the leases, the terms were inadvertently reversed. Had the lease from Bates contained the 60-day provision it was intended to contain, it would have expired on March 23d, the date the extension was executed; but the fact that the 45-day period had expired some 15 days before the extension was granted does not invalidate the extension. By the extension Bates recognized the existence of the lease and its continuing validity, and the proof indicates that under the circumstances the extension was supported by a sufficient consideration.

[5] So far as the Oklahoma cases cited establish rules of property, I consider them binding on this court. So far as they announce the view of that court upon certain equitable principles involved, they are, like all other respectable authorities, persuasive, but not binding upon the federal court. It will be noted that Judge Williams, in Kolachny v. Galbreath, expressly refrained from determining whether the option expressed in the lease under consideration would be valid at law, but bases his decision upon the ground that the lease presented such a unilateral contract as a court of equity would not specifically perform.

Upon consideration of the pleadings and proof offered at the hearing, I conclude that the temporary injunction should be granted. Order may enter accordingly, to become effective upon the execution by the plaintiff to the defendants of a good and sufficient bond appropriately conditioned, to be approved by the clerk, in the sum of $10,000.

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## In re WEINTROB.

(District Court, E. D. North Carolina. March 17, 1917.)

No. 567.

1. BANKRUPTCY ⟸377—COMPOSITION—ACCEPTANCE BY CREDITORS.

Votes, to accept an offered composition in bankruptcy of 25 per cent., cast by an assignee of a claim against a bankrupt, who paid the full face value of the claim shortly before the creditors' meeting, and by relatives of the bankrupt, who claimed for moneys loaned by them to him, should not be considered, where the bankrupt made no explanation for the purchase of the claim, or as to the circumstances of the loans, in determining the majority of creditors necessary to accept the composition under Bankr. Act July 1, 1898, c. 541, § 12d, 30 Stat. 549 (Comp. St. 1913, § 9596), providing that the judge shall confirm a composition, if satisfied that the offer and its acceptance are in good faith, and have not been made or procured by any means, promises, or acts therein forbidden.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 586–588.]

2. BANKRUPTCY ⟸384 — COMPOSITION — DENIAL — ACTS PREVENTING DISCHARGE.

Under Bankr. Act, § 12d, as amended in 1910, authorizing the judge to confirm a composition with creditors, if the bankrupt has not been guilty of any acts which would bar his discharge, a composition will not be confirmed where, if a bankrupt's statements to sellers of merchandise were correct, a large amount of assets had disappeared, concerning which the bankrupt could give no explanation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590–592.]

In Bankruptcy. In the matter of Abe Weintrob, bankrupt. On exceptions to the referee's report on petition for confirmation of composition. Confirmation denied.

D. H. Gladstone and Bryant & Brogden, all of Durham, N. C., for bankrupt.

R. H. Sykes, D. W. Sorrell, and E. L. Tilley, all of Durham, N. C., for creditors.

CONNOR, District Judge. Abe Weintrob, trading under the firm name and style of A. Weintrob & Co., of Durham, N. C., filed his petition on December 2, 1916, submitting an offer of 25 per cent. to his creditors as a composition, before adjudication, as provided by section 12, amended by Act 1910, 36 Stat. 839, Fed. Stat. Anno. (2d Ed.) 543 (Comp. St. 1913, § 9596). He complied with the provisions of the statute, and, upon the hearing, at the meeting, 23 of his creditors filed proof of claims, which were allowed, aggregating $6,169.99; fifteen creditors, representing claims aggregating $3,377.12, voted to accept

the offer of composition; 8 creditors, representing claims aggregating $2,833.47, voted against acceptance; 8 creditors, representing $1,178.13 scheduled, were not filed; 4 creditors, relatives of the bankrupt, holding claims aggregating $800, voted to accept the offer and filed waivers of their right to receive cash for the amount due them. Rosenstein deposited, for Weintrob, the amount necessary to pay the composition and costs. The referee recommended the confirmation of the composition.

John B. Ellison & Son, whose claim for $1,018.24 was allowed, objected to the confirmation, and filed several specifications as the ground of their objection. Among other things they charge: That, during the four months immediately preceding the date of making the offer of composition, the bankrupt purchased and received goods, wares, and merchandise to an amount largely in excess of the assets scheduled by him. That he made and signed to Bradstreet Mercantile Agency, on May 22, 1916, a statement in which he represented that his estate was of the value of $8,761.96, while his liabilities amounted to only $1,955.32; that his goods and accounts inventoried $5,211.35. That on September 1, 1916, he made a statement, as a basis of credit, to Rose Bros., of New York, representing his assets to be $7,793.83 and his liabilities $2,061.37. He scheduled, on December 1, 1916, when making his offer of composition, his entire assets at $3,435 and his indebtedness as $7,013.58. That the petitioner procured, or advised, the purchase by L. Gladstein, Jr., of the claim, or debt, of Rose Bros., by paying to them the full amount thereof, and immediately thereafter said Gladstein voted to accept in settlement thereof 25 per cent. of said debt. That the petitioner kept no books of account, showing, or enabling his creditors to ascertain, the condition of his business or his true financial condition. That the composition is not for the best interest of the creditors.

Upon the filing of the report of the referee and the specifications, the cause was set for hearing, and, after notice to the petitioner and the objecting creditors, was heard at Raleigh, March 9, 1917; the parties being represented by counsel. The examination, taken before the referee, and oral evidence, was introduced on the hearing.

[1] The duty of the judge, upon the motion for confirmation, is prescribed by section 12d of the Bankruptcy Act (Collier [10th Ed.] page 283):

"He shall confirm the composition, if satisfied that (1) it is for the best interest of the creditors; (2) the bankrupt has not been guilty of any of the acts, or failed to perform any of the duties, which would be a bar to his discharge; (3) and the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises or acts herein forbidden."

It will be convenient to consider the specifications in the reverse order.

It is charged that the petitioner made a written statement to Rose Bros., of New York, on September 1, 1916, in which he represented that his stock inventoried $4,879.36 and his total assets were $7,793.83, and his liabilities $2,061.34. He purchased, at that time, from Rose

Bros., goods to the amount of $297.50. They sent this claim, with the "statement" made by Weintrob, to an attorney in Durham, N. C., for collection. A short while before the date set for the meeting of the creditors, they instructed their attorney to deliver the account, with the "statement," to L. Gladstein, Jr., of Durham, who paid Rose Bros. by check the full amount thereof, and took, from them direct, an assignment of the claim. Gladstein voted the debt for acceptance of the offer of composition. The significance of this transaction is found in the fact that, to have a majority in amount of the claims proven and allowed, it was necessary that more than $3,084.99, being one-half of $6,169.99, the amount proved, should vote for acceptance. Without the claim of Rose Bros., the amount so voting was $3,079.62. It may be that this claim had a special interest, and value, because of the alleged "statement" attached to it. This "statement" has not been produced, nor has Gladstein been called upon to explain the inducement which moved him to purchase, at its full face value, a debt against a bankrupt for $297.50, and immediately go into a meeting of the creditors and vote to accept, in full satisfaction, 25 per cent. of the debt—thus throwing away $223.12. When Weintrob is asked about the transaction, he contents himself with a stereotyped answer, "I don't remember." The transaction calls for explanation. It does not appear that Gladstein is related to Weintrob by blood or marriage, or bears any other relation to him, explanatory of his voluntary loss of $223, under the circumstances. Without the favorable vote of this claim, the composition would, at that stage, have failed.

Three other claims occupy a rather unsatisfactory attitude, when sought to be used to compel the very large minority, and without them the majority, of his creditors to accept one-fourth of their debts in full satisfaction. L. Friedman, an uncle, residing in Washington City, proves for $100; J. Weintrob, father, Atlantic City, proves for $250; H. Weintrob, brother, Atlantic City, proves for $100; D. Weintrob, brother, Cambridge, Md., proves for $350. The bankrupt says that these amounts are due—borrowed money; there is a painful uncertainty in regard to the dates upon which the money was loaned; there does not appear to be any other evidence of the debts than the statements of the bankrupt and his kinsmen. They all generously vote to accept 25 per cent. of their debts and to release their claim to that small percentage. This they are entitled to do, but when their generosity is used to make up the majority, in number and amount, of the creditors, and thereby secure, against the consent of a majority, confirmation of the composition, the court should call for satisfactory proof of the validity of their debts, and the reasons why they so generously reduce them by 75 per cent. and then surrender the 25.

[2] Passing to the specification in regard to the alleged shrinkage in the property of the bankrupt, it appears that he is engaged in the business of a "merchandise tailor and clothing." He did business in Atlantic City 5 or 6 years, and went to Washington City, where he remained about 18 months, when he went to Durham, N. C., April 8, 1916, bringing his goods with him. He says that he does not remember the value of the goods which he brought when he took an

inventory—whether he made any statement about the middle of May, 1916. When asked in regard to his purchases, sales, receipts, and other pertinent questions, relating to his business, he consistently adheres to the answer, "I don't remember," with an occasional variation, "I don't know." Industrious counsel say that these answers were given to 121 questions. This state of mental negation does not satisfactorily explain a business career of 7 months, beginning, as he stated, with a substantial balance and ending in unsecured debts, aggregating $7,013.59, and "stock in trade, $2,500; fixtures, $460; debts due on open accounts, $450"—and a proposition to settle with his creditors by paying them 25 per cent. of the amount due them. His entire indebtedness was contracted during the year 1916, and, except $250 due the bank, about $300 due for advertising, and the amounts which he says he owes his kinsmen, $800, it is all for goods and merchandise. He had no fire or other disaster, nor were his expenses large. He says that, during the spring or summer of 1916, he had diamond rings worth $1,000, one of which he sold to his sister for $300, and the others he sold or pawned and received $300 for them, making $600. He made several trips to Atlantic City during the summer and early fall of 1916. What relation these trips bear to his insolvency does not appear; he says that he did not gamble. He has but little education. He says that he employed Mr. Crabtree, who kept such books as were found by the receiver. Mr. Crabtree was not examined. The inventory was properly and correctly taken by the receiver. There is no cause of complaint in respect to his action. It is difficult to resist, upon this record, the conclusion that the bankrupt would not be entitled to a discharge, if asking for it in a case which had gone through the usual course in bankruptcy. There is either an unexplained large shortage in his assets, or the statements made by him during the spring of 1916 were false. It is apparent, upon his schedule, that he purchased goods between April 18, 1916, when he went to Durham, and December 2, 1916, amounting to more than $5,000, and that, on the last date, his entire assets amount to $3,435. Without taking into account any goods which he brought from Richmond, this shows a shortage of $1,600.

It is suggested that the proceeds of the goods on hand, with such amounts as may be collected on open accounts, will pay more than 25 per cent. Of this I am doubtful. I am not certain that the creditors will get, from the estate, more than the percentage offered, if so much. I can form no conclusion whether, eliminating this question, it is for their best interest to accept the composition. I cannot forecast the future of the bankrupt. I do not think, upon the showing made, that the assignee of the Rose Bros. account should be permitted to vote, or rather that, in securing the requisite amount to secure an acceptance of the offer, this claim should be counted. It may be that the objection to it should have been lodged before the referee. There is in this claim, and probably in those of his kinsmen, a strong suspicion that the acceptance of the offer of composition has been obtained by means prohibited by the law. In Re Comstock (D. C.) 154 Fed. 747, Judge Brown says:

"It is clear that, if the bankrupt has been guilty of any of the acts which would be a bar to his discharge, the court is without power to confirm a composition, even if satisfied that it would be for the best interests of the creditors to do so." Collier on Bankruptcy (10th Ed.) 299.

I could not, in the light of the disclosures in this case, the persistent refusal of the bankrupt to give any explanation of conditions calling for explanation, which he should have been able to give, grant a discharge.

The motion for confirmation of the composition is denied. This will be certified, to the end that further proceedings may be had in accordance with law.

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## KENYON v. WEISSBERG et al.

(District Court, S. D. New York. February 20, 1917.)

No. 44.

1. EQUITY ⟸66—MAXIMS.

The maxims, that he who goes into a court of equity must go with clean hands, and that he who has not done equity cannot have equity, have given rise to the rule that a court of equity will refuse to grant relief to one who, in the matter or transaction concerning which he seeks aid, has been wanting in good faith, honesty, or righteous dealing; a court of equity being a court of conscience.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 188–190.]

2. SPECIFIC PERFORMANCE ⟸32(3)—UNILATERAL CONTRACT—EMPLOYMENT OF ACTOR.

A contract providing for defendant's employment as a motion picture actor, which entitled plaintiff to defendant's services for a period of five years, which gave defendant no right to compel plaintiff to perform, plaintiff being entitled to assign the contract or dismiss defendant at his pleasure, and providing that defendant should receive no compensation when not acting, without fixing any period for which employment should be furnished, is lacking in mutuality, and specific performance will not be enforced by injunction.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 92–98.]

3. SPECIFIC PERFORMANCE ⟸32(3)—MUTUALITY OF CONTRACT—EMPLOYMENT—OPTION OF EMPLOYER.

Specific performance of a contract will be refused, where the other party at its option may decline to carry out its provisions. Therefore, where the contract of employment authorized the employer at his option to dispense with the services of the employé, specific performance will not be enforced at the suit of the employer.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 92–98.]

4. SPECIFIC PERFORMANCE ⟸51—MUTUALITY OF CONTRACT.

Where a contract of employment allowed the employer to assign the contract, and thus to relieve himself of financial liability, regardless of the assignee's responsibility, the contract is unfair and unjust, and equity will not aid in its enforcement.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 153, 154.]

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In Equity. Suit by Harry Kenyon against Roy B. Weissberg and another. Preliminary injunction denied.

House, Grossman & Vorhaus, of New York City, for plaintiff.
David L. Podell, of New York City, for defendants.

MANTON, District Judge. The defendant Weissberg is a professional actor, known as "Billy West," and is called throughout the contract "the artist." The contract provides for his employment as a "sole" star of motion pictures. The plaintiff here seeks to enjoin Weissberg from entering the employment of the codefendant. The third paragraph of the contract provides:

"It is agreed that the manager shall have the privilege to assign this contract to any other person, firm or corporation without the written consent of the 'artist' and that in the event of such assignment the said 'manager' shall be relieved from any and all financial liability under the terms and conditions of this agreement."

The fourth paragraph provides:

"It is hereby agreed that the 'artist' shall devote his entire time and attention for the rendition of the services herein agreed to be rendered by him to the utmost of his ability, and to the satisfaction of the manager."

The sixth paragraph provides for a scale of wages commencing in November, 1916, up to and including October 31, 1919.

The eleventh paragraph provides:

"* * * It is expressly understood and agreed that the 'artist' shall receive no compensation for performances in which he does not actually render his services or for non-playing days which should occur because of sickness to him, public calamity, riots or from the acts of God or the public enemy or for such times when the said company for which the 'artist' shall be cast may not be playing or for any other reason the said 'manager' is not responsible for."

The defendants oppose the granting of this preliminary injunction upon the following grounds:

(a) That a court of equity will not decree specific performance in a case where it cannot compel complainant to perform on the ground that such a contract is lacking in mutuality.

(b) That the contract gives the power to one of the parties to dissolve such contract at any time whether legally or otherwise, and is therefore not enforceable in equity.

(c) That the contract is not fair, just, and equal in all its parts.

(d) That the complainant has abandoned the contract by failure to live up to its terms.

[1] A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then whatever may be the rights he possessed, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity. Weegham v. Killefer (D. C.) 215 Fed. 168.

The often heard maxims, "He who goes into a court of equity must go with clean hands," and "He who has not done equity cannot have equity," have given rise to the rule of law that a court of equity will leave to remedy at law, and will refuse to interpose to grant relief to one who, in the matter or transaction concerning which he seeks aid.

has been wanting in good faith, honesty, or righteous dealing. A court of equity has been said to be the forum of conscience, and an appeal directed to it is an appeal to the moral sense of the judge. In a proper case, the court acts upon the conscience of the defendant and compels him to do that which is just and right.

[2] Examining the provisions of this contract with these simple rules of equity in mind, I am of opinion that the plaintiff is not entitled to the relief he seeks, to wit, a preliminary injunction. It confers a right upon plaintiff to bind Weissberg for a period of five years, but it gives no corresponding right to compel the plaintiff on his part to perform. The plaintiff may discharge Weissberg at any time when the manager determines that his services are not to his satisfaction. Nowhere is it expressed what would constitute satisfaction. If, for any reason, the plaintiff chooses not to continue the contract and finds that the continuance of the contract would result in a financial loss to him, or for any other reason, be it good or bad, he has the right to assign his contract to any person or corporation, whether the assignee be responsible financially or otherwise. This is an inequitable provision. These provisions give undue advantage to the manager against the artist, who is described in the affidavits as unique, well known, and well thought of by the public. The contract provides that the artist is bound to "devote his entire time" and attention for the rendition of services agreed, but his payment is conditioned upon actual performance of service and he is not to be paid for such times when the company for which the artist shall be cast may not be playing. The manager in no way obligates himself to organize a company so that the artist may be cast. I think the contract is lacking in mutuality and specific performance should not be decreed. Lerner v. Tetrazzini, 71 Misc. Rep. 182, 129 N. Y. Supp. 889, affirmed 144 App. Div. 928, 129 N. Y. Supp. 1132, and 207 N. Y. 709, 101 N. E. 1109. Here the court said:

"What employment was the plaintiff bound to give her? There is nowhere any obligation on the part of plaintiff to employ Tetrazzini any given number of times in any one week or during the whole term of the contract, which is cleverly devised for the benefit of plaintiff alone. * * * But in the contract before us there is no mutuality. Plaintiff was not bound to pay defendant any certain sum, or to give her any certain number of appearances, and therefore the contract is void for the want of mutuality."

In the present contract, during the term of employment, the employer has the right not to use defendant's services or pay therefor. In Keith v. Kellerman (C. C.) 169 Fed. 196, the court held:

"On the other hand, the second part of the contract, regulating the summer season, seems to me to be open to the objection that it does lack equitable mutuality. Neither expressly nor by necessary implication does it fix the periods when performances shall be given. For business or other reasons satisfactory to him, the plaintiff might omit exhibitions during any part of the summer season. During such period there will be no proceeds to divide, and the defendant would be without compensation and at the same time under a covenant not to perform for any one else. The contract lacks in this respect the kind of mutuality which moves a court of equity to aid its performance by injunction. Shubert Theatrical Co. v. Coyne (Sup.) 115 N. Y. Supp. 968. As in the cause cited, the defendant would receive compensation, if any, only for actual performances."

[3] The federal courts have refused to decree specific performance of a contract, where the other party at its option may refuse to carry out its provisions. The essence of a decree for specific performance is that it should be mutually binding and conclusive on both parties. Federal Oil Co. v. Western Oil Co. (C. C.) 112 Fed. 373.

Under the fourth clause of the contract, the services to be rendered by the artist may be dispensed with by the manager, even though they do involve art, taste, fancy, and judgment, at any time that they do not reach a grade of satisfaction to be determined by him. There is nothing in the contract to show that the manager must act in good faith or in any way to limit the manager in this regard. I think a contract so worded should not be specifically enforced. Southern Express Co. v. Railroad Co., 99 U. S. 191, 25 L. Ed. 319.

This is a reservation by which the manager may abrogate his contract to dismiss the defendant from his service. It makes the contract unenforceable as against the manager, and is somewhat similar in principle to the case considered in Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955, where the court refused specific performance. See, also, Philadelphia Ball Club v. Hallman, 8 Pa. Co. Ct. R. 57; Metropolitan Exhibition Co. v. Ward (Sup. Ct.) 9 N. Y. Supp. 779; Brooklyn Baseball Club v. McGuire (C. C.) 116 Fed. 782; Triumph Electric Co. v. Thullen (D. C.) 228 Fed. 762.

[4] The third paragraph permits the assignment of the contract without the consent of the artist, and relieves the manager from financial liability thereunder after such assignment. A court of equity should not extend its aid to the enforcement of such a contract, for such a provision is unfair and unjust.

"If an agreement be deficient in either fairness, justice, or certainty, its specific performance will not be decreed." 2 Story, Equity, §§ 769, 770.

There are other considerations urged by the defendants against this preliminary injunction, but I think it sufficient to mention the foregoing and to deny the injunction at this time.

An order may be presented accordingly.

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## BUTTERICK CO. v. UNITED STATES.

## FEDERAL PUB. CO. v. SAME.

(District Court, S. D. New York. March 5, 1917.)

1. INTERNAL REVENUE ⟸9—EXCISE TAXES—STATUTE.

Corporation Excise Tax Act Aug. 5, 1909, c. 6, 38 Stat. 11, 112, which embraced no tax upon dividends received by corporations from stock of other corporations, subject to the tax, was repealed by Income Tax Act Oct. 3, 1913, c. 16, 38 Stat. 114, 166, which contained a proviso that the repeal of existing laws or modifications thereof embraced in the act should not affect any act done or right accruing, or any suit or proceeding had or commenced, in any civil case before such repeal or modification, but all rights and liabilities under such laws should continue and might be enforced in the same manner as if such repeal or modification had not been

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

made. *Held*, that such saving clause was intended to relate only to rights and liabilities in respect to taxes which had accrued under the act of 1909, and was not intended to cover excise taxes upon corporations for the months of January and February, 1913, which were imposed by the Income Tax Act, as the constitutional amendment of March 1, 1913, designed to permit taxation of incomes without apportionment was not adopted until March 1st; this being apparent from the provision in that act that excise taxes for two months shall be ascertained in accordance with the provisions of section 2g. Consequently exemptions in the Corporation Excise Tax Act are not applicable to taxes imposed for those two months.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28.]

2. INTERNAL REVENUE ⊂⊃9—CORPORATION TAXES—FRANCHISE.

A corporation, which merely held the stock of other corporations and, by issuance of proxies to vote at the meetings of the subsidiary companies, directed such corporations, is not exercising any franchise on which excise taxes may be assessed, under Income Tax Act 1913, for the months of January and February of that year, prior to the ratification of the income tax amendment to the Constitution of the United States; this being so, though the holding corporation made a loan to its subsidiary company.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28.]

At Law. Actions by the Butterick Company and by the Federal Publishing Company against the United States. Judgments for plaintiffs.

Noble, Estabrook & McHarg, of New York City (Herbert Noble, of New York City, of counsel), for plaintiffs.

H. Snowden Marshall, U. S. Atty., and Ben A. Matthews, Asst. U. S. Atty., both of New York City.

AUGUSTUS N. HAND, District Judge. These actions are brought under Tucker Act March 3, 1887, c. 359, 24 Stat. 505, to recover excise taxes paid under protest. The plaintiff in each case was a holding company, which did nothing more than receive and distribute income derived from dividends paid by subsidiary operating companies engaged in the publication of magazines. These plaintiffs necessarily held corporate meetings of the stockholders and directors, and issued proxies to vote the stock of the operating companies. The Butterick Company also has indorsed notes of a subsidiary company to promote the successful operation of the latter.

[1] The Corporation Excise Tax Act of 1909 (Act Aug. 5, 1909, c. 6, 36 Stat. 11, 112) was succeeded by the Income Tax Act of 1913 (Act Oct. 3, 1913, c. 16, 38 Stat. 114, 166), which followed the constitutional amendment of March 1, 1913 (article 16), designed to permit taxation of incomes without apportionment which had been held unconstitutional in the case of Pollock v. Farmers' Loan & Trust Company, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759. In order to avoid taxing incomes under the act of 1913 prior to the date of the adoption of the constitutional amendment, that act provided for an excise tax on corporations for the months of January and February, 1913, measured by a percentage of the amount of net income during those months, and for a tax on incomes as such after March 1, 1913.

The Corporation Excise Tax Act of 1909 imposed no tax upon dividends received by corporations from stock of other corporations subject to the corporation excise tax, and while this act was repealed by the Income Tax Act of October 3, 1913, the latter act contained the proviso that:

"The repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said repeal or modification; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made." 38 Stat. 202.

I am inclined to think that the foregoing saving clause was intended to relate only to rights and liabilities in respect to taxes which had accrued under the act of 1909 and that it was not intended to cover excise taxes upon corporations for the two months of January and February, 1913. The act of 1913 must be regarded as entirely supplanting the former act as to all taxes which the act of 1913 imposes. Consequently excise taxes for the first two months of 1913 were a new tax, subject only to such exemptions or limitations as might be found in the later act. This seems clear from the provision in the act of 1913 that the excise tax for those two months was to be "ascertained in accordance with the provisions of subsection 'G' of section 2 of this act." In that section Congress made no provision for the exemption of dividends upon the stock of other corporations which had paid a tax. This being the case the taxes for these two months while measured by the income of corporations accruing therein must be paid without regard to exemptions in the former act.

[2] Whether the Butterick Company and the Federal Publishing Company were liable to a tax for the months of January and February, 1913, depends, therefore, not on any exemption in the act of 1909, but purely on whether these plaintiffs were exercising any franchise during those months other than that of simply being corporations (a franchise which was not under the decisions taxable as an excise). Mr. Justice Day said in the case of Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, when speaking of this excise tax:

"* * * The tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate * * * business and with respect to the carrying on thereof. * * *"

The plaintiffs here paid the taxes for the months of January and February under protest and seek to recover them in these actions. The government contends that the direction of the management of the subsidiary companies by the holding companies was a doing of business which subjected the holding companies to an excise tax. This direction was accomplished only by the control of the subsidiary companies through stock ownership. Of course, proxies had to be issued to vote at the meetings of the operating companies, and the directors of the latter were chosen by the owners of the stock. No holding company can exist without a corporate activity involved in the exercise of such con-

trol through its stock ownership in the operating company, but such corporate activity is not, under the authority of United States v. Nipissing Mines Co., 206 Fed. 431, the exercise of a franchise which is subject to an excise tax.

The indorsement by the Butterick Company of the notes of its subsidiary company was the only fact which is to be added to the facts before the court in the case of United States v. Nipissing Mines Co., supra, which was decided by the Circuit Court of this Circuit; but this is not sufficient to differentiate that case from the action by the Butterick Company here under consideration. The indorsement was, if anything, less than a loan by the holding company, and I can hardly believe that a loan by a holding company to its subsidiary, without further direct participation in the activities of the latter, would render the holding company subject to the excise tax. The Minehill Railway Company showed greater corporate activity than this in the case of McCoach v. Minehill Railway Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842. There the company did more than receive payments from another company, for it maintained an office force at large expense and invested its funds and collected income from such investments; yet it was held by a majority of the Supreme Court not to be subject to an excise tax. See, also, Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428; United States v. Emery, etc., 237 U. S. 28, 35 Sup. Ct. 499, 59 L. Ed. 825.

It is urged on behalf of the government that the Butterick Company, as well as the Federal Publishing Company, through stock ownership, direct and control various competing companies. The record shows that only the operating companies have office staffs and pay salaries. That each of the plaintiffs has more than one subsidiary company, and that such subsidiary companies might be in competition, if they were not owned by the same interests, does not show that the holding companies in their respective corporate activities differ from holding companies which have but one subsidiary operating company. In other words, the cases seem to fall within the doctrine of United States v. Nipissing Mines Co., supra.

Mr. Justice Day, in the case of Von Baumbach v. Sargent Land Company, 242 U. S. 503, 37 Sup. Ct. 201, 61 L. Ed. ——, decided January 15, 1917, enunciated the rule applicable to such cases as those under consideration:

"The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes."

Under the foregoing definition, I do not think the plaintiffs can be regarded as engaged in business in a way which would subject either of them to an excise tax.

The plaintiffs should have judgment in each case for the amounts for which action has been brought.

## R. G. PACKARD CO. v. COMMISSIONERS OF THE PALISADES INTERSTATE PARK.

(District Court, S. D. New York. January 14, 1916.)

COURTS ⟸303(1)—FEDERAL COURTS—ACTIONS AGAINST STATE—IMMUNITY FROM SUIT—WAIVER.

Laws N. Y. 1900, c. 170, creating a commission to select lands in the Palisades on the Hudson river to establish a state park, section 2 (as amended by Laws N. Y. 1915, c. 562) of which provides that the board of commissioners and their successors are thereby created a body politic, with power to sue and be sued, to use a common seal, and to make and adopt by-laws to regulate its proceedings, and authorized to choose its officers and employés, and section 5 of which empowers the board to take in fee or otherwise by gift, devise, or eminent domain, and that deeds of conveyance for such land shall be made to the board of commissioners by its corporate name, created a corporation, and thereby the state waived its immunity from suit against the commission by a citizen of another state given it by Const. Amend. 11.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 844.]

At Law. Action by the R. G. Packard Company against the Commissioners of the Palisades Interstate Park. On demurrer by defendant. Demurrer overruled.

Mark Ash, of New York City, for plaintiff.
George A. Blauvelt, of New York City, for defendant.

MAYER, District Judge. The action is to recover damages for an alleged breach of a contract entered into between plaintiff and the defendant, Commissioners of the Palisades Interstate Park. The demurrer interposed by defendant raises the sole question as to whether this court has jurisdiction of the defendant in this action; it being claimed that the defendant is, to all intents, the sovereign state of New York, and therefore cannot be sued in this court, by virtue of the provisions of the Eleventh Amendment to the Constitution of the United States.

By chapter 170 of Laws of 1900, the state of New York provided for a commission, the purpose of which was to select and locate lands in the Palisades on the Hudson river, in order to establish a state park, and thereby preserve the scenic beauty of the Palisades. Under the act, a board of commissioners was created a body politic, with power to sue and be sued. Sections 2 and 5 provide, among other things, as follows:

"Sec. 2. *Such board of commissioners, and their successors, are hereby created a body politic, with power to sue and be sued, to use a common seal, and to make and adopt by-laws to regulate its proceedings. Such board shall annually choose from among its members a president, a vice president, treasurer and secretary and appoint such other officers and such other employees, including patrolmen, as it may deem necessary to carry out the purpose of this act, and may employ counsel.*" (As amended by Laws 1915, c. 562.)

"Sec. 5. The said board of commissioners shall have the power to acquire, maintain and make available for use as a public park the lands located as aforesaid, and for this purpose shall have power to take in fee or otherwise, *by purchase, gift, devise or eminent domain, the said lands, or any of them, and any rights, interests and easements therein, and to receive by gift, contribution or bequest moneys to be used in acquiring or improving the said lands or any of them; deeds of conveyance for such lands shall be made to said board of commissioners by its corporate name, and it shall be the duty of said board to preserve, care for, lay out and improve the said park and to make rules for the use and government of the same.*"

The act has been amended in some particulars, not here relevant, except that Laws 1915, c. 562, reiterate the provisions of section 2, supra. There is no question that the act describes, in every sense, a corporation, and gives to the so-called body politic, thus created, all of the powers and machinery of a corporation.

It is well settled that a state may waive its immunity (36 Cyc. 912, and authorities cited), and thus create a corporation of this character, which may be sued on its contracts in a court of general jurisdiction. The opinion of Judge Dietrich in the comparatively recent case of Interstate Const. Co., Ltd., v. Regents of the University of Idaho (D. C.) 199 Fed. 509, makes unnecessary further citations or references.

The fact that the state of New York has made various appropriations for defendant does not affect nor change the proposition here involved. To ascertain whether immunity has been waived, we must look to the statute which describes and defines the character of the corporation created and the powers conferred upon it.

The demurrer is overruled.

# BIRD et al. v. CITY OF RICHMOND.

## In re AINSLIE CARRIAGE CO.

(Circuit Court of Appeals, Fourth Circuit. March 14, 1917.)

No. 1461.

1. BANKRUPTCY ⊂=198—PREFERENCES—LANDLORD'S LIEN.

A landlord's lien, perfected less than four months before the tenant's bankruptcy by distress warrant proceedings under Code Va. 1904, §§ 2787, 2790–2792, which are declaratory of the common-law right of distress for rent, is not a levy or a lien obtained through legal proceedings, within Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (Comp. St. 1913, § 9651), providing that all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent within four months prior to the filing of a petition against him, shall be deemed null and void in case he is adjudged a bankrupt, since it is an inchoate right, which dates from the time the tenant places the goods on the premises and may be perfected at any time by summary proceedings, and its effect is not to permit one general creditor to obtain a preference over another merely as the result of a race of diligence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296–316.]

2. BANKRUPTCY ⊂=346—PAYMENT OF CLAIMS—PRIORITY—TAXES—"DIVIDENDS."

Bankr. Act, § 64b (Comp. St. 1913, § 9648), providing that the court shall order the trustee to pay all taxes in advance of the payment of dividends to creditors, does not authorize the payment of taxes out of the fund derived from the sale of goods subject to a landlord's lien, under a distress warrant, in view of section 67d, providing that liens given in good faith for a present consideration shall to the extent of such consideration not be affected by the act, since "dividends," as used in the Bankruptcy Act, applies only to claims of general unsecured creditors, and not to secured creditors, except as to the amount of the claim in excess of the security (quoting Words and Phrases, Second Series, Dividend).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535.]

3. MUNICIPAL CORPORATIONS ⊂=978(3)—TAXATION—LIEN—PERSONAL PROPERTY TAXES—CHARTER PROVISION.

Within Richmond City Charter, § 73, providing that all goods and chattels may be distrained and sold for taxes assessed and due thereon, and no deed or trust or mortgage thereon shall prevent the distress and sale, the expression "taxes due and assessed thereon" limits the lien for a personal property tax to the particular property on which the assessment was made for the current year, so that the city cannot distrain for taxes for previous years on a stock of carriages and materials which is constantly changing, and thereby displace a landlord's lien thereon, without proof that the goods were the same as those on which the taxes for those previous years had been assessed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2108.]

4. COURTS ⊂=366(6)—RULES OF DECISION—DECISION OF STATE COURT—CONSTRUCTION OF TAXATION.

The decision of the highest court of the state construing statutes authorizing distress for personal property taxes is conclusive on the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 961.]

Woods, Circuit Judge, dissenting.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond, in Bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of the Ainslie Carriage Company, bankrupt. Petition by Elizabeth W. Bird and others against the City of Richmond to superintend and revise in matter of law proceedings of the District Court whereby the city was given a preference for the payment of its taxes over the claim of petitioners for a landlord's lien. Reversed.

James E. Cannon, of Richmond, Va., for petitioners.

George Wayne Anderson, Asst. City. Atty., of Richmond, Va., for respondent.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is a controversy between the landlords of the bankrupt, Ainslie Carriage Company, claiming a lien upon the bankrupt's assets by virtue of a distress warrant for rent, levied on November 1, 1909, and the city of Richmond, claiming priority over the landlords by virtue of certain bills for delinquent personal taxes assessed against the bankrupt for the years 1907, 1908, and 1909, and for current taxes for the year 1910, being the year in which the adjudication in bankruptcy was made.

It is conceded that the landlords levied a distress warrant on the 1st day of November, 1909, and that the city of Richmond made no effort to levy for its delinquent taxes for the years 1907, 1908, and 1909, although given the express power to do so by section 73 of its charter in the following language:

"All goods and chattels, wheresoever found, may be distrained and sold for taxes assessed and due thereon. * * *"

It appears from the answer of the city of Richmond that the ordinances of the city provide that the taxes for each year are payable on or before June 30th, and, under chapter 14, section 7, of Richmond City Code, it is provided that, if all taxes be not paid before September 1st, the tax collector shall distrain, except where one-half has been paid prior to June 30th. The situation of the parties on November 1, 1909, may be summarized as follows:

The landlords, in pursuance of chapter 127 of the Code of Virginia, had distrained for rent to the extent of $2,929.57, at the rate of $2,000 per annum. Section 2787 of the Code of Virginia provides that rent of every kind may be recovered by distress on action, section 2790 that rent may be distrained for within 5 years from the time it becomes due, and section 2791 that distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises, or which have been removed therefrom not more than 30 days. Under the provisions of its charter the city of Richmond had a right to distrain for taxes due in 1907 on the 1st day of September, 1907, and at any time thereafter; likewise for its 1908 taxes on the 1st day of September, 1908, or any moment thereafter, and for its 1909 taxes

it had the same right, all of which continued until the time the landlords made their levy.

It is contended by the landlords that inasmuch as they exercised their right of distress, and that the city did not exercise its right to levy and collect, that they acquired a lien upon the bankrupt's assets superior to that of the city. On the other hand, the city claims that its inchoate and unexercised right of distraint gives it a priority over the landlords, and, furthermore, under the Bankruptcy Act (section 64a), the taxes are given priority over all other claims.

It appears that the adjudication in bankruptcy was made on the 3d day of February, 1910, or less than 4 months after the levy of the landlords, and one of the contentions of the city is that therefore, under section 67f of the Bankruptcy Act, the landlords were not entitled to any lien at all. The referee made a report under date of July 14, 1910, in which he found that the landlords were entitled to participate in the distribution of the fund arising from the sale of the bankrupt's assets ahead of the claim of the city of Richmond and of the commonwealth of Virginia for franchise tax and registration fee, but recited an agreement by which final determination of the question should await the decision of the Supreme Court of Appeals of Virginia as to whether, under like circumstances in a case before it, the city and state did in fact have a lien for their taxes without making a levy.

Under date of March 12, 1913, the referee made another report, in which he stated that the case in the Virginia appellate court had gone off on a question of jurisdiction, and in which he proceeded to hold that, under the proper construction of section 67f of the Bankruptcy Act, the landlords were not entitled to a lien, and that being, therefore, relegated to the class of general creditors, the city and state were preferred in the distribution of assets by virtue of section 64 of the Bankruptcy Act. To this report the landlords filed exceptions, which were treated by the court below as a petition to review such report, and the court, by an order entered on the 14th day of April, 1914, reversed the ruling of the referee and held that the landlords did have a valid lien for their rent under the Bankruptcy Act, and that such lien took priority over the claims of the state of Virginia and of the city of Richmond.

On April 21, 1916, the court below, having previously granted a rehearing on application of the city of Richmond, handed down an opinion reversing its former ruling, and holding that the city's claim for taxes should take priority over the landlords' lien, and carried this ruling into effect by the entry of an order on June 19, 1916, which order we are now asked to review.

We are not unmindful of the importance of the questions involved in this controversy. That the state and its municipalities should be clothed with ample power to assess and collect taxes promptly and with as little delay as possible is conceded. In this suit, as appears from the statement of facts, a controversy has arisen which involves on the one hand the character of a lien to which a landlord is entitled under the laws of the state of Virginia, and on the other the character of a

lien for taxes to which the city of Richmond is entitled by virtue of its charter.

[1] The petitioners rest their "claims upon those statutes of Virginia which are merely declaratory of the common-law principle of distress for rent in arrear which obtains in one form or another throughout the entire English-speaking world." Section 2787 of the Code of Virginia is pertinent to this case, and reaffirms the common law, to wit:

"Rent of every kind may be recovered by distress or action."

Section 2790 also provides:

"Rent may be distrained for within five years from the time it becomes due, and not afterwards, whether the lease be ended or not."

Section 2791 is in the following language:

"The distress may be levied on any goods of the lessee, or his assignee, or under tenant, found on the premises, or which may have been removed therefrom not more than thirty days. If the goods of such lessee, assignee, or under tenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are on the leased premises, that shall be liable to distress, but for not more than one year's rent, whether it shall have accrued before or after the creation of the lien. No other goods shall be liable to distress than such as are declared to be so liable in this section."

In this instance it appears that the landlords proceeded to enforce their statutory rights and to perfect the inchoate lien, which they had by virtue of their lease, by levying a distress warrant for 18 months' rent, which gave them a lien subject to the provisions of section 2792, in which it is provided that:

"Neither this or the preceding section shall affect any lien for taxes, levies, or militia fines."

The referee who passed upon this question in his second report held that this lien was of no effect because of section 67f of the Bankruptcy Act, that part which is germane being in the following language:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition against him shall be deemed null and void in case he is adjudged a bankrupt. * * *"

The framers of the Bankruptcy Act, in employing the word "levies," etc., obviously had reference to writs of execution, fi. fa. garnishment, etc. In other words, this section is limited to liens obtained through legal proceedings. This, we think, easily distinguishes the liens contemplated by section 67f from the landlords' lien, which is not, in any sense of the word, a lien obtained through legal proceedings. Collier on Bankruptcy, at page 966, in referring to levies under section 67f, says:

"A lien acquired by a levy under a landlord's distress warrant is not obtained through legal proceedings within the meaning of this subsection."

A landlord's lien is contradistinguished from the other class of liens to which we have referred, in that it is inchoate from the moment the lease is executed, and may be made perfect at any moment by distress, a remedy which is summary in its character.

The Bankruptcy Act is intended to prevent one general creditor from obtaining an advantage over another. In other words, it was the intention of the Congress in the enactment of this law that, where one becomes unable, by misfortune or otherwise, to meet his obligations, to preserve the status of his estate, so that there might be an equal distribution of his assets between all his creditors, subject to the claims of lien creditors whose standing is fixed by the statute; in other words, to prevent preferences and secure a fair and impartial distribution of the bankrupt's estate among his creditors, having, as we have stated, due regard to the valid liens of any of his secured creditors.

We do not think there is anything in the statute to authorize the contention that a landlord should be treated as a general creditor, and thus deprive him of the lien which is guaranteed by the statutes to which we have referred. Remington on Bankruptcy, § 1160, in referring to this point, says:

"A landlord's lien for rent, or right of priority on distribution, is not impaired by the bankruptcy act. But the subject is complicated by the fact that landlords are frequently also given priority by state law, upon distribution of an insolvent estate, regardless of lien, and that this priority is preserved in bankruptcy by section 64b."

The referee in the report to which we have referred cites the case of West Side Paper Co., 159 Fed. 241, 20 Am. Bankr. Rep. 289, in support of his contention. In that case the District Court held that a levy of a distress warrant for rent made within four months was invalid. However, this case was carried to the Circuit Court of Appeals for the Third Circuit, where the judgment of the lower court was reversed. 162 Fed. 110, 89 C. C. A. 110, 15 Ann. Cas. 384. That court, in referring to this phase of the question said:

"Distress for rent in arrear is one of the most ancient as well as 'one of the most efficient of the landlord's remedies for the collection of rent.' It is in most of our states, as it was at common law, a right sui generis, belonging to the landlord whenever the right of landlord and tenant existed. It appears to have been abolished in a few of the states, and in most of them its exercise has been regulated by statute. Its essential characteristics are, however, for the most part, the same as existed at common law. * * * The right to distrain or levy upon all the goods upon the demised premises, whether those of the tenant or of a stranger, arises the moment the relation of landlord and tenant is established. It is a right in the nature of a lien, rather than a lien, until the goods are actually distrained under a landlord's warrant. * * * No suit or proceeding at law, whether in personam or in rem, in the proper sense of those words, was necessary for the assertion of this right. It belongs to that small category of personal rights, the assertion of which has always been independent of legal procedure, of which the right to abate a nuisance, under certain circumstances, and the right to distrain cattle damage feasant, are examples. While there is no specific lien, except on the goods actually distrained under the landlord's warrant, all the goods on the demised premises are to be considered as being under a quasi pledge, which gives superiority to the specific lien established by the distraint. Such a lien is in no sense 'obtained through legal proceedings.' Nor is it within the spirit of the bank-

rupt law in this regard, as evidenced by other provisions thereof, as well as that of 67f, above quoted."

Also the case of In re Burns (D. C.) 175 Fed. 633, is very much in point.

This question was also passed upon in the case of In re Robinson & Smith, 154 Fed. 343, 83 C. C. A. 121. In that case a distress warrant was levied just two days before the petition in bankruptcy was filed. The learned judge who heard the case, after citing subsections "c" and "f" of section 67, then stated the claim of the appellants as follows:

"That the seizure in distress is, within these paragraphs, in the nature of a suit or proceeding in attachment, and having been begun within the four months before bankruptcy is annulled by the adjudication of bankruptcy. We cannot concur in this view. The whole question is one of interpretation of the Bankrupt Act—the policy of that act respecting the recognition of liens in the distribution of bankrupt estates. Paragraphs 'c' and 'f,' quoted, were meant, in our judgment, to relate only to those actions or proceedings taken by creditors, who having no existing lien or right of lien resting in existing contract, entered into in good faith, seek to obtain preference by being first in a race of diligence. * * * But the lien obtained by the distress warrant under the kind of lease involved in this case is not the result of a race of diligence. Under the lease * * * the right of lien was created when the lease was executed, and the tenant entered upon possession of the premises—a right put wholly, at that time, within the control of the landlord and maturing the moment the landlord chose to mature it. And though it did not actually attach * * * until within four months of the bankruptcy, it was the kind of lien, it seems to us, that section 67d was intended to preserve; for unquestionably as between the parties to the lease it was a lien, not simply because the distress warrant was actually levied, but because, by contract between them, the levy of the distress warrant was authorized."

There are a number of other cases wherein the Court of Appeals in the other circuits have taken the same view of this matter. In the case of In re Emslie, 102 Fed. 291, 42 C. C. A. 350, where a mechanic's lien was filed within four months preceding the adjudication in bankruptcy the Circuit Court of Appeals for the Second Circuit held that it was protected by section 67d. The court in that case in referring to this point said:

"There are no equitable considerations in favor of the general creditors of a debtor which should defeat a mechanic's lien. Every creditor dealing with the debtor does so with the knowledge that those who are furnishing labor and materials for the building can, if they choose, acquire a priority of payment over other creditors. Statutes giving such liens are designed to enable mechanics and material men to rely upon the security of the building itself, without looking to the responsibility of the owner. The justice and expediency of giving such claims priority over the debts of general creditors is manifested in the legislation of the several states. We cannot believe that it was the intention of Congress to put them upon the footing of the liens particularly mentioned in section 67. The question of the validity of such liens was considered by the Circuit Court of Appeals for the Seventh Circuit. In re Kerby-Dennis Co., 36 C. C. A. 677, 95 Fed. 116. In considering the provisions of section 67 the court used this language: 'We cannot indulge the presumption that Congress intended to avoid a lien secured by the act of labor, and preserved and continued in force only when legal proceedings are instituted within a specified time. Such a construction would avoid all mechanic's liens, and all the liens of laborers, which the laws of various states have for years sought to protect and to prefer.' We agree with the opinion of that court that the terms of section 67 do not invalidate such a lien."

See In re Yoke Vitrified Brick Co. (D. C.) 180 Fed. 235.

In the case of In re West Norfolk (D. C.) 112 Fed. 767, Waddill, District Judge, in referring to the statute which provides for a supply lien, said:

"The time of furnishing the supplies is the period as of which the material man is given a right of lien. The right to claim the lien arises under this section, and may be enforced at any time after the supplies are furnished, but may be lost by failure to comply with some provisions of the act giving the right. The only requirement is that the lien shall be filed 'within ninety days after the last item of the bill becomes due and payable.' If the claim is filed within that time, the lien secured relates to the time the supplies were furnished."

Likewise, under the Virginia statute, the lien dates from the time the tenant takes the lease and places his goods upon the premises; such right is inchoate, and continues as such until a distress warrant is executed on the property. In other words, the landlord's right is in the nature of a lien, and to enforce which he has only to comply with the provisions of the statute that authorizes distraint, and when the distraint is executed it relates, as it was said in the case just quoted, to the date when the tenancy began.

[2] It is insisted that section 64a of the Bankruptcy Act (Comp. St. 1913, § 9648) gives the claim of the city priority over that of the landlords. The section in question is in the following language:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

It should be borne in mind that the landlords do not invoke this section, but place their claim upon the ground that they are lien creditors. Section 67d reads as follows:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act."

There is nothing contained in the foregoing that could be construed so as to affect the lien of the landlords. Section 64a has no reference to lien creditors, but is intended to apply only to general creditors, and should be read in connection with subsection "b" relating to debts that are to be paid in full, to wit: Costs of preserving the estate; filing fees in involuntary cases; cost of administration; wages; debts entitled to priority by the laws of any State or the United States. Counsel for respondent, among other things, say:

"It will be observed that the language of section 64a is that the taxes are to be paid prior to 'dividends to creditors.' There can be no controversy over their priority to unsecured creditors, but it is claimed by petitioners that, having secured a lien by a distress levy prior to the petition and adjudication, they are entitled to be paid in full in preference to the taxes, upon the theory that they do not get a dividend and that dividends are only paid to unsecured creditors. That this is erroneous has been held in the cases of In re Muhl-

hauser, 9 Am. Bankr. Rep. 81, and In re Barber [D. C.] 97 Fed. 547. In the last-named case the meaning of the word 'dividend' is discussed at length. * * *"

While it is true the cases of In re Muhlhauser and In re Barber, supra, sustain the contention of respondent, nevertheless the great weight of authority is to the contrary. The term as employed in the Bankruptcy Act is well defined in the case of Hawthorne v. Hendrie & Bolthoff Mfg. & Supply Co., 50 Colo. 342, 116 Pac. 122. This definition is also to be found in Words and Phrases, vol. 2, page 102 (Second Series), as follows:

"Under Bankr. Act July 1, 1898, c. 541, § 65a, 30 Stat. 563 [Comp. St. 1913, § 9649], providing that dividends of an equal per centum shall be declared and paid on all allowed claims except such as have priority or are secured, the word 'dividends' as used in the bankruptcy act applies only to claims of general unsecured creditors and not to secured creditors, except as to the amount of the claim in excess of the security."

In the case of In re Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383, the Circuit Court of Appeals for the Seventh Circuit, in passing upon this point, said:

"The point in dispute is: What is the meaning of 'dividends,' as the word is used in these provisions? The question has been considered in a number of cases by the District Courts. In re Ft. Wayne Electric Corp. (D. C.) 96 Fed. 803, 3 Am. Bankr. Rep. 186; [Id.] 94 Fed. 109; In re Fielding (D. C.) 3 Am. Bankr. Rep. 135, 96 Fed. 800; In re Barber (D. C.) 3 Am. Bankr. Rep. 306, 97 Fed. 547; In re Sabine, 1 Am. Bankr. Rep. 321. We agree with the conclusion declared in the first two of these cases that sums to be paid upon secured claims or other claims entitled to priority of payment are not 'dividends' upon which the trustee or referee may receive a commission. This is made clear by other provisions of the statute. By sections 56b and 57e (Comp. St. 1913, §§ 9640, 9641) creditors holding claims which are secured or have priority can vote at creditors' meetings, or their claims be counted in computing either the number of creditors or the amount of their claims, only when the claims exceed the value of the securities or priorities, and then only for the excess. They are treated as creditors only for the unsecured excess. Section 65a declares that 'dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.' This, if not strictly speaking a definition of the word 'dividends,' is equivalent to a declaration that in this respect claims having priority and secured claims are upon the same footing. The opinion in the Barber Case, supra, recognizes this construction, but makes a distinction against secured creditors who invoke the action of the bankruptcy court, and through the action of that court alone have their security converted into a fund in the hands of the trustee. 'If a secured creditor' it is said, 'refrains from asking or invoking the aid of the court of bankruptcy to enable him, through its officers, and its exercise of jurisdiction, to turn his securities into cash, then, although the court, for the benefit of the unsecured creditors, should use its equitable power to the extent of selling the incumbered property free and discharged of the incumbrance, assuming to care for the equitable rights of the secured creditor in its disposition of the moneys arising from the sale, there would seem to be reason for holding that the moneys going to the secured creditor under such circumstances only came into the case incidentally as the result of the effort to realize and obtain other money for the unsecured creditors, and that it should not be regarded as any dividend, or charged with any commissions.' * * * We find no warrant for this distinction in the terms of the statute."

Also Collier on Bankruptcy (10th Ed.) p. 16, in referring to In re Barber, supra, among other things, says:

"It may be doubted whether this is correct since under section 65a dividends can only be paid on claims which are neither secured nor entitled to priority."

It is obvious that the word "dividend" as employed in section 64a of the Bankruptcy Act was intended to apply to all claims except such as are secured or have priority.

In the case of New Jersey v. Lovell, 179 Fed. 321, 102 C. C. A. 505, 31 L. R. A. (N. S.) 988, it was contended that the taxes due the state should take priority over costs, including those in preserving the bankrupt's estate after filing the petition. The Circuit Court of Appeals for the Third Circuit, after quoting subsections "a" and "b" said:

"Now, while the relative order in which subdivisions 'a' and 'b' are placed is not happy, and indeed tends to mislead, yet the general intent of the section is clear. In subdivision 'b' we find the general scheme of awarding priority in advance of dividend creditors. That subdivision makes provision for paying such costs, fees, and liens as are therein provided, and if there are no outstanding taxes the fund is then paid to creditors. But before paying creditors, subdivision 'a' intervenes and makes provision for what, if omitted, has often proved a hardship, if not indeed an abuse in the settlement of decedent and insolvent estates, viz., delay in payment of taxes. Tax collectors whose powers to distrain lapsed when the estate passed into the custody of the law, or who were left to come in as general creditors, were subjected to trying delays. Obviously subdivision 'a' meant that this delay should not occur, and therefore provided that, 'in advance of payments of dividends to creditors,' the court shall order the trustee to pay 'all taxes legally due and owing by the bankrupt,' * * * and to prevent delay from questions concerning such taxes, it provided, 'in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court.' And yet in case the court had to take testimony, or order a reference to determine the legality of such tax, the adjudged tax would, under the construction here contended for, absorb the whole fund and leave unpaid the agency by which its payment was effected. Now whether the 'creditors' referred to in the phrase, 'in advance of the payment of dividends to creditors,' places the payment of taxes ahead of dividend creditors alone, or places it also ahead of those creditors who under subdivisions 4 and 5 are paid in full, is a question not before us. It suffices to say that on the question that is before us, namely, whether the taxes of a state are, under clause 'a' given priority 'over the actual and necessary cost of preserving the estate subsequent to the filing of the petition,' we are clear they are not."

The state of New Jersey in that case applied for a writ of certiorari to the Supreme Court of the United States, which was denied.

This court in the case of Mills v. Virginia-Carolina Lumber Co., 164 Fed. 168, 90 C. C. A. 154, 21 L. R. A. (N. S.) 901, in passing upon this question said:

"Aside from the mere cost incident to the proof of the claim, we do not see how this creditor should be required to pay any part of the costs of the administration of this bankrupt's estate. The lumber company had its claim secured by deed in trust on the property of the bankrupt and it was entitled to have its claim paid in full, provided the property so conveyed would bring enough. The trustee in bankruptcy elected to sell this property and has the proceeds of the sale in hand. The lumber company, in our opinion, is entitled to have of the proceeds of the sale sufficient to pay its debt and interest, provided there is enough. If the property did not bring enough to pay the debt and interest in full, then the lumber company is entitled to have the whole of the proceeds. In other words, this creditor, which has simply come into a bankrupt court and established a debt that is a lien upon specific property of the bankrupt, should not be charged, so as to reduce the security, by making

the fund arising from such specific property liable for the costs of the general administration of the bankrupt's estate."

We do not deem it necessary to extend this discussion further than to say that there are numerous cases in support of the rule which we have announced, notably among them being In re Williams Estate, 156 Fed. 934, 84 C. C. A. 434; In re Howard (D. C.) 207 Fed. 402; In re Zehner (D. C.) 193 Fed. 789; In re Halsey (D. C.) 175 Fed. 825.

[3] We will next consider the question as to whether under the laws of Virginia, including the charter of the city of Richmond, the respondent is entitled to priority over the claim of the landlords in the absence of a levy pursuant to the authority granted by the Charter of the city. Section 73 of the charter of the city of Richmond is in the following language:

"All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon, and no deed, or trust, or mortgage upon goods or chattels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found."

The court below in referring to this section said that:

"There is no limitation apparently upon the city's right of distraint for its past and present taxes."

This section is undoubtedly broad in its scope, and a casual reading of the same is calculated to give one the impression that a lien for taxes is given priority over all liens of whatsoever character. However, a careful analysis of the same leads us to the conclusion that the words, "for taxes due thereon," are in the nature of a limitation confining the lien thus given to the personal property on which the assessment is made for the current year. If this be the correct interpretation, then the state would only have a right to levy on such property as it could show was owned and in the possession of the tenant at the time the levy was made.

Under the charter of the city of Richmond complete and summary power is granted by which any taxes then due may be collected. In this instance it appears that notwithstanding the fact that the tax collector, who had ample authority to collect the taxes assessed and due for each year, took no steps to collect the same for a period of three years. Can it be possible that, in a case where a third party acquires a lien upon the property on which assessment has been made, he is to be deprived of the right thus acquired for years other than the current year upon which the assessment is made? It seems to us that a fair interpretation of this would be that the city has a right, independent of deeds of trust, mortgages, or otherwise, to distrain and collect taxes upon such property for the year for which such assessment is made and where such property can be identified. It would be manifestly unfair in a case like the one at bar to permit the city, after it has neglected to collect the taxes by distraint and sale of the property for the years in which the levy is made, to thereafter displace the landlords' lien in favor of the city. We think that in order for the

city to reach this property by levy it would have been necessary for it to have shown that the goods and chattels in the possession of the trustee were the same goods and chattels which the bankrupt had and on which taxes were assessed for the previous years. From the very nature of things, a stock of material and carriages, like a stock of goods, is constantly changing, being diminished and replenished daily by sales and purchases, and there is no evidence to show that the landlords had in their possession in 1910 any of the material or carriages upon which the assessment was made for 1907, 1908, and 1909. The city having failed to establish this fact, in the absence of such proof, it thereby lost the right to levy upon the goods of the bankrupt for any year anterior to 1910.

The case of Taylor v. Sutherlin-Meade Co., 107 Va. 787, 60 S. E. 132, is cited by counsel for petitioners in support of the contention that it is the duty of the court, before distributing the funds under its control, to provide for the payment of taxes and levies due by the bankrupt. It should be borne in mind that the question of delinquent taxes was not involved in that case. There the court expressly said that the appointment of a receiver had prevented a levy. From this expression we must infer that a receiver had been appointed before the taxes became due and before the city had the right to levy upon the property in question. Therefore there is quite a distinction between that case and the case at bar. There the court speaks of the city being denied an opportunity to collect its taxes by levy. In this instance the city had an opportunity to collect the taxes but utterly failed to avail itself of the summary remedy afforded by the provisions of the law which authorized the assessment and collection of taxes.

The Supreme Court of Virginia passed upon this question in the case of Jackson Coal Co. v. Phillips Line, 114 Va. 40, 75 S. E. 681. In that case the court of first instance gave the state and the city of Petersburg priority for delinquent taxes over lien as well as general creditors of the insolvent steamship line, which was in the hands of receivers. The court, in passing upon this phase of the question, said:

"With respect to that part of the decree appealed from, which directed the payment of taxes due from the Phillips Line, and its predecessor in title, to the state of Virginia and the city of Petersburg, out of the fund under the control of the court, and giving the taxes priority of payment over the creditors of the receivers, the court erred, except as to the taxes for the year 1910. The property upon which these taxes were assessed was wholly personal, and no effort appears to have been made, certainly as to the years prior to 1910, either by the auditor of the state or by the city of Petersburg, to collect the taxes until the property was placed in the hands of the receivers in this cause and an account of debts against the Phillips Line ordered. The state had a right, under sections 604–623 of the Code, for one year from the date on which the taxes in her favor were assessed, to levy upon the property assessed with the taxes, which right was not exercised; and it appears that the city of Petersburg had a right of distress against the property assessed with taxes in its favor, which the city might have exercised before the taxes were returned delinquent, or the property upon which they were assessed had passed into the hands of subsequent purchasers, and thereby secured a lien therefor, but these rights were never exercised. Under these circumstances, neither the state nor the city had a lien upon the property of the Phillips Line when it went into the hands of the receivers for the taxes due them, respectively, and therefore the position of the state and city was no better than that of

the general creditors of the company, and they were not entitled to share in the proceeds of sale of the company's property, except as to the amount of taxes due them [the state and city], respectively, for the year 1910, assessed against * * * the receivers."

[4] This decision, coming as it does from the highest court of the state, clearly indicates the rights of the city under the facts of this case, and, we think, is conclusive. Taylor v. Secor, 92 U. S. 575, 23 L. Ed. 663; Lewis v. Monson, 151 U. S. 545, 14 Sup. Ct. 424, 38 L. Ed. 265. The Supreme Court of the United States, in speaking of the weight to be given to the decisions of the highest court of a state bearing upon local questions of this character, in the case of Bailey v. Maguire, 89 U. S. (22 Wall.) 215, 22 L. Ed. 850, employed the following language:

"The whole subject we have discussed recently came before the Supreme Court of Missouri in the case of Pacific Railroad Co. v. Cass County, 53 Mo. 17. The assessor of Cass county had levied taxes for both state and county purposes on the property of the company in the county, and the question was whether these levies were authorized. The court held that the taxes for county purposes were rightfully assessed, under the general revenue laws, but that the taxes for state purposes were unauthorized, because section 12 of the act of 1852 had been repealed either by an express provision of a subsequent law or by necessary implication, and, being in force, state taxes could only be collected in the way pointed out in that section. As it is the peculiar province of the highest court of a state to decide whether or not the method pursued in the assessment and collection of taxes is in conformity with the law of the state, this decision is controlling."

From what we have said it follows that the city and state had the right to levy and collect the taxes for the year 1910, its tax collector having used due diligence as to the collection of taxes for that year. However, as to the years 1907, 1908, and 1909 we are of opinion that the lien of the landlords is entitled to priority over that of the city, and that the court below was in error as respects this phase of the case.

We have carefully examined the cases relied upon by the city, but in the light of the authorities we have cited bearing upon the Bankruptcy Act, as well as the case of Jackson Coal Co. v. Phillips Line, supra, we are of opinion that the judgment of the lower court should be reversed, and the case remanded, with instructions for further proceedings in accordance with the views herein expressed.

Reversed.

WOODS, Circuit Judge (dissenting). The Ainslie Carriage Company was adjudicated a bankrupt on February 3, 1910. In the distribution of the funds derived from the sale of its property a contest arose between the city of Richmond, claiming arrears of taxes, and Elizabeth M. Bird, Loulie M. Nolting and Charles E. Whitlock, claiming rent due them as owners of the premises occupied for business purposes by the carriage company. The question to be decided is whether the District Court was right in holding that the taxes should be paid in preference to the rent. The facts are:

On November 1, 1909, the petitioners levied a distress warrant on the goods and chattels found on the premises leased from them by the carriage company for $2,929.57 arrears of rent. Before sale could

be made the chancery court of the city of Richmond took charge of all the assets of the carriage company, and was administering them at the time of the adjudication in bankruptcy, when all the assets were turned over to the District Court for the Eastern District of Virginia. Upon the estate coming into the hands of the bankruptcy court, the petitioners proved their debt for rent, and claimed the proceeds of sale by virtue of the lien acquired by levy of the distress warrant under sections 2791 and 2792 of Virginia Code. At the time the distress warrant was issued, taxes on the property were due to the city of Richmond for the years 1907, 1908, and 1909, and after it passed into the hands of the court of chancery the taxes for 1910 became due, the whole amounting to $657. The landlords conceded that the taxes for the year 1910 should be paid in preference to their claim, but asserted their lien to be superior to that of the city for the delinquent taxes of 1907, 1908, and 1909. There is no claim on the part of the city that the landlords' lien was invalid under section 67f of the Bankruptcy Act, because perfected by distress within four months of bankruptcy. In re Emslie, 102 Fed. 291, 42 C. C. A. 350; In re Robinson & Smith, 154 Fed. 343, 83 C. C. A. 121; In re West Side Paper Co., 162 Fed. 110, 89 C. C. A. 110, 15 Ann. Cas. 384.

We consider first the effect of the Virginia statutes. Section 2792 relating to distress for rent puts this limitation upon the effect of the levy of the warrant:

"Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines."

It will be observed that the statute does not expressly create a lien in favor of the landlord by virtue of the distress for rent, but does so only by necessary implication. By an implication still stronger the following section of the charter of the city of Richmond confers a lien for taxes on personal property:

"Sec. 73. All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon, and no deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels from being distrained and sold for taxes thereon, no matter in whose possession they may be found."

The right to distrain and sell goods and chattels for taxes "wheresoever found" means that they may be taken if found in the hands of one holding under the landlords' right or any other claim whatever. It seems to me that this is the meaning of the law beyond all doubt, but if there were any doubt it should be resolved in favor of the collection of the public revenue. Indeed, this construction seems to be conceded, for it is admitted that the rent claim must yield to the taxes for the year 1910; and it was the construction adopted by the Supreme Court of Virginia in Jackson v. Phillips Line, 114 Va. 40, 75 S. E. 681, as to the taxes for the current year due the city of Petersburg.

In the case cited it was decided, however, that the right of the state to levy for taxes expired at the end of one year from the date at which the taxes were assessed, and "that the city of Petersburg had a right

of distress against the property assessed with taxes in its favor, which the city might have exercised before the taxes were returned delinquent, or the property upon which they were assessed had passed into the hands of subsequent purchasers, and thereby have secured a lien therefor, but these rights were never exercised." The charter of the city of Richmond contains no such limitations as to taxes after they are returned delinquent, but, on the contrary, provides by section 51 that the officer charged with the collection of delinquent taxes "shall have the same power to collect by the same means and processes all bills, assessments and accounts delivered to him as are conferred by the city charter upon the collector of taxes." The case before us is thus clearly distinguished from Jackson v. Phillips Line, and falls within the general principles so well stated in Taylor v. Sutherlin, etc., Co., 107 Va. 797, 60 S. E. 132. Hence it follows that there was the same right of distress for the collection of taxes due the city of Richmond, and delinquent for the years 1907, 1908, and 1909, as for the current taxes of 1910.

If this reasoning be sound, the petitioner's claim to have a lien under the Virginia statute superior to the claim of the city of Richmond for taxes must rest upon this proposition: After the levy of the distress warrant for rent on behalf of the petitioners, the city might nevertheless have levied under a distress warrant for taxes and thus displaced to the extent of the taxes the lien of the landlords; but since the court took the property after the lien of the landlord had attached to it by distress, and thus made impossible a levy on behalf of the city, the right of the city to acquire the superior lien or preference was forever lost. It would indeed be a curious result for a court to seize property in the interest of general creditors, and thus forbid the city to exercise its statutory right of perfecting its inchoate lien by levy and then penalize it for not exercising the right. In such circumstances the court necessarily deals with the city as if it had actually done that which the court incidentally in the interest of others had prevented it from doing. The matter is thus disposed of by the Supreme Court, quoting with approval Greeley v. Provident Savings Bank, 98 Mo. 458, 11 S. W. 980:

"It may be conceded that the state did not have an express lien upon the assets that went into the hands of the receiver, but it had a right paramount to other creditors, to be paid out of those assets—a right which it could have enforced through its revenue officers by the summary process of distress—but for the fact that the property and assets of its debtor had passed into the custody of its courts; whose duty it was in the administration and distribution of those assets to respect that paramount right, upon the untrammelled exercise of which depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the distribution of assets in custodia legis except in subordination to that right." In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; Taylor v. Sutherlin, etc., Co., 107 Va. 797, 60 S. E. 132.

St. Va. 1897–98, p. 824 (V. C. § 492b), forbids any court to distribute or dispose of funds or other property without first paying the taxes thereon.

The argument is presented that section 73 of the charter of the city of Richmond authorizes a levy on property only for taxes due thereon—that is, on the identical property assessed, and that the property in the hands of the court is not the property upon which the taxes were assessed. The argument falls for several reasons: First. The petition before us and the entire record refer throughout to the property levied on for rent as identical with that upon which the taxes were in arrears for 1907, 1908, and 1909; and the court should not assume that it is a shifting stock of goods. Second. Even if it be assumed without proof that the property was a stock of merchandise changing in its items in the course of trade, surely it should not be assumed further that all of the goods in stock when the taxes were assessed had been sold in the course of trade. The entire property realized in the hands of the court $3,343.02. The aggregate of the city taxes was $657. I do not perceive upon what ground it can be assumed that the entire stock had been purchased since the taxes were assessed in 1907, 1908, and 1909, or that of the total stock, $3,343.02, found on hand there was not $657 worth on hand at the date of the assessment. Third. But even if it be assumed that the property was a shifting stock of goods and that all of its items had changed in the course of business, the argument is still unsound. Of necessity the law considers a merchant's stock a definite entity upon which the taxes are assessed and remaining the same aggregate entity until the taxes are paid, notwithstanding the changing of the items in the regular and anticipated course of trade. Surely it cannot be the law that if a dealer's stock of dry goods or groceries are assessed for taxes in January and in the course of business the dealer sells all of the particular goods then on hand, replacing them with others, the city would be unable to enforce its right by levy on the stock because the items of the stock had been changed.

There is no force in the suggestion that the city lost any right conferred either by the federal or state statute by the mere procrastination of its officers. Robertson v. Sichel, 127 U. S. 507, 8 Sup. Ct. 1286, 32 L. Ed. 203; Powell v. Richmond, 94 Va. 79, 26 S. E. 389. It is no hardship that a preference is given for taxes for all may ascertain if they have been paid by inquiry at the proper office. It thus seems clear that if the Bankruptcy Act were silent on the subject, the statutes and decisions of Virginia require all taxes due the city to be paid in preference to the distress for rent.

Let it be assumed, however contrary to this conclusion, that the view most favorable to the petitioners is correct, namely, that the landlords acquired by their distress for rent a first lien on the property under the statute law of Virginia, which could not have been displaced by the levy of a distress warrant for the delinquent city taxes. Nevertheless, under the bankruptcy statute the court is required in accordance with the general equity rule to pay the taxes before distribution of the proceeds of the sale to the petitioners or any other lien creditors. The following sections seem to make this very clear:

"Sec. 64a. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court." Comp. St. 1913, § 9648.

"Sec. 57*l*. Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part." Comp. St. 1913, § 9641.

"Sec. 65a. Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured." Comp. St. 1913, § 9649.

The requirement put upon the court itself by section 64a to pay taxes in advance of the payment of dividends is not limited in its application to dividends to unsecured creditors. Taxes are not debts, and the statute means that they are to be paid in preference to all debts. The statute by section 57 undertakes to provide for the proof of secured as well as unsecured claims, and for the rights of all classes of creditors; and in subdivision "*l*" of that section the word "dividend" must be referred to the distribution of the assets to all classes before referred to in the section, that is, secured or unsecured, and the recovery of dividends improperly paid to any creditor of any class mentioned, secured or unsecured.

Section 65a clearly means that dividends of equal per cent. shall be paid on *all* allowed claims, and that dividends on secured claims shall be paid in view of their priority. It could hardly be denied that the pro rata distribution of the proceeds of the sale of the property of a bankrupt corporation to the holders of its mortgage bonds would be the payment of dividends to them. To restrict the meaning of "dividend" to payments made to unsecured creditors would not only distort the act, but would mean that the act had made no provision whatever for distribution of assets in the hands of the court belonging to secured creditors of the same class or different classes. The word "dividend" is not one of the words limited in its meaning by a definition contained in the act itself, and hence it has its usual well-known meaning, per centum of payments made in the distribution of funds in the hands of the court to all creditors whose claims are before it. It is true it is more frequently used in the act in connection with the distribution to unsecured creditors; but that is not controlling, for the same word or phrase often has a different meaning in the same statute according to its association. American S. Co. v. Commissioners, 224 U. S. 491, 32 Sup. Ct. 553, 56 L. Ed. 856. The universally recognized rule of practice is that the courts, even when there is no statute on the subject, pay the taxes on property from the proceeds of its sale before paying dividends on debts of lien creditors, and that too without respect to whether taxes have been made a lien by statute or not. In section 64a of the Bankruptcy Act Congress has by statute enjoined on the courts the observance of this rule.

In support of this conclusion it seems only necessary to refer to In re Tyler, 149 U. S. 184, 13 Sup. Ct. 785, 37 L. Ed. 689; New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284; 2 Remington on Bankruptcy (2d Ed.) §§ 2141–2144, and cases cited. I think the judgment of the District Court should be affirmed.

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## STEINMAN v. CLINCHFIELD COAL CORP.

(Circuit Court of Appeals, Fourth Circuit. February 27, 1917.)

No. 1465.

1. GIFTS ⊜25—PAROL GIFT INTER VIVOS—DESCRIPTION OF LAND—DEFINITENESS.
   The definiteness or reasonable certainty as to the description of the land necessary to make valid a parol gift is relative and may be much less in a wild country where the land has a nominal value than in a city, the definiteness required being that everything of importance to the parties in the effect of the transaction should be expressed in the contract, and a possible variance which the parties themselves would have regarded as unimportant does not defeat the gift.
   [Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 43–48.]

2. GIFTS ⊜25—PAROL GIFT INTER VIVOS—POSSESSION BY DONEE.
   Where a son to whom his father had made a parol gift of part of the home tract built a permanent home thereon, cleared the land to the recognized line, and was using it as his home, there was sufficient notice of his rights as against a subsequent purchaser from the father.
   [Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 43–48.]

3. GIFTS ⊜49(4)—PAROL GIFT INTER VIVOS—REQUISITES.
   Where there was a definite agreement that a father should give and a son should receive a gift of a particular tract of land, the boundaries of which were indicated with reasonable certainty to the satisfaction of both parties but to be fixed with absolute accuracy by a subsequent survey, the father renounced all claim to possession and control, and the son entered into possession claiming and holding the land as his own and built a dwelling thereon and made improvements, which, though small in actual value, were of substantial and peculiar value to one in his station and with his means, and it would operate as a fraud on him for his father or any one claiming under him to assert the legal title against the gift, the parol gift will be sustained.
   [Ed. Note.—For other cases, see Gifts, Cent. Dig. § 99.]

   Dayton, District Judge, dissenting.

Appeal from the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Henry Clay McDowell, Judge.

Suit by the Clinchfield Coal Corporation against A. J. Steinman for specific performance of an oral agreement to convey land. Decree for complainant, and defendant appeals. Affirmed.

R. T. Irvine, of Big Stone Gap, Va. (Irvine & Stuart, of Big Stone Gap, Va., on the brief), for appellant.

W. H. Rouse, of Clintwood, Va., and E. M. Fulton, of Wise, Va. (Fulton & Vicars, of Wise, Va., and Morison, Morison & Robertson, of Big Stone Gap, Va., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. The appellant, A. J. Steinman, claiming under a conveyance dated December 18, 1874, made by Philip Fleming of all the coal, iron ore, and other minerals and fire clay in and under a tract of land containing 1,000 acres, brought an action of ejectment against the Clinchfield Coal Corporation for a tract of 54 acres, which was included in Philip Fleming's conveyance. The Clinchfield Coal Corporation then instituted this suit in equity alleging that John W. Fleming had acquired an equitable title to the land from his father, Philip Fleming, by a parol gift in 1870; and that it had acquired the title of John W. Fleming through successive conveyances. The relief asked in the bill was that Steinman be enjoined from prosecuting his legal action and that he be required to specifically perform the alleged agreement of Philip Fleming with his son, John W. Fleming, to convey the land. The decree of the District Court sustaining a demurrer to the bill was reversed by this court. 217 Fed. 875, 133 C. C. A. 585. The District Court held upon trial of the cause on the merits that the complainant had substantially proved the allegations of the bill, and granted the relief demanded.

In the effort to reverse the judgment, Steinman relies on these positions: (1) There was only a general understanding between Philip Fleming and his son John W. Fleming, revocable at the will of the father, and not a definite and certain contract that the son should have any land. (2) The contract or agreement, if any, was uncertain and indefinite as to the corners and boundary lines. (3) The acts proved as part performance were not done in pursuance of the agreement or with reference to it, and the possession of the son was not distinct from the father and was not defined by marked boundaries. (4) Even if the possession would have been sufficient between father and son, it was not such as gave a purchaser from the father notice.

The equitable principles applicable to the case, so frequently stated by the Virginia court, were set out in the opinion on the former appeal. They were thus clearly summarized by Judge Keith in McLin v. Richmond, 114 Va. 244, 76 S. E. 301:

"'First, that the agreement relied on is certain and definite in its terms; second, that the acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved; and, third, that the agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party and place him in a situation which does not lie in compensation.' Wright v. Pucket, 22 Grat. (63 Va.) 370; Plunkett v. Bryant, 101 Va. 818, 45 S. E. 742; Reed v. Reed, 108 Va. 790, 62 S. E. 792." East v. Atkinson, 117 Va. 490, 85 S. E. 468.

There was no substantial dispute as to the facts. Philip Fleming was the owner of a tract of land conveyed to him by Warders containing 2,008 acres. Before his transactions with his son John W. Fleming, and with Steinman, here involved, he sold 395.15 acres to Collier, 141.7 acres to Rose, and 505.1 acres to Phipps. The tract claimed by John W. Fleming as a gift made in 1870, for which a deed was made to him in 1878, contained 161.3 acres. At the date

of these transactions, all of the land referred to was wild mountain land, 40 or 50 miles from any railroad, and having little or no market value. The country was sparsely settled. Philip Fleming lived in a one-room cabin with his entire family. There was little communication between him and the outside world. The manners and customs were primitive, business transactions were few and conducted in a very loose and inartificial way. Little attention was paid to exact boundaries because of the small value of the land. The testimony of John W. Fleming concerning the alleged gift from his father was to this effect: When he was nearly 20 years old and about to marry, his father settled him on a tract of land, gave it to him, telling him pretty much how the lines would run. His father told him that he would make the deed as soon as he should get a surveyor and have the land surveyed. He settled on the land, built a small log house, cleared land from time to time, in all about nine or ten acres, and raised crops on it, planted an orchard, and used the land in all respects as his own. His father always spoke of it as his land and made no claim to it himself after the gift. He was urged by his father to have the land surveyed and the deed made so that his father could be relieved of the taxes on it and have them charged to him. Before he took the land, his father indicated the entire tract intended for him and his brother, Preston, and also in a general way the line of division between him and Preston. He was given choice as to the portion he would take. He did not go around the land with his father, but his father mentioned the particular trees he intended to mark the dividing line and indicated the land he was to take in this way:

"Starting from the beech coming around between me and Pres dividing the north mountain between us two it came around to the top of the ridge at the chestnut corner, giving me the heads of the hollows and Pres the bottom."

The testimony of John leaves no doubt that he and his father understood that the established Rose and Collier lines would be boundaries. His testimony tends to show, also, that they understood that the northern line, which is the line now claimed to be indefinite, would commence at the beech indicated by his father, which was the beginning corner of the Rose tract, and that they understood very nearly, if not accurately, just where it would come out on the ridge. It was understood that it was to go from that point to the Short Branch, which mean that it would go by the shortest distance. The objection to John's testimony was withdrawn; and it was corroborated by other witnesses who made more definite the location of the trees referred to by him and the boundaries intended, by their testimony as to the statements and conduct of Philip Fleming in their presence. To some of them he pointed out the trees intended to mark the boundary; he warned those cutting timber on the remainder of the land not to cross the line indicated by him as the boundary of John's land.

[1] The definiteness or reasonable certainty as to the land intended required to make valid a parol gift is relative. Definiteness and certainty in the description of a city lot may be a matter of feet; of arable and valuable agricultural land it may be a matter of a few acres or rods. In a wild mountain country among a primitive people where

the land has a nominal market value, a variation from absolute accuracy of a number of acres or of many rods may be negligible because a matter of indifference to the parties. The definiteness required is that everything of importance to the parties in the effect of the transaction should be expressed in the contract. The location or indication of a line varying from accuracy even by a number of rods ought not to be regarded vital when the parties themselves would have regarded it unimportant. Looked at in this practical way, there is no doubt that a surveyor going on the land could have made a line under the description of the lines and boundaries expressed by Philip Fleming to John W. that would have been unquestioned by either of them and that would have been regarded satisfactory by any party interested at the time. We think a surveyor could have made a practically accurate survey by the assistance of the other witnesses to whom Philip had indicated the location of the lines. The utmost result that lack of exactness in the description of the land would be that all doubts as to the exact location should be solved against John, the donee.

[2] There is no doubt that John had built and established a permanent home entirely distinct from that of his father, had cleared to the recognized line, and was using the land as his own. This was sufficient notice to Steinman, the purchaser from Philip. Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846.

[3] To sum the case up, it was clearly proved that the father and son had a definite agreement that the former should make and the latter receive a gift of a particular tract of land; that the location and boundaries were indicated and understood with reasonable certainty to the entire satisfaction of both parties, the general location of one of the lines being indicated by trees named by the father to be fixed with absolute accuracy by a subsequent survey; that the father renounced all claim to possession and control, and the son entered into possession claiming and holding the land as his own in reliance on the gift; that the son established his home by building a dwelling, clearing and cultivating the land, some of the clearing being up to the line alleged by the defendant to be uncertain; that the improvements, while small in actual value, were of substantial and peculiar value to one in his station and with his means; and that it would operate as a fraud upon him for his father or anyone claiming under him to assert his legal title against the gift. The case is thus brought clearly within the principles laid down in the last deliverance of the Supreme Court of Appeals of Virginia in East v. Atkinson, supra.

To deny validity to such a parol gift as is here proved for indefiniteness or uncertainty would be giving such rigidity to rules of law as to deny equal justice to primitive and untutored people.

Affirmed.

DAYTON, District Judge. I am constrained to dissent. In the first place, the action of ejectment enjoined does not seek to recover the 54 acres of land, but only the coal and minerals underlying it. The right of John W. Fleming to hold or sell the surface thereof has

never been disputed. Both sides claim title from a common source. The legal title can be briefly outlined as follows:

Philip Fleming, the common source, on December 18, 1874, conveyed to J. D. Price and A. J. Steinman, for a consideration of $125, "all the bituminous and other coals, iron ore and all other minerals and fire clay" in and underlying a tract of 1,000 acres, fully bounded and described, with the usual rights to mine and remove the same. This deed was, on the day of its execution, duly admitted to record. On February 23, 1878, he "granted, bargained and willed" to his son John W. Fleming, for the consideration of one dollar, 169 acres of this tract. This deed was not admitted to record until January 28, 1887. It contained no reservation of the coal and other minerals previously sold and conveyed by him to Price and Steinman.

On January 29, 1887, the day after he recorded this deed from his father, John W. Fleming sold and conveyed 54 acres in fee of this 169 acres, for the consideration of one dollar per acre, to H. H. Willard of Cleveland, Ohio, who on February 28, 1887, sold and conveyed with mining rights, "all the coals, gases, minerals and oils" in and under 24 tracts including this 54-acre one, to F. A. Stratton of Tennessee. Willard sold these coals, etc., for a consideration of 75 cents an acre. The 24 tracts aggregated 7,193 acres. He did not sell the surface of the 54-acre tract in controversy. Stratton, in turn, conveyed these coals and minerals to the Virginia Mining & Improvement Company. This company mortgaged the same to the Boston Safe Deposit & Trust Company. The latter foreclosed the mortgage, sold and conveyed to Charles E. Hellier of Boston, who vested his rights in the Elkhorn Coal & Coke Company. The latter conveyed the same to the Cranes Nest Coal & Coke Company which, in turn, conveyed by deed of June 4, 1906, to the appellee, the Clinchfield Coal Corporation. The whole controversy is over this parcel of 54 acres, the legal title to which, as disclosed by the records, is clearly, so far as the surface is concerned, vested in H. H. Willard by virtue of his deed of January 29, 1887, for the fee from John W. Fleming, and so far as the coals and other minerals are concerned, in the appellant, Steinman, by virtue of his deed of December 18, 1874, from Philip Fleming to himself and Price; he claiming now to be the sole owner, although how he acquired Price's interest is not disclosed.

These facts are admitted. Steinman instituted ejectment against the Clinchfield Corporation for these coals and minerals. The latter filed this bill to enjoin the prosecution of this ejectment suit, and to secure and quiet its title to the coal and minerals underlying this 54 acres. To secure this relief, it alleges that, while Philip Fleming did not convey the 54 acres to his son John (under whom it claims its right) until 1878, and while he did in 1874 convey the coal underlying to Steinman and Price, nevertheless four years prior to this last conveyance he had orally given the land to his son John, who had then taken possession thereof, made valuable and permanent improvements thereon, of which gift, possession, and improvements Steinman and Price were bound to take notice. To this bill demurrer was interposed in the court below, sustained by it and overruled, upon appeal, by this

court. 217 Fed. 875, 133 C. C. A. 585. After this reversal, upon hearing on the merits, the court below sustained the bill, perpetuated the injunction, and vested the title to the coal and minerals in and under the 54 acres, in the Clinchfield Corporation. From this decree this appeal is taken by Steinman.

It goes without saying that the decision of this court upon the demurrer to the bill was governed by entirely different rules than those that must govern us in this hearing upon the merits. I think the allegations of the bill were specific enough, as to the oral gift, the boundaries of the land alleged to have been given, and the possession taken and the improvements made by the donee, to entirely justify the overruling of the demurrer; but I think, on the other hand, that the appellee has wholly failed in evidence, as to all these essential elements, to meet the requirements of equity necessary to warrant specific performance. Before considering the evidence, it would seem proper to briefly consider the origin of, and the rules governing, this equitable practice of upholding oral contracts of sale and gift of real estate in Virginia.

Under the Statute of Frauds, 29 Car. 11c 3, originating, it is said, with Lord Hale and another, the enforcement of such contracts is impossible, by reason of the seventh clause of the act, declaring:

"All declarations or creations of trusts or confidences in any land, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare the trust, or by his last will in writing, or else they shall be utterly void."

This statute, being subsequent to St. 4 Jac. I, was never in force in Virginia, and its statute of frauds, first enacted in 1785, and all subsequent re-enactments, have omitted this seventh as well as the eighth and ninth clauses of the English statute and substituted therefor the words:

No action shall be brought * * * upon any contract for the sale of land, tenements, or hereditaments, or the making any lease thereof for a longer term than one year, or upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.

The struggle in Virginia courts to establish the doctrine that the "action" forbidden by this statute could be construed to mean actions at law, and that equity in certain exceptional cases of peculiar hardship, under limited conditions, could specifically enforce such oral contracts, was a long and bitter one, starting in 1800 with the case of Buck & Brander v. Copland, 2 Call (Va.) 218. A brief and defective recital of the controversy is given in Re Henderson (D. C.) 142 Fed. 568.

Possibly the best statement of the result, finally arrived at, is found in Wright v. Pucket, 22 Grat. (Va.) 370, 373, where the court says (italics mine):

"The statute of frauds was founded in wisdom and sound policy. Its primary object was to prevent the setting up of pretended agreements, and then supporting them by perjury. But besides these direct objects, there is a mani-

fest policy in requiring contracts of so important a nature as the sale and purchase of real estate, to be reduced to writing; since otherwise, from the imperfection of memory, and the honest mistakes of witnesses, it must often happen, either that the *specific* contract is incapable of *exact proof*, or that it is unintentionally varied from its original terms. The *statute, therefore, required in contracts of such nature as are therein mentioned more satisfactory and convincing testimony than mere oral evidence affords.* The wisdom of permitting any deviation from the terms of the statute has been questioned by the most eminent chancellors of England and of this country. Courts of equity, however, in their efforts to do complete justice and prevent fraud, have in certain cases relaxed the operation of the statute; and in cases where a parol agreement for the *sale* of land has been clearly and distinctly proved, and part performance in pursuance of the agreement established, a court of equity will decree specific execution."

Notwithstanding continued opposition, the equity courts of Virginia established the doctrine, first, that oral sales, and finally that oral gifts, could be specifically enforced under these conditions: (1) The parol agreement relied on must be certain and definite in its terms. (2) The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved. (3) The agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation. Venable v. Stamper, 102 Va. 30, 35, 45 S. E. 738.

The persistent opposition to the assertion of this power so assumed by the equity courts is illustrated by section 1, c. 116, p. 500, Va. Code 1849, which provided that:

"No estate of inheritance or freehold, or for a term of more than five years, in land, shall be conveyed unless by deed or will; and no gift of a slave or of any goods or chattels shall be valid, unless by deed or will, or unless actual possession shall have come to and remain with the donee, or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section."

This section was amended and re-enacted in 1887, in these words:

"No estate of inheritance or freehold, or for a term of more than five years, in lands, shall be conveyed unless by deed or will, nor shall any voluntary partition of lands, by coparceners, having such an estate therein, be made, except by deed; nor shall any right to a conveyance of any such estate or term in land accrue to the donee of the land or those claiming under him, under a gift or promise of gift of the same hereafter made and not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee or those claiming under him." Pollard's Code 1904, § 2413.

It would seem fair to assume from this legislation that the people of Virginia, after more than 80 years' experience, concluded that, so far as gifts of real estate were concerned, equity's practice of enforcing oral contracts thereof operated to perpetuate fraud rather than prevent it, and by its legislation determined to forbid, hereafter, its exercise. This case impresses me as a striking illustration of the wisdom of this legislative conclusion. Here an alleged oral gift of land, charged to have been made by a father to his son in 1870, is sought to be enforced, as to the coal and minerals underlying 54 acres part thereof (which coal and minerals at that date were of a market value of not more than

12½ cents per acre, or $6.75), 43 years thereafter, not in favor of the original donee, but in favor of a coal corporation, which bought, after coal had become valuable, with full record evidence before it, that the alleged donor with no protest from the alleged donee had, in 1874, sold and conveyed the legal title to such coal to Steinman and Price. Is there to be no limitation to the enforcement of these contracts short of eternity?

Virginia does not stand alone in now forbidding their enforcement after full experience. Most of the states adopted the English statute of frauds including the seventh clause thereof, forbidding the enforcement of such contracts. The state of Pennsylvania was an exception until 1856, when it enacted this forbidding clause.

The legal deductions to be drawn may be summarized as follows:

(1) The common law does not recognize the doctrine and will not enforce it.

(2) The policy of Virginia legislation has been against it, resulting finally in absolute prohibition so far as gifts are concerned.

(3) The necessity of clear and convincing proof of each and every element required by equity in the administration of the doctrine is universally conceded. These elements relate:

First. To the character of the gift itself which must be (a) actual and complete, not conditional; and (b) it must be of a specific boundary, well defined, and not subject to confusion or misunderstanding. Wright v. Pucket, 22 Grat. (Va.) 370; Pierce's Heirs v. Catron, 23 Grat. (Va.) 588; Campbell v. Fetterman, 20 W. Va. 398; Lester v. Lester, 28 Grat. (Va.) 737; Blankenship v. Spencer, 31 W. Va. 510, 7 S. E. 433; Plunkett v. Bryant, 101 Va. 814, 45 S. E. 742.

Remembering that West Virginia adopted the Virginia statute of frauds and that many cases have arisen in that state touching the enforcement of these oral contracts, some of her decisions are very much in point as illustrating the definiteness of description of the land given, that is required. In Westfall v. Cottrills, 24 W. Va. 763, the contract was for "forty acres off the Spring fork end of my tract of 147 acres on Beech fork in Calhoun county." The description of the land was held to be too vague and indefinite. In Blankenship v. Spencer, 31 W. Va. 510, 7 S. E. 433, the claim was for "a certain piece of land containing 67½ acres, being the lower end of a certain survey sold and conveyed to S. by W., and adjoining lands of H. and of R., in the district of F., in the county of G., in the state of W. Va." The tract was shown in fact to contain 117 acres. Held:

"That the description of the boundaries of the 67½ acres, as described in said parol contract, is too vague and indefinite to authorize a court of equity to enforce the specific execution thereof."

Second. The possession required.

It must be actual, exclusive, open, and notorious. Woods v. Stevenson, 43 W. Va. 149, 27 S. E. 309; Miller v. Lorentz, 39 W. Va. 160, 19 S. E. 394.

It shocks the conscience, I submit, to hold that a father and son should be able, by means of this equitable doctrine, to enforce, against an innocent purchaser from the father afterward, a parol contract bas-

ed upon a slight possession of a few acres of a large boundary, of a thousand acres or more, of unimproved land upon which both reside, the son being at the time under age and only living apart on the land because he had married and the father's one-roomed cabin was too small to accommodate both.

Third. The improvements to be made.

(a) They should be substantial in character and both valuable and enduring.

(b) They should be put on the property by the son and donee, and not by the joint labor of the son and father. For the latter to be the case, rebuts, to a degree, the idea of complete surrender, by the father, of all interest in the land, and also of open, notorious, and exclusive possession by the son.

(c) They should be of such character as to be not well compensable in money damages. Griggsby v. Osborn, 82 Va. 371; Lightner v. Lightner (Va.) 23 S. E. 301; Trout v. Trout's Ex'r (Va.) 25 S. E. 98.

Fourth. The payment of taxes by the donee.

It is common experience that the method most generally resorted to by prospective purchasers to ascertain the owner and the extent and character of his possession and title, in Virginia and West Virginia, is by examination of the assessment land books of the county. To such an extent is this true, if John W. Fleming had run out and had his gift severed from his father's tract, placed it upon the land books, and caused it to be assessed to himself for taxation, and paid the taxes so assessed for any considerable number of years, this would have constituted the very best notice to the world of his claim of possession. Ever since the Acts of 1874–75, p. 219 (Code, 1904, § 458, c. 21), and I think long before that, the Virginia assessment law has required the commissioner before making out his land books, and at the time he takes the taxpayer's list of taxable personal property, to "carry with him the last land book that may be had, and the entry of lands charged to any person resident, or having an agent within his county, district or city, shall be shown to such person or his agent, who shall be required to state, on oath, whether the same be correctly entered; whether any part thereof ought to be transferred to any other person, and if so, to whom, and the nature of the evidence to authorize such transfer." Failure on the part of such commissioner to present such book to the taxpayer and on the part of the taxpayer to give such information are made finable offenses. Again: To sustain a parol sale of land under this doctrine, clear proof of the payment of the purchase price, or a substantial part thereof, is required. Necessarily in cases of gifts this element is wanting. The Virginia courts, it seems to me, have wisely, in effect, substituted for it the requirement that taxes should be paid by the donee, as set forth in Harrison v. Harrison, 36 W. Va. 556, and in Lightner v. Lightner, 23 S. E. 301, 2 Va. Dec. 258, where one of the reasons given for refusing to sustain alleged oral gifts by a father to his sons was the fact that the father had continued the payment of taxes after the alleged gifts had been made. This last-cited case is a very interesting one, and comes very near to paralleling many of the facts of this one.

Carefully analyzing the evidence in this case, it is clear that no specific boundary of land that Philip Fleming is claimed to have orally given his son John, was defined until after the survey was made and deed executed in 1878, four years after Philip had sold the coal to Steinman and Price; up to that time no mention or even guess of the number of acres to be given to John had been made. In this connection, it is to be noted that John did not even record his deed until 1887, when he undertook to sell and convey the 54 acres to Willard in fee, surface and coal together, for one dollar per acre. This was 13 years after the father had sold the coal to Steinman and Price. During all these years he never disclaimed or disavowed the father's right to sell the coal and minerals underlying either these 54 acres or the residue of the 169 acres which his father conveyed to him four years after such sale. This land lay in Dickenson county, west of the Alleghany Mountains, where, by section 2915 of the Va. Code (1904), no entry on, or suit to recover, land can be maintained after 10 years' adverse possession. While the question of adverse possession cannot directly arise here, it seems clear to my mind that by parity of reasoning the owner of the surface, if he disputes the legal title of the other party to the coal by reason of his having equitable title thereto by prior parol contract, should, by equitable proceedings, perfect such equitable title and secure the cancellation of the other's legal title to the coal as a cloud on his right, within 10 years after notice thereof, or be estopped from doing so; and this for the reason that he can take manual possession of his surface and by such possession perfect a defective title in ten years, while the owner of the title to the coal cannot take possession of surface or coal other and to a greater extent than his contract right to ingress and egress in and over the surface may give him.

The evidence shows that, in the primitive conditions existing in that locality in 1870, when this oral gift is alleged to have been made, it was the general custom of a father owning land, when a son married, to establish him on some part of his farm, with a view, if the boy was satisfied, he could reasonably expect the father, in future, either to deed or will to him the land; but, if not satisfied, he could leave (not sell) the land and go elsewhere and do for himself.

Larkin Stanley says, supplemental record top page 12:

"The rule among people was that, if the boys liked the land their father gave them and stayed on it, their father would make them a deed. If they did not make them a deed then, they would do so later. I don't know of any boy ever undertaking to sell the land or exercising ownership over it until after he got his deed. There was not much use."

W. R. Reedy testifies:

"When a man gave his son a part of his home farm like this, started the boy on it, the boy could use his choice either to stay there if it pleased him or he could move off. Unless a boy got a deed from his father, he never undertook to sell the place or trade it like he owned it. As a general thing, he stayed and worked on it, and, when he would make a swop, he would generally get his father's consent. I don't think a father would give his son land like that and let him sell it without his consent; he would not want a neighbor thrust on him without his consent."

W. A. Stanley says:

"When Philip Fleming first told me how he had settled his children, including John W. Fleming, was along after Jack had married and Jack was on the land at the time. I don't know whether it was before or after December, 1874. It was along after Jack was living up there. Philip Fleming was a mighty good man, a good citizen, and highly regarded. He liked his fun and talked a good deal, but when it came to business he was straight. I do not think he was a man who would sell his minerals to a stranger and get money for it, when he had already given his land away to his son. I would be satisfied that he did not do anything like that."

Jefferson Fleming says:

"My father told me before I was married that I could pick me a piece of land, and when I wanted to go to work I could do so, and I made a choice of what is known as the Holly Creek Ridge and had two fields cleared. I was married January 12, 1871, and was 22 years old on the 17th of March following. My father said that he would give me the land I went to work on. I do not remember when he made me a deed for it, but he told us time and again that he was ready to make us a deed and we ought to have it surveyed and fixed up, and have the tract."

Again he says:

"He said: 'Boys, you had better have your land surveyed so that I can make you a deed; I am ready at any time.' We neglected, just like boys will. We never took things into consideration much. In time we did do it, got a surveyor, and had it run out. He made it our duty to have it surveyed out; I don't know whether he put in the deed to John W. Fleming that he granted and willed him the land. He meant for us to have a home; I suppose he meant he was willing the land he made the deed to when he was still alive."

Again he says:

"My father expected John W. and Jeff to arrange and have their deeds made as soon as possible after they moved on their land. My father was a pretty hard worker and was a poor man, with right smart family. He had right smart taxes to pay and not much way to pay them. He says, 'Boys, you ought to have deeds so that you can lighten my taxes.'"

And John W. Fleming himself says his father told him:

"That I could get a surveyor to run it out, and that it would be a help to him about lightening the tax on him, and so on."

In view of this testimony, how can it be said that here was a contract certain and definite in its terms whereby the father had unconditionally parted with any specific number of acres of land prior to the survey and deed made in 1878? The boy, if he liked the location and was willing to stay, and his father naturally wanted him to do so, was to be deeded the land after it was surveyed out by the son and the specific boundaries had been agreed upon. Until that time the boy could not sell or dispose of it, but could give it up and leave it any time he desired. The conviction comes to me with great force that none of these illiterate people had ever heard of, or had the slightest idea, that a parol contract, either of sale or gift, could be made and sustained. On the contrary, I doubt not, the impression was universally prevalent that all contracts about land must be in writing. This view is clearly shown, I think, by the fact that the father, burdened with poverty and taxes, was urging his boys to have surveys made so as to define and make certain the quantity and boundaries of the lands

he was going to give them, in order that he might unload upon them a part of his burden of taxation. Yet, if he and his son John, in fact, regarded the oral contract, at the time, complete and not inchoate, both for eight consecutive years until the deed was made in 1878, violated the assessment law of the state in allowing the land to remain assessed in the father's name.

But it seems to me the alleged contract was not only inchoate, but to the last limit indefinite and uncertain. There is not a word in the evidence to show that a specific quantity in acres was talked about. The two sons were to have land off the father's large boundary, and it was to be divided by survey between them, whereby John was to have "the heads of the hollows and Pres the bottom." It is true that John testifies that his father did tell him "pretty much" how the lines would run, but he admits he "never went around the lines but looked at the place"; that he does not remember of knowing, before he moved on the tract, where "the sugar tree in the forks of Saw Pit Hollow," a prominent corner afterwards fixed by the survey, stood; that he "does not remember" that his father told him that this tree would be a corner to his tract; that he "just can't hardly tell" how far from the passway up that spur the first corner stood; that he did not know where the walnut corner over on Short Branch was "until the line was run." In answer to the question, "Now, when your father told you that he would give you that land up there, what was the first corner he said you would run to after leaving the big beech on the Elias Rose land?" he said, "I could not say." And to this question, "You knew about where your line would run from what he said?" he answers: "Yes, sir; but did not know where he would make the corners." Two questions arise here: First, how is it possible to fix and certainly define a boundary of land requiring a division line, without knowledge of a corner to start from; and, second, how could equity enforce a verbal contract, under its rules for definiteness, when all the corners and the division line had to be fixed by future agreement and survey?

But he goes on and admits that the division line between him and his brother Pres was never made until the survey and deed were made in 1878; that, if his father had "some corners or lines in mind, he did not tell him where they were." I further cite these questions propounded to him and his answers:

"You understood that you was to have the heads of the hollows, but you did not know how they would run? A. I had a good idea. He told me I would get all the heads of them as far as I would ever want to clear down the mountain. Q. Nothing said between you and your father about the coals and minerals under the land? A. No, sir. Q. That question you all never raised at all, did you? A. No, sir. Q. Neither you nor he regarded the coal worth anything? A. No, sir."

While the evidence is somewhat more persuasive as to the improvements made and possession taken, yet, to my mind, it wholly fails to meet the requirement of the rule. In the first place, in passing, it is to be noted from the testimony of John given above that no thought was given to the underground coal. The fact that the honest old father sold it afterwards may be taken to indicate that he did not, in 1870, intend to give it to his boys, and that the boys had no claim to it

by any oral contract. The possession given may well be limited to that of the surface. But let us put that aside and look at this possession of the surface. To my mind it was a family communistic, and not an individualistic one. The father lived in a single one-roomed log house. He had a family, of at least five or six, all living in this one room, independent of this boy John. John got married, and, though necessity, had to have a place for himself and wife to go. The father, two sons, and the neighbors got together and put up another one-roomed log house on the father's land for John. The outlay in money was nominal, in labor that of a few days. Jefferson, the brother, tells us how it was done, and the witness Reedy describes the character of the work and improvements. John did clear out eight or ten acres necessary to secure his living.

With full conviction that this whole proceeding was simply an afterthought, conceived by this Clinchfield Corporation to secure, contrary to the statute of frauds, the coal underlying this 54 acres, bought by it with full notice, through recorded deed, that such coal had been honestly bought and paid for by another some 40-odd years ago, I would reverse the decree of the court below and remand, with directions to dissolve the injunction and dismiss the bill.

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## ATTLEBORO MFG. CO. v. FRANKFORT MARINE, ACCIDENT & PLATE GLASS INS. CO.

## FRANKFORT MARINE, ACCIDENT & PLATE GLASS INS. CO. v. ATTLEBORO MFG. CO.

(Circuit Court of Appeals, First Circuit. February 27, 1917. On Petition for Rehearing April 11, 1917.)

Nos. 1253, 1254.

1. ACTION ⟸27(2)—AGAINST COMPANY—NATURE—TORT.
   Where the several counts of a declaration against an indemnity insurance company alleged that by the terms of the policy the company had the right to defend any action brought against the insured, that it had undertaken the defense of such an action, and that because of its negligence in the conduct of the negotiations for settlement and of the defense a judgment was obtained against the insured far in excess of the amount of the policy, and which the insured had been compelled to pay, whereby it received damages, for which recovery was sought, the action sounds in tort, not in contract.
   [Ed. Note.—For other cases, see Action, Cent. Dig. §§ 183, 186–188, 192–194.]

2. INSURANCE ⟸631—ACTION AGAINST INSURER—ACTION IN TORT—PLEADING—POLICY.
   In an action in tort by the holder of an indemnity insurance policy to recover damages caused by the negligent defense by the insurer of an action against the insured, it was necessary to plead the provisions of the policy under which the insurer undertook the defense of the suit, to show the relationship between the parties, since there can be no actionable negligence, in the absence of some relationship between the parties.
   [Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1588, 1589.]

3. NEGLIGENCE ⟸2—INTERFERENCE WITH RIGHTS—ANTICIPATION OF DAMAGE.
   Where a person who knows or has reason to anticipate that the property or personal rights of another are so situated with reference to him that

they may be injured through his active intervention, it becomes his duty so to govern his action as not negligently to injure those rights.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4.]

4. NEGLIGENCE ⊜1—LIABILITY—CONTRACTUAL RELATION.

Where the only relation between the parties is contractual, the liability of one to the other for negligence must arise from some positive duty, which the law imposes because of the relationship, or because of the negligent manner in which some act required by the contract was done; the mere breach of an executory contract not being the basis of an action in tort.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1.]

5. INSURANCE ⊜622(1)—LIABILITY ON POLICY—LIMITATION OF ACTIONS—ACTION FOR TORT.

The provision in an indemnity insurance policy that no action should be brought by the insured against the company thereon after the expiration of the period from the date of the accident within which an action might be brought against the insured, unless a suit was pending at the expiration of that time, does not apply to a suit by the insured in tort to recover damages for the negligent defense by the company of an action against insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1540, 1544.]

6. INSURANCE ⊜621—CONSTRUCTION OF POLICY—LIMITATION OF SUITS.

A provision in an indemnity insurance policy limiting time within which suits may be brought thereon is in derogation of a common-law right, and not entitled to a broad construction.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1542, 1543.]

7. INSURANCE ⊜514—INDEMNITY INSURANCE—LIABILITY OF INSURER—NEGLIGENCE—DEFENSE OF SUIT.

Where an indemnity insurance policy gave the insurer the right to defend any action against the insured, though it did not require it to undertake such defense, the insurer is liable to the insured for damages occasioned by its negligence in the conduct of a defense which it had undertaken under the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1298.]

8. LIMITATION OF ACTIONS ⊜55(2)—ACCRUAL OF RIGHT OF ACTION—NEGLIGENCE IN DEFENSE OF SUIT.

A right of action for the negligence of an indemnity insurance company in the defense of a suit against the insured did not accrue until the judgment recovered in that action was paid, or at least until the verdict was rendered.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 300.]

9. INSURANCE ⊜156(1)—AGENCY—EXISTENCE OF RELATION—CONTRACT TO DEFEND SUIT.

An indemnity insurance company, which elects to exercise its right under the policy to defend an action brought against the insured, is not the agent of insured in the defense or settlement of the suit, but is rather in the position of an independent contractor; the conduct of the defense and settlement being in no wise subject to the direction of insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 316–318, 320–322.]

10. INSURANCE ⊜73—INDEMNITY INSURANCE—LIABILITY OF INSURER—DEFENSE OF SUIT—ACTS OF AGENT.

Where an indemnity insurance company elected to defend a suit brought against insured, its agent employed to conduct the defense was not the agent or subagent of insured, but was the agent of the company, for whose acts within the scope of his authority the company was liable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 99, 100.]

11. INSURANCE ⊂⊃93—INDEMNITY INSURANCE—LIABILITY OF INSURER—DEFENSE OF SUIT—NEGLIGENCE OF ATTORNEY.

The fact that an agent to whom an indemnity insurance company intrusted the defense of an action against insured was an attorney at law does not relieve the company from liability to insured for his negligence in the conduct of the defense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 123.]

12. PRINCIPAL AND AGENT ⊂⊃21, 22(1), 121, 122(1)—PROOF OF AGENCY—TESTIMONY OF AGENT—DECLARATIONS.

An agent is a competent witness upon the issues of his agency or authority, though those issues cannot be established by the supposed agent's declarations.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 39, 40, 413–416, 418.]

13. EVIDENCE ⊂⊃121(2)—RES GESTÆ—DECLARATIONS OF AGENT.

After proof by competent evidence that an agent of an indemnity insurance company was authorized by it to negotiate for a settlement of an action against insured, the agent's declarations in attempting to make the settlement are admissible as part of the res gestæ in an action by the insured to recover damages for company's negligent conduct of the defense and negotiations for settlement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 308.]

On Petition for Rehearing.

14. INSURANCE ⊂⊃512—INDEMNITY INSURANCE—LIABILITY OF INSURER—NEGLIGENT DEFENSE OF ACTION.

In an insurance policy indemnifying insured against liability for injuries to employés caused by his negligence, and giving insurer the right to defend or settle any action against insured, a clause limiting the liability of insurer in respect to any one employé to $5,000 is no defense to an action by insured against insurer for the latter's negligence in conducting the negotiations for settlement and the defense of an action by an employé, as a result of which negligence insured was compelled to pay a sum largely in excess of the amount of the insurance.

In Error to the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Action by the Attleboro Manufacturing Company against the Frankfort Marine, Accident & Plate Glass Insurance Company. Judgment for the plaintiff for part of the amount claimed, and both parties bring error. Reversed and remanded, and petition for rehearing denied.

See, also, 202 Fed. 293.

Alexander Lincoln, of Boston, Mass. (Sherman L. Whipple and Whipple, Sears & Ogden, all of Boston, Mass., on the brief), for plaintiff.

Charles F. Choate, Jr., Choate, Hall & Stewart, Frank W. Knowlton, and Robert Hale, all of Boston, Mass., for defendant.

Before DODGE and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

BINGHAM, Circuit Judge. These are writs of error from a judgment in favor of the Attleboro Manufacturing Company against the Frankfort Marine, Accident & Plate Glass Insurance Company, entered in the District Court for Massachusetts, in an action brought to

recover damages alleged to have been suffered by the plaintiff through the defendant's negligence.

The Attleboro Manufacturing Company is a corporation engaged in the manufacture of jewelry, at Attleboro, Mass., and on the 8th day of July, 1902, procured from the defendant, the Frankfort Marine, Accident & Plate Glass Insurance Company, an employer's liability policy for the term of one year, from the 11th day of July, 1902, to the 11th day of July, 1903, wherein the defendant agreed to indemnify the plaintiff—

"against loss arising from legal liability for damages on account of bodily injury or death suffered by any employé or employés of the assured resulting from any and every accident of whatsoever nature or cause happening in, upon, or about the premises of the assured; * * * but the liability of the company in respect to any one employé suffering injury or death shall in no case exceed the sum of five thousand dollars ($5,000), nor shall the total liability of the company in respect to any one accident resulting in injury to or the death of several employés in any event exceed the sum of ten thousand dollars ($10,000)."

In furtherance of its obligation to indemnify the plaintiff, the defendant agreed:

"That if any legal proceedings are taken to enforce a claim against the assured, covered by this policy, the company shall, at its own cost, undertake the defense of such legal proceedings in the name and on behalf of the assured, and shall have the entire control of such defense. But if the company shall offer to pay the assured the *full amount* for which the company is liable in respect to the claim sought to be enforced, it shall not be bound to defend any legal proceedings, nor be liable for any costs or expenses which the insured may incur in defending the same. * * * The company may undertake at its own cost the settlement of any claim, * * * and the assured shall not, except at his own cost, settle any claim nor incur any expense without the consent of the company thereto previously given in writing."

During the existence of the policy, and on the 28th of January, 1903, an accident occurred to one Hodde while employed in the plaintiff's business at Attleboro. As a result of the accident, an action was brought by Hodde against the Attleboro Company March 31, 1903, in the superior court of Massachusetts, and on January 7, 1907, a verdict having been returned for Hodde, judgment was entered in his behalf for the sum of $17,343.81. January 19, 1907, the Attleboro Company paid the judgment. Thereafter, but prior to May 13, 1911, when the present action was brought, the Frankfort Company paid the Attleboro Company the $5,000, and interest, called for in the policy.

The declaration in the present suit contains three counts. In the first count the plaintiff recites the issuance of the policy and the stipulations therein contained, above set forth. It then alleges the happening of the accident, the assertion of a claim of legal liability, the assumption by the defendant of the defense of the Hodde suit, and the entire and exclusive control thereof; that it was the duty of the defendant—

"in defending said suit to conduct itself with a reasonable degree of care, skill, and diligence commensurate with the duties and responsibility assumed by it, as aforesaid, but that defendant, unmindful of its duty in the premises, so carelessly, negligently, and unskillfully conducted and demeaned itself in the premises that the plaintiff in said suit recovered final judgment against this plain-

tiff in the sum of $17,343.81, which judgment this plaintiff has been compelled, on writ of execution issued against plaintiff by said superior court, at the instance of said Hodde, to satisfy and pay in full, principal, interest, and costs; that the aforesaid negligence and misconduct of the defendant consisted in this: That defendant, although given by plaintiff timely and ample notice of said accident, claim and suit, negligently failed to make any timely, proper, or intelligent investigation touching the facts and circumstances under which said bodily injuries were sustained by said William Hodde, Jr., whereby material evidence favorable to this plaintiff would, could, and should have been produced at the trial of said suit, was not produced or offered thereat on this plaintiff's behalf; that no intelligent, adequate, or timely preparation was made by the defendant in this suit for the trial of said suit of said William Hodde, Jr.; that competent and legal evidence material to the issues in said suit, and tending to exculpate this plaintiff of liability therein, and which was known, available, and accessible to defendant herein, and which could and should have been produced on this plaintiff's behalf on the trial of said suit, was not produced or offered by defendant; that it was charged by said Hodde in said suit that his said injuries had been caused by the negligence of this plaintiff, as it was alleged, in furnishing said Hodde with a defective and unsuitable pitcher for carrying certain acid, which claim that said pitcher was defective and unsuitable was denied by plaintiff, so that the actual condition of said pitcher became and was one of the vital issues on the trial of said suit; that said pitcher, if it had been offered in evidence on the trial of said action, would have tended strongly to rebut and negative said charge of negligence of said Hodde, and would on said trial have seriously impaired the weight and credibility of the evidence offered on his behalf; that this plaintiff, before the trial of said suit, at defendant's request, delivered into defendant's custody and care the said pitcher, but the defendant, instead of taking care of the same, carelessly and negligently permitted said pitcher to become lost or destroyed, so that it was not and could not be used or offered in evidence in this plaintiff's behalf on the trial of said suit. And plaintiff states that it was by reason of the aforesaid negligence, carelessness, and unskillfulness of defendant in and about the premises that said judgment was rendered against this plaintiff and became final as aforesaid."

In the second count, after reciting the issuance of the policy and the stipulations therein contained, with reference to the payment of the indemnity, the defense of the suit, and settlement thereof, it was alleged that:

"Thereupon, by the terms of said policy, the defendant acquired the right and it became the defendant's duty either to pay the plaintiff the sum of five thousand dollars ($5,000), the amount of the indemnity provided for in said policy of insurance, or in the alternative, acting in behalf of the plaintiff, to take charge of said claim against the plaintiff and of negotiations for settlement of said claim by way of compromise, and to take entire control of the defense of the suit brought in behalf of said Hodde to enforce said claim"; that "the defendant elected the alternative, and thereafter did in fact take charge of said claim and of negotiations for settlement thereof, and undertook the defense of said suit"; that "it entered into various negotiations with said Hodde's counsel and representatives, caused the appearance of its attorneys to be entered in court as attorneys for this plaintiff, entered upon the preparation of the defense of said suit and had entire and exclusive control of said claim and negotiations for settlement thereof and of the defense of said suit throughout the pendency thereof"; that "it became the duty of the defendant, having undertaken in the plaintiff's behalf, and for a consideration, the exclusive control and management of said claim and the negotiations for settlement thereof, and the defense of said suit to enforce said claim, to conduct itself in respect to such negotiations for compromise and the management of the defense of said claim and suit with a reasonable degree of care, skill and diligence for the protection of the plaintiff's interests, and, among other things, it became the defendant's duty to report to the plaintiff seasonably, in order to permit the

plaintiff to act thereon, any offers for settlement of said claim. But the plaintiff says that the defendant was negligent in the performance of the duties which it assumed, and wholly failed in the diligent performance thereof, in that it entirely failed to conduct said negotiations for settlement by way of compromise with reasonable skill and diligence, failed to report to the plaintiff offers of settlement made by said Hodde's representatives in compromise of said claim, whereby the plaintiff might have settled said claim by a reasonable compromise at its own cost; and, furthermore, immediately preceding the trial of said suit, although it was advised that the plaintiff was under a legal liability to said Hodde and that the injuries sustained by said Hodde were severe and permanent, carelessly and negligently, and against the plaintiff's protest and the advice of its own counsel, declined and refused to cause said suit to be settled and adjusted according to an offer made in behalf of said Hodde for the sum of four thousand dollars ($4,000), towards which sum this plaintiff, though not bound so to do, offered to contribute voluntarily the sum of one thousand dollars ($1,000)."

The allegations of negligence in the third count are restatements of those alleged in the first and second counts, namely, negligence in the preparation and trial of the case and in the conduct of the negotiations for settlement.

The defendant filed a general denial, and for a further answer said:

"That if any acts or omissions of the character described in the plaintiff's declaration occurred, they occurred more than six years prior to the date of the writ in this cause."

At the trial the plaintiff was allowed to go to the jury upon the first count only of the declaration. The court also ruled that the evidence to be received would be limited to alleged negligent acts occurring prior to December, 1904, when Mr. Romney Spring, an attorney at law, was employed by the defendant to prepare and defend the case, and to these rulings the plaintiff excepted. May 20, 1914, the jury returned a verdict for the plaintiff in the sum of $4,750, and on October 18, 1916, judgment was entered thereon for $5,437.17 damages, exclusive of costs.

[1] The first contention made by the defendant under its first assignment of error is that the plaintiff's action as set out in the several counts of its declaration sounds in contract and not in tort. We do not regard this as a true conception of the allegations there made.

The first count is plainly based upon the idea that the defendant, having entered upon the task of defending the suit, was under a duty imposed by law to exercise due care and skill as respects the plaintiff's rights, which it could reasonably anticipate would be damaged if it failed to exercise such care, and that, by reason of its failure in this respect, it was responsible to the plaintiff for the damages it suffered.

In the second count it is alleged that the defendant undertook and entered upon the task of settling the suit, whereby it became its duty to exercise reasonable care and diligence to effect a settlement, but that through negligence it failed so to do.

The third count, as before stated, seeks to charge the defendant upon the grounds stated in both the previous counts. If the second and third counts are not so carefully drawn as the first, and if their concluding paragraphs, and perhaps some others, give the impression that the plaintiff's suit is for a breach of contract, and not for negligence, it is to be borne in mind that the allegations there made are

not the essential ones upon which the plaintiff's right of action proceeds and which are elsewhere stated.

The plaintiff does not seek in any of the counts to recover damages for a breach of contract, and the contract is not set out for the purpose of showing that its obligations have been broken by the defendant. The allegations of this character were made for the purpose of showing the relationship existing between the parties, and the rights of the plaintiff in the subject-matter as to which the defendant was dealing and which it was bound to anticipate might be infringed if it failed to use due care in the performance of the duties imposed upon it by law.

[2] The rule of reasonable care which lies at the foundation of actions for negligence has to do with one's acts with reference to the person, property, or rights of another. "It is a rule of relation. If there be no relation, there is nothing upon which the rule can operate. * * * Unless and until one is brought into relation with other men, or property, or rights, he has no obligation to act with reference to them; and this is true whether the obligation be called legal, moral, or reasonable." Garland v. Boston & Maine R. R., 76 N. H. 556, 563, 86 Atl. 141, 142, 46 L. R. A. (N. S.) 338, Ann. Cas. 1913E, 924. For this reason, and no other, it was essential for the plaintiff to set out in its declaration the stipulations of the policy into which the defendant had entered.

[3] It is a well-recognized rule in the law of negligence that, when one knows or has reason to anticipate that the person, property, or rights of another are so situated as to him that they may be injured through his active intervention, it becomes his duty so to govern his action as not negligently to injure the person, property, or rights of that other. Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; Tuttle v. Gilbert Mfg. Co., 145 Mass. 169, 13 N. E. 465; Dustin v. Curtis, 74 N. H. 266, 268, 67 Atl. 220, 11 L. R. A. (N. S.) 504, 13 Ann. Cas. 169; Pittsfield Cottonwear Co. v. Shoe Co., 71 N. H. 522, 533, 534, 53 Atl. 807, 60 L. R. A. 116; Rich v. Railroad, 87 N. Y. 382; Hubbard v. Gould, 74 N. H. 25, 28, 64 Atl. 668; Edwards v. Lamb, 69 N. H. 599, 45 Atl. 480, 50 L. R. A. 160; Conway Bank v. Pease, 76 N. H. 319, 82 Atl. 1068; Attleboro Mfg. Co. v. Frankfort Insurance Co. (C. C.) 171 Fed. 495; Tom v. Nichols-Fifield Shoe Machinery Co., 215 Fed. 881, 885, 132 C. C. A. 221.

[4] It is also a well-recognized rule that, where the only relation between the parties is contractual, the liability of one to the other, in an action of tort for negligence, must arise out of some positive duty which the law imposes because of the relationship or because of the negligent manner in which some act which the contract provides for is done, and that the mere breach of an executory contract, where there is no general duty, is not the basis of such an action. Dustin v. Curtis, 74 N. H. 266, 268, 67 Atl. 220, 11 L. R. A. (N. S.) 504, 13 Ann. Cas. 169, and cases there cited. It is not claimed in this case that the defendant was under a general duty to the plaintiff to defend or settle the suit. The claim is that, having actively intervened in the defense of the suit and in the settlement thereof, it was under a duty im-

posed by law to exercise due care not to injure the plaintiff's rights in what it did; and we so hold.

[5] The further position is taken, under this assignment of error, that the action is barred by the fourteenth clause of the policy, which reads as follows:

"That no action shall be brought by the assured against the company upon this policy, in any court, after the expiration of the period, from the date of the accident, within which an action for injuries or damages may be brought against the assured, unless a suit be pending against the assured, at the expiration of that time, in which event an action for indemnity under this policy may be brought against the company within sixty (60) days after the final determination of such action, and not afterwards."

[6] If the language of this provision is given its ordinary meaning, it amounts to nothing more than that no action to recover the indemnity provided for in the policy can be brought by the assured against the company after the expiration of six years from the date of an accident covered by the policy, unless, at the expiration of that time, a suit arising out of an accident is then pending, in which case an additional period of 60 days from the termination of the suit is to be allowed. There is nothing in the language disclosing an intention to place a limitation upon the time within which an action of tort may be brought against the company for breach of a duty imposed by law and arising out of its active intervention in the defence or settlement of a suit, or that any such right of action was in contemplation. Furthermore, the stipulation is a limitation in derogation of a common-law right, and its language is not entitled to a broad construction.

[7] The contention is also made that the defendant owed the plaintiff no duty to defend the suit; that, under the policy, that duty was assumed by the defendant for its own protection and benefit, and not that of the plaintiff. It is true that in the policy the defendant stipulated it should have the right to defend, and it no doubt acquired this right for its own protection; but this does not militate against the proposition that when it entered upon the defense of the suit, the law imposed on it, for the plaintiff's benefit, the duty of so conducting the defense as not negligently to injure the plaintiff's rights.

[8] The court did not err in ruling that the plaintiff's cause of action did not accrue until it paid "the judgment recovered by Hodde, or, at any rate, until the bringing in of the jury's verdict in Hodde's favor." A right of action for negligence does not accrue until actual damage is sustained, and the plaintiff cannot be said to have suffered actual damage prior to the return of the verdict, and probably not before the judgment was entered or paid. Sullivan v. Old Colony R. R., 200 Mass. 303, 86 N. E. 511; Church of Holy Communion v. Patterson, etc., R. Co., 66 N. J. Law, 218, 49 Atl. 1030, 55 L. R. A. 81; Haven v. Pender, 11 Q. B. D. 503, 507; Dodd v. Pittsburg, etc., Ry. Co., 127 Ky. 762, 106 S. W. 787, 16 L. R. A. (N. S.) 898; Miller v. Eskridge, 23 N. C. 147.

[9-11] By entering into the agreements contained in the policy, the defendant did not become the plaintiff's agent in respect to the defense or settlement of the suit. It stood rather in the position of an independent contractor, for it was given the control of the defense and

settlement of the suit, and was in nowise subject to the plaintiff's direction. Furthermore, Mr. Spring, who was employed by the defendant in December, 1904, to prepare and present the defense in the Hodde suit, was not the plaintiff's agent or a subagent of the plaintiff appointed by the defendant for its benefit. The defendant had no authority to appoint an agent or subagent for the plaintiff. The plaintiff did not select him and had no authority or control over him. The defendant had the exclusive control of the defense, which carried with it the right to employ whomever it chose as its attorney and to direct him in the management of the case as it saw fit. Under such circumstances, Mr. Spring was the defendant's agent for whose conduct, while in its service and acting within the scope of his employment, it was responsible. The mere fact that he was also an attorney at law did not excuse the defendant from responsibility in this respect. Poucher v. Blanchard, 86 N. Y. 256, 260. Apart from its duty to exercise due care, the defendant was not required to employ an attorney at law to act for it out of court in preparing the defense, or in court to present the defense. It was no doubt a prudent thing to employ a skilled agent, as it usually is when dealing with a matter calling for special knowledge and skill.

We are, therefore, unable to sanction the ruling whereby the plaintiff's evidence was limited to alleged negligent acts occurring prior to Mr. Spring's employment.

The defendant also contends that no evidence was presented warranting the submission of the case to the jury. It seems to us, however, after a careful examination of the record, that there was sufficient evidence to warrant its submission to the jury; but, in view of the fact that there must be a new trial, because the court erred in ruling that the defendant was not responsible for negligence in the preparation and trial of the case after it was turned over to its attorney in December, 1904, and, as a result of which, much evidence was excluded which the plaintiff was entitled to have admitted, we do not deem it necessary or profitable to consider this contention further.

[**12, 13**] Certain declarations bearing upon the negligence charged in the second count of the declaration, purporting to be declarations made by the defendant's attorney while taking part in negotiations for a settlement of the suit, and explanatory of his action at that time, were offered in evidence by the plaintiff, and excluded. The reason for their exclusion is not stated. It may have been because they related to acts of negligence occurring subsequent to the employment of Mr. Spring, and come under the ruling above considered, or it may have been because it did not appear, apart from the declarations, that Mr. Spring was authorized to enter into negotiations for a settlement and, if such was the fact, the declarations would not be admissible. An agent is a competent witness upon the question of his agency or authority (Clough v. Co., 75 N. H. 84, 86, 71 Atl. 223; 2 Wig. Ev. § 1078, note 4), and the fact may be proved in any other competent manner; but it cannot be established by the supposed agent's declarations (Clough v. Co., supra; Nowell v. Chipman, 170 Mass. 340, 49 N. E. 631; 2 Wig. Ev. § 1078; 1 Greenleaf on Ev. [16th Ed.] § 184d). If, however, it appeared at the trial or, at a subsequent trial, it shall be made to appear by competent evidence that Mr. Spring was authorized to ne-

gotiate for a settlement of the case, and, while engaged in that undertaking, made certain declarations explanatory of the action then being taken, such declarations would be admissible as a part of the res gestæ. In Cooley and Wife v. Norton, 4 Cush. (Mass.) 93, 95, the court said:

"The rule of law is, that when an agent is acting within the scope of his authority, his declarations accompanying his acts are admissible. * * * They are a part of the res gestæ, and may qualify the acts."

Greenleaf, in his book on Evidence (volume 1 [16th Ed.] § 184c), in discussing this question, says:

"The principal constitutes the agent his representative, in the transaction of certain business; whatsoever, therefore, the agent does while in the lawful prosecution of that business is the act of the principal whom he represents. And 'where the acts of the agent will bind the principal there his representations, declarations, and admissions respecting the subject-matter will also bind him if made at the same time, and constituting a part of the res gestæ.' They are of the nature of original evidence, and not of hearsay; the representation or statement of the agent in such cases being the ultimate fact to be proved, and not an admission of some other fact. * * * It is because it is a verbal act, and part of the res gestæ, that it is admissible at all; and, therefore, it is not necessary to call the agent himself to prove it; but, wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it."

See, also, Union Pocket Co. v. Clough, 20 Wall. 528, 540, 22 L. Ed. 406; Vicksburg & Meriden Railroad Co. v. O'Brien, 119 U. S. 99, 103–106, 7 Sup. Ct. 118, 30 L. Ed. 299; Nebonne v. Railroad, 67 N. H. 531, 38 Atl. 17.

Entertaining these views, we think there should be a new trial.

The judgment of the District Court is reversed, the verdict is set aside, and the case is remanded to that court for further proceedings not inconsistent with this opinion; and the plaintiff recovers its costs in this court.

On Petition for Rehearing.

The petition for rehearing must be denied.

1. The defendant's duty to the plaintiff, as set out in the first and second counts of the declaration, does not depend upon whether it did or did not obligate itself in the policy to prepare and defend the Hodde suit, or to settle the same. As pointed out in our opinion handed down in this case on February 27, 1917, the plaintiff's right of action in the first count is based upon the ground that defendant entered upon the preparation and defense of the suit, and in the second count that it entered upon the task of settling it, and that in each case it was negligent in what it undertook to do. As each count sounds in tort, and is based upon a duty imposed by law, it is wholly immaterial whether the defendant was or was not under a contractual duty to prepare and defend the suit or to settle the same.

[14] 2. The clause in the policy providing that "the liability of the company in respect to any one employé suffering injury or death shall in no case exceed the sum of five thousand dollars" is not a defense to the action. The loss with reference to which the defendant agreed to indemnify the plaintiff in the policy, and with reference to

which its liability was not to exceed $5,000, was a loss sustained by the plaintiff through its negligent failure to perform a duty it owed to its employés. The plaintiff, however, in this action, is not seeking to recover from the defendant indemnity against loss which it sustained due to its own negligence, but to recover damages which it says it has sustained because of the defendant's negligence, a matter as to which the indemnity provided for in the policy and the limitation therein stipulated for have nothing to do. The limitation is upon the defendant's obligation to indemnify the plaintiff, not upon its liability for damages occasioned the plaintiff through the defendant's negligence.

Petition denied.

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## MAINE NORTHWESTERN DEVELOPMENT CO. v. NORTHWESTERN COMMERCIAL CO.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1917. Rehearing Denied March 19, 1917.)

No. 2773.

1. APPEAL AND ERROR ⟸3—FORM OF REVIEW—EQUITABLE DEFENSE IN ACTION AT LAW.

Under Judicial Code, § 274b, as added by Act March 3, 1915, c. 90, 38 Stat. 956, providing that in actions at law equitable defenses may be interposed by answer, that review of the judgment or decree in such case shall be regulated by rule of court, and that, "whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require," in the absence of a rule of court to the contrary, it is not important whether such a case is tried by legal or equitable procedure, or whether it is reviewed on writ of error or appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8–24.]

2. EVIDENCE ⟸209—ADMISSIONS—STIPULATION OF COUNSEL.

A stipulation made by his attorneys relating to amendments to pleadings, which are subsequently superseded by further amendments, is not evidence against a party as to any material fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 726–728.]

3. CORPORATIONS ⟸432(12)—LIABILITY FOR STOCK SUBSCRIPTION—REPRESENTATION BY OFFICERS.

Evidence *held* to sustain the verdict of a jury finding that a subscription by a corporation to the stock of another corporation was invalid and not enforceable, on the ground that it was made by the president without authority, and was not ratified, but repudiated, by the directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1737, 1743, 1762.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action at law by the Maine Northwestern Development Company against the Northwestern Commercial Company. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 213 Fed. 103; 228 Fed. 791.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The agreed statement of the case, made by the parties and certified as correct by the trial judge, shows, among other things, that the original complaint was filed in the court below March 29, 1912, to which an amended answer was filed March 17, 1913, and a third amended answer September 24, 1914. The next year, and on the 31st day of July thereof, the plaintiff filed an amended complaint, to which on September 20, 1915, an amended answer was filed, to which latter the plaintiff filed a reply October 25, 1915. Upon the pleadings so filed in 1915 the case was tried before the court sitting with a jury.

That amended complaint alleges, among other things, that the plaintiff (appellant here) is a corporation of the state of Maine, with a capital stock of $6,250,000—divided into two classes, to wit: One class, $2,500,000 preferred stock, divided into 500,000 shares, of the par value of $5 each; the other class, $3,750,000 common stock, divided into 750,000 shares, of the par value of $5 each—organized for this, among other purposes: "To purchase or otherwise acquire from John Rosene 171 certain mining claims and certain water rights in Alaska, and as payment therefor to issue and deliver $3,750,000 par value of fully paid and nonassessable shares in the common stock of the corporation, and to pay the sum of $245,000 in cash, on the terms of an agreement to be authorized by its board of directors."

The amended complaint further alleges that on March 20, 1906, the plaintiff purchased from Rosene the mining claims and water rights mentioned for the sum of $3,995,000, and as payment therefor, on March 30, 1906, issued and delivered to the order of Rosene $3,750,000 par value of full-paid and nonassessable shares in its common stock and thereafter paid the sum of $245,000 in cash on the terms of an agreement authorized by its board of directors, which said mining claims and water rights were in the judgment of the plaintiff's directors necessary for its business, and which said sum of $3,995,000 was in the honest and bona fide judgment of plaintiff's directors the fair and reasonable value of the mining claims and water rights; that the said purchase was authorized by a resolution duly adopted by the unanimous vote of the board of directors of the plaintiff, at a meeting thereof duly called and held on March 20, 1906, at which all of the directors were present and participated; that the said directors, together with the said Rosene, were on the day last named the owners and holders of all of the capital stock of the plaintiff corporation then issued and outstanding, and said purchase was thereafter ratified, approved, and confirmed by the unanimous vote of all of the stockholders of the plaintiff, at a meeting of such stockholders duly called and held on March 29, 1906, at Portland, Me., at which meeting all of the capital stock of the plaintiff then issued and outstanding was represented and voted; that on March 21, 1906, the said purchase was completed by the conveyance of Rosene to the plaintiff of the mining claims and water rights; that thereafter, and prior to April 4, 1906, of said fully paid common stock so issued, 499,989 shares were by Rosene deposited with A. A. Housman & Co., for delivery to the order of the several subscribers to the preferred shares of capital stock of plaintiff, at the rate of one share of common for every $5 paid on account of their subscriptions, respectively, and ever since the date last mentioned up to May 1, 1909, Housman & Co. have been ready, able, and willing, and ever since May 1, 1909, the plaintiff, as assignee of Housman & Co. of said common shares last mentioned solely for the purpose of delivery as aforesaid, has been ready, able, and willing, to deliver common shares of plaintiff's capital stock to the order of the subscribers to the preferred shares of plaintiff's capital stock, at the rate aforesaid; that plaintiff at all times since April 4, 1906, has been and is now ready, able, and willing to issue and deliver to the defendant to the action its preferred stock to the amount of its subscription thereto, upon payment of said subscription; that during all of the times mentioned the defendant was and still is a corporation of the state of Washington, and that on April 4, 1906, by its subscription agreement in form common to all subscribers, for value received, subscribed to $250,000 of the $2,500,000 preferred stock of the plaintiff corporation and thereby agreed to pay therefor as follows: Twenty per cent. of said subscription on signing, 10 per cent. thereon on July 15, 1906, and the residue thereof from time to time as called for by the directors of the plaintiff on 30 days' notice: Provided that not over 50 per cent. of said subscription should be payable during the year

1906—a copy of which said alleged subscription agreement is annexed to the amended complaint and made a part thereof.

The amended complaint further alleges that between April 4 and October 17, 1906, both inclusive, the defendant paid the plaintiff on account of its said subscription to said preferred stock $125,000, which amount was credited thereon from time to time as it was received, for which the plaintiff issued to the defendant 25,000 shares of the preferred stock, which the defendant received; that between April 4 and November 9, 1906, common shares of plaintiff's capital stock deposited with Housman & Co. were delivered to the order of the defendant as a subscriber to said preferred shares, at the rate of one share of common stock for every $5 paid by the defendant on account of its said subscription to the preferred stock; that on January 15, 1912, the plaintiff by resolution adopted at an adjourned meeting of a special meeting of its stockholders duly called and held January 10, 1912, and by resolution of its board of directors at a special meeting thereof duly called and held January 22, 1912, duly levied and called for assessments on the residue of the subscriptions to its preferred capital stock, payable on or before March 12, 1912, to the treasurer of the plaintiff, in care of either A. A. Housman & Co., at 20 Broad street, New York City, or Union Savings & Trust Company, Seattle, Wash., as follows: Assessment No. 1, of 20 per cent., on the preferred shares of said capital stock and on the subscriptions thereto; assessment No. 2, of 50 per cent., on the preferred shares of said capital stock and on the subscriptions thereto—and thereby directed that 30 days' written notice thereof be given subscribers to said preferred shares, and that so much of such subscription to the preferred shares in excess of 30 per cent. thereof agreed to be paid as therein provided, and not exceeding 50 per cent. thereof, as had theretofore been paid by subscribers thereto, be credited upon said assessment No. 1 against said preferred shares so subscribed and upon which said excess had been so paid; and that so much of each subscription to said preferred shares in excess of 50 per cent. thereof agreed to be paid as in such subscription agreement provided as had theretofore been paid to plaintiff by subscribers thereto, be credited upon said assessment No. 2 against the preferred shares so subscribed, and upon which such amount in excess of 50 per cent. had been so paid.

The amended complaint further alleges that thereafter, at a special meeting of the stockholders of the plaintiff duly called and held March 1, 1912, at its office in the city of Portland, Me., the acts of its stockholders at the special meeting thereof on January 15, 1912, and the acts of its board of directors in adopting the resolution of January 22, 1912, in levying and calling of said assessments, directing 30 days' notice thereof, fixing the time when and the place where and the person to whom the same should be payable, and directing so much of said subscriptions to said preferred stock in excess of 30 per cent. as had theretofore been paid be credited upon said assessments aforesaid, were duly ratified and confirmed; that on February 8, 1912, the plaintiff gave the defendant 30 days' written notice of said calls and assessments, of the time when, place where, and person to whom payments thereof were payable, and of the credit on assessment No. 1 on defendant's subscription of a sum equal to the sum of said assessment No. 1 of defendant's subscription theretofore paid by defendant on said subscription, and that the defendant failed and refused, and still fails and refuses to pay said assessment No. 2 on its said subscription to said preferred stock, and that on March 13, 1913, the plaintiff by resolution of its board of directors authorized its president to bring suit therefor.

The amended answer of the defendant to the amended complaint put in issue those of its allegations charging liability of the defendant, and, among several affirmative defenses, set up that Rosene was one of the promoters and the managing director of the plaintiff corporation, and had entered into certain contracts with certain other promoters of the plaintiff and with the plaintiff, whereby it was agreed, among other things, that Rosene and his associate promoters would organize the plaintiff corporation; that Rosene and certain other persons were the owners of the mining claims, which they were desirous of selling, and which claims were alleged to have been of but little value, and that it was agreed between Rosene and his associate owners of the property

and the other promoters of the plaintiff corporation that when said corporation was organized the said mining property would be conveyed to Rosene by the other parties interested therein, and that Rosene would thereupon convey the same to the plaintiff corporation, and should be paid therefor in full payment for the property the sum of $245,000; that $1,250,000 par value of the capital stock of the plaintiff, known as common stock, should be issued to Rosene, ostensibly as a part payment for the property, but in reality as a bonus and gift to Rosene and the other promoters of the plaintiff corporation; that it was further understood and agreed, and was a part of the same arrangement, that Rosene would provide the $245,000 to be paid to himself for the property, by subscribing for preferred shares of the plaintiff corporation on behalf of the defendant (of which defendant company Rosene is alleged to have been also president and managing director) to the amount of $250,000, and that the money realized on such subscription should and would be appropriated by the plaintiff company to the payment to Rosene of said $245,000, and that the subscription on behalf of the defendant referred to in the complaint was made by Rosene and accepted by the plaintiff company pursuant to that agreement and understanding by him with the plaintiff and its promoters, and in furtherance thereof and for his own personal interest and of those of said other promoters, and not otherwise; that, after the organization of the plaintiff corporation, it and its officers and directors had full knowledge of those facts, understandings, and agreements, and that the plaintiff became a party thereto; that said subscription on behalf of the defendant was accepted by the plaintiff with full knowledge of all of those facts, and that pursuant to said agreement the said common stock of plaintiff was issued by the plaintiff to Rosene and his copromoters; that the defendant did not authorize nor approve said subscription, and was ignorant of the secret understandings, agreements, and interests of Rosene until it acquired knowledge thereof during the years 1910 or 1911; that at a meeting of the board of trustees of the defendant company in April, 1906, at which Rosene was present, when said defendant was first notified that Rosene had made the alleged subscription, the board of trustees of the defendant immediately repudiated the same, and verbal notice thereof was immediately thereafter given to the plaintiff corporation through its president and treasurer; that the defendant on various other occasions thereafter, whenever the matter of the subscription sued on was mentioned or brought before it, consistently and persistently repudiated the same and disclaimed any liability thereunder; that Rosene conveyed the mining claims to the plaintiff pursuant to the agreements and understandings alleged by the defendant, and that he, without the knowledge or consent of the defendant, caused moneys of the defendant aggregating $125,000 to be turned over to the plaintiff on said alleged subscription; and that the plaintiff, pursuant to said understandings and agreements, turned over said money, or a large part thereof, to the said Rosene.

The trial resulted in a verdict and judgment for the defendant, and the case is brought here by the plaintiff by appeal.

William H. Gorham, of Seattle, Wash., for appellant.

W. H. Bogle, Carroll B. Graves, F. T. Merritt, and Lawrence Bogle, all of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] The appellee has interposed a motion to dismiss the appeal on the ground that the appellant has mistaken its remedy, and that this court is without power to review the case upon appeal. In view of the provisions of the act of Congress approved March 3, 1915 (38 Stat. 956, c. 90), adding to the Judicial Code, among others, section 274b, we do not regard it as important whether the matters set up in the affirmative defense referred to in the statement constitute an equitable defense, or were properly tried and disposed of at law. That section is as follows:

"Sec. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of [or] seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

In the absence of a rule of court regulating the method of procedure, the court is thus given "full power to render such judgment upon the record as law and justice shall require." There being no such rule to the contrary, we do not think we would be justified in dismissing the appeal. The motion is denied.

On the trial no request was made on behalf of the plaintiff for a directed verdict, but upon the conclusion of all of the evidence the case was submitted to the jury upon the merits and under full instructions from the court, to which no exception was taken on behalf of the plaintiff, although the record shows that upon the conclusion of the court's instructions the plaintiff asked that instruction numbered 16 as filed by it be given, in response to which request the record shows the following proceedings, and those only:

"The Court: The plaintiff requests me to give this instruction. This is in substance what I have stated to you, but I will read it: The plaintiff had a legal right to issue all of its common stock to John Rosene in part consideration of the conveyance by Rosene to it of certain mining properties and water rights, provided that all of its then stock subscribers concurred therein. And if you find that all of plaintiff's common stock was issued to John Rosene for such properties, with the concurrence of all its then stock subscribers, and all of the holders of its capital stock then outstanding—I will just modify that—provided they acted in good faith in the matter, and were not guilty of actual fraud in the transactions, as I have already instructed you, then such issue was legal.

"Mr. Gorham: We desire now to note an exception, if the court please, for the failure to give particularly instruction No. 16 as among the requests of the plaintiff."

The agreed and certified statement of the case not containing such requested instruction, it is manifestly impossible for us to determine or consider whether or not the request should have been granted, though it is obvious from the proceedings set out that the instruction was to some extent modified by the court, and in part at least given.

Of the 17 assignments of error, the first relates to a ruling of the court not excepted to, the third to the introduction in evidence of certain minutes of the proceedings of a corporation which are not disclosed by the agreed and certified statement of the case, and the fourth assignment relates to the alleged ruling of the court upon an objection to a question which the record fails to show was even asked, much less objected to.

Complaint is made by the second assignment of error of the refusal of the court to admit in evidence a written stipulation signed by the attorneys of the respective parties, the first, second, and fourth sub-

divisions of which only are claimed to have been pertinent to the cause. The stipulation is as follows:

"It is hereby stipulated by and between the parties hereto:

"(1) That the plaintiff's complaint in the above-entitled cause may be amended by adding to paragraph X of the original thereof on file in the above-entitled cause, as follows: 'That between the 4th day of April, 1906, and the 9th day of November, 1906, upon payment by defendant to plaintiff of said $125,000 as aforesaid, plaintiff issued to defendant and defendant accepted therefor 25,000 shares of said preferred stock.'

"(2) That defendant's second amended answer heretofore served and filed in said cause may be amended by adding to paragraph numbered I of the said second amended answer the following: 'Except that defendant admits that between April 4, 1906, and November 9, 1906, plaintiff issued to and defendant accepted 25,000 shares of the preferred capital stock of plaintiff for the $125,000 which said John Rosene had paid out of the funds of this defendant; and defendant denies that any of said preferred stock was issued to or accepted by defendant otherwise than as hereinabove expressly admitted.' * * *

"(4) That said second amended answer as thus amended shall be considered and stand as defendant's answer to said complaint as so amended.

"Dated Seattle, Wash., May 11, 1914."

The evidence shows that the 25,000 shares of the preferred stock of the plaintiff (accepted by the defendant under subscription made by virtue of a resolution of its board of directors adopted September 6, 1906, and hereinafter referred to) were theretofore issued to A. A. Housman & Co., and by them assigned to the defendant September 24, 1907. But the contention of plaintiff's counsel was and is that the fact is overcome and the defendant bound by that stipulation of its attorneys respecting amendments to then existing pleadings, subsequently superseded by pleadings upon which the case was tried.

[2] While a bill or answer in equity, or a pleading in an action at law, sworn to by a party, is competent evidence against him in another suit as a solemn admission by him of the truth of the facts stated (Pope v. Allis, 115 U. S. 363, 370, 6 Sup. Ct. 69, 29 L. Ed. 393), it is clear that such a pleading, not under oath, nor signed by the party, is not evidence of any fact material to the party's cause (Delaware Co. v. Diebold Safe Co., 133 U. S. 473, 487, 10 Sup. Ct. 399, 33 L. Ed. 674); a fortiori is a stipulation of his attorneys regarding amendments to pleadings, subsequently superseded by other and further amendments, not evidence against the party respecting any material fact. There was, therefore, no error in the ruling rejecting the stipulation offered.

The action, as has been seen, was based on a subscription alleged to have been made by the defendant on the 4th day of April, 1906, for preferred stock of the plaintiff, in the amount of $250,000. Moritz Thomsen, H. W. Treat, J. D. Trenholme, and Capt. Jarvis were directors of the defendant, as was Rosene, who was also its president, as well as then director and president of the plaintiff. Thomsen was called as a witness and questioned by the plaintiff about a meeting of the plaintiff corporation held April 10, 1906, at which he testified, among other things, that Rosene reported the subscription he had made on behalf of the defendant on the 4th of April, 1906, for the preferred stock of the plaintiff, to the amount of $250,000, and that at the meet-

ing of April 10th, so far as the witness remembered, "every member outside of Rosene took the stand that Rosene had no legal right to subscribe, and therefore they would not recognize it, and he (Rosene) asked us as a matter of courtesy to him to not put anything in the minutes; that he (Rosene) would dispose of the stock in a few days and then call us together again; that a payment of $50,000 on that subscription was reported at that time;" that he would not say that there was any action of the board with respect to that payment, except they claimed he had no right to pay it; that his idea was that Rosene claimed that he could dispose of the stock, and he (witness) presumed that he (Rosene) knew what he was doing, and that he knew what he could do, and that he would dispose of it in a few days; that as to what was done with relation to the $50,000 he was not sure but what personally he made the remark that, if that proposition was such a good one as Rosene stated, it might be well for the company, perhaps, to keep the $50,000; that he did not know if anybody concurred in his attitude; that no action was taken upon his suggestion that the company keep the $50,000, and no motion was made or vote taken affirming or disaffirming the action of Rosene, who asked that nothing be put on the minutes, and nothing was done, except the expression of the views of the directors.

Subsequently Treat was called as a witness by the defendant, and was questioned regarding the meeting in Seattle of April 10, 1906, which he said was also attended by the attorney of the defendant. His testimony in part is thus stated in the agreed and certified statement of the case:

"That at that meeting they passed a resolution that they repudiated Mr. Rosene's subscription; didn't remember who introduced that resolution; witness might have; thought perhaps he did; was not sure; thought so though. That everybody was in favor of it, and it was carried. Mr. Rosene then said that the stock had been oversubscribed in New York, and it would be much easier for him, and it would keep him in better standing with his associates, if they did not take any action which would reflect upon the subscription, and begged them not to do it, and assured them that he would let the people who had subscribed in the East take the stock in their stead, and asked them for that reason to leave it off their record, and not to make any permanent record of it, and they consented to it, thought that would be the simplest way out of it, so that it was not put on the record. That they talked it over with Mr. Hartman [the attorney] at the time and he said that would be perfectly all right."

Treat was then questioned in respect to the subscription that the defendant admits to have been made by it September 5, 1906, for preferred stock of the plaintiff to the amount of $125,000, and his attention called to the two following entries from the minutes of the defendant of that date:

"The question of Mr. Rosene's subscription to the stock of the Northwestern Development Company was fully discussed, and Mr. Thomsen introduced the following resolution: 'Resolved, that the president be authorized to subscribe to the stock of the Northwestern Development Company for this company, in the sum of $125,000.' Mr. Thomsen moved the adoption of the above resolution, and the same being seconded by A. J. Trimble, the same was put to vote and unanimously adopted."

"Whereas, it was necessary to provide funds to build or purchase additional steamers for the company's use: Resolved, that the president be instructed to sell or dispose of the stock held by this company in the Northwestern Development Company down to $50,000."

Having stated that he remembered those resolutions, the witness was asked the question which is the basis of the appellant's fifth assignment of error, and which is as follows:

"State what took place before the board at the time when those resolutions were adopted."

An objection by the defendant on the ground of its incompetency was overruled, to which the plaintiff excepted, and the witness answered:

"That they had a general discussion, and looked into the accounts of both companies, and found the Northwestern Development Company owed the Northwestern Commercial Company such an amount for freight and supplies that, if they were to settle upon a $125,000 sum, it would merely square the account and make it satisfactory to both companies and start over again, as it were; so the transfers were made. There had been some transfers made in the books without coming up before them. He didn't think there was any cash paid for any of this stock. He thought it was merely a question of bookkeeper's transfers and journal entries; that he was the treasurer at that time; that there had not been any cash payments on this Rosene subscription that he knew of. He never knew how it was paid for. All of those things came up at that time. They found that there had been entries and cross-entries, and credits and debits, and that by making it $125,000 subscription they could nearly square the accounts, and it would seem to be the proper thing to do—a compromise arrangement—and that resolution was passed; that Mr. Perl, who kept the books, had made those entries which witness spoke of on the books; that he thought Mr. Perl was dead, he didn't know, some one had said so here (at the trial) the other day. He didn't know it before."

It is manifest, we think, that, even if the ruling be conceded to have been erroneous, the answer of the witness was without prejudice to the plaintiff, for it was in substantial accord with that of some of the testimony given by witnesses for the plaintiff, and was not in contradiction, but explanatory, of the resolution.

The sixth assignment of error is to the effect that the court erred in permitting the defendant's witness Trenholme, over the objection of the plaintiff, to be asked whether the defendant's board of directors at any time ratified any subscription made on its behalf by Rosene to the capital stock of the plaintiff. It had been shown that the minute book of the defendant showed no such ratification, and there had been testimony given that at the meeting of its board of directors April 10, 1906, the latter had repudiated the subscription made on behalf of the defendant six days before, which action, at Rosene's request, had been kept from the minutes. The evident purpose of the question was to show that there had been no ratification by the board *withheld from the minutes*—the witness having previously testified that he was present at all of its meetings. We are not prepared to hold that the ruling was erroneous.

The seventh assignment of error is based on the objection made, on the ground of incompetency, to a question propounded to the secretary and one of the directors of the defendant as to whether he had notified the president of the plaintiff company of the action of the

board of directors of the defendant of April 10, 1906, repudiating the Rosene subscription. It had been shown, and was undisputed, that Henry C. Davis was then the president of the plaintiff, and a member of the firm of Housman & Co., and was a resident of New York, but was at the time in question in Seattle. The contention of the appellant is that:

"It does not appear from the record that Davis was present at any time in Seattle on the business of plaintiff, or that he transacted, as such president, any business for the plaintiff at Seattle; his home and place of business, both as to the firm of A. A. Housman & Co. and as to the plaintiff, was in New York City;" and that, while the general rule is that notice of a fact acquired by an agent while transacting the business of his principal operates constructively as notice to his principal (Thompson, Corp. § 5189), yet the "rule is subject to the exception that where the president is totally disassociated from the company's business, as where he is on a journey, notice to him is not notice to the corporation (10 Cyc. 1059)."

The record does not bear out the statement of counsel that Davis was in Seattle on a journey, disassociated from the business of the company of which he was president, but the contrary. The testimony of the witness is that:

"He met Mr. Davis at the entrance of the Butler Hotel, and they walked into the hotel and sat down there and began talking about the Development Company, and Mr. Davis asked witness about the trouble that they were making for Mr. Rosene out here, and Mr. Davis asked witness what it was all about, and witness told him. Witness told him of the action of their trustees with reference to Rosene's subscription, told him of their action, of the trustees, with reference to this subscription of that $250,000."

There was also evidence to the effect that, while the plaintiff had an office and its directors met in New York, it also had an office in Seattle, where a large part of its business was transacted, its main business being carried on in Alaska; and it further appeared that Davis had been in Seattle for some time prior to the above conversation, held with him by the defendant's secretary and director. Manifestly Davis was a proper officer to receive the notice, and we are unable to hold that his presence in Seattle was of such a casual and unofficial character as to render the notice ineffectual. It may be added that, had the objection been directed to the ground upon which the point is made, the defendant would have been afforded an opportunity, and might have been able, to meet the objection by direct proof that the president of the plaintiff was in Seattle only on the business of his company.

[3] The remaining points on behalf of the appellant really go to the question of the sufficiency of the evidence to justify the verdict of the jury and the judgment of the trial court. Being unable to hold, after a careful consideration of the evidence, that the jury was not warranted in returning the verdict it did, and the court below in giving the judgment complained of, we find it unnecessary to consider the contention of the appellee that no recovery can be had either upon a subscription contract or upon an assessment by a corporation itself for an unpaid subscription, unless all of its stock has been subscribed for.

The judgment is affirmed.

## UNITED STATES & MEXICAN TRUST CO. et al. v. BEATY et al.*

## BEATY et al. v. UNITED STATES & MEXICAN TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1917.)

Nos. 4550, 4552.

1. RECEIVERS ⟸158(2)—CLAIM—PREFERENCE—SUPPLIES FOR OPERATING.
Where receivers, appointed in a suit to foreclose a mortgage on a railway and ordered to continue the operation of the railway, used in such operation coal delivered to the railway company prior to the receivership, the seller is entitled to the payment of the contract price for such coal out of the proceeds of the sale of property and in preference to the payment of the secured bonds, there being no income or revenue derived by the receivers from the operation from which such claim could be paid, especially where the trustee representing the bondholders asked for the appointment of the receivers, because the railway company was insolvent and unable to pay for the necessary supplies to keep its road in operation, and requested the court to take possession of the railway and operate it to relieve it from being presently compelled to pay its debts for supplies before it could arrange for the payment of all its obligations.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 303.]

2. RECEIVERS ⟸160—CLAIMS—PREFERENCE—DEBTS FOR SUPPLIES.
Claims against a railroad company for coal furnished to and used by the railroad for operating its trains and shops during the period shortly before the appointment of receivers are not entitled to preference over the bonds, where there had been no revenue received by the railroad company above its operating expenses which it had diverted from the payment for supplies to the benefit of the bondholders.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 309, 310.]

3. RECEIVERS ⟸158(2)—CLAIMS—PREFERENCE—DEBTS FOR SUPPLIES—REVENUE.
The fact that the railroad company, indebted for coal furnished to it shortly before receivers were appointed, had rendered services to a subsidiary corporation for which no payment was received and which, if they had been paid for, would have given the railroad a surplus of revenue over operating expenses sufficient to pay for the coal, does not entitle the claim for coal to a preference over the bonds, though the bonds of the subsidiary corporation were pledged as security for the bonds of the parent company.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 303.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by the United States & Mexican Trust Company and others against the Kansas City, Mexico & Orient Railway Company and others, in which W. E. Beaty and another, as receivers of the Sans Bois Coal Company, intervened and claimed a preference right to the payment by the receivers of the railway company of interveners' claim for coal furnished the railway company in preference to the bonds secured by mortgage to the complainant. From decrees allowing part of the claim as a preference, and denying a preference for the balance, both parties appeal. Affirmed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied May 29, 1917.

Samuel W. Moore, of Kansas City, Mo. (Samuel Untermyer, of New York City, on the brief), for appellants in No. 4550 and for appellees in No. 4552.

A. C. Dustin, of Cleveland, Ohio (C. E. Warner, of Ft. Smith, Ark., on the brief), for appellees in No. 4550 and for appellants in No. 4552.

Before ADAMS, Circuit Judge, and REED and ELLIOTT, District Judges.

REED, District Judge. These cases arise in the foreclosure proceedings against the Kansas City, Mexico & Orient Railway Company et al., in which the case of Chicago & Alton R. R. Co. v. United States & Mexican Trust Co. (this complainant) et al., 225 Fed. 940, 141 C. C. A. 64, and the case of Martin Metal Manufacturing Co. v. United States & Mexican Trust Co. et al., 225 Fed. 961, 141 C. C. A. 85, arose. In this proceeding W. E. Beaty and W. E. Crane, as receivers of the Sans Bois Coal Company (which will be called the Coal Company), a corporation engaged in mining and selling coal in Oklahoma and elsewhere, a creditor of the defendant Kansas City, Mexico & Orient Railway Company, in due time intervened and claimed the superior right in equity to be paid the sum of $27,388.44 from the income or proceeds of the property of said Railway Company for coal furnished by the Coal Company to said Railway Company, which it is alleged was a necessary current expense of operating said road to preserve its property and business and keep it in a going condition, for the four months immediately preceding the appointment of the receivers, which was March 7, 1912, and during the receivership after their appointment. The complainant Trust Company answered the intervening petition, in which it admits the purchase by the Railway Company of coal of the value of $27,388 from the Coal Company in 1911 and 1912, and the use thereof by the Railway Company as fuel in the daily operation of its locomotives and shops between November 15, 1911, and March 7, 1912, and by the receivers of said Railway Company after their appointment, for which payment has never been made, but deny that the interveners are entitled to the payment for such coal from the income or proceeds of the property of the Railway Company prior to the complainant's mortgage liens thereon. After taking much testimony upon the claim of the interveners, and other matters pertaining to the respective earnings of the Kansas Railway Company and of the Texas Railway Company, a corporation of Texas, it was agreed between the complainant, interveners, and the Kansas Company as follows:

"In order to dispense with the taking of evidence, it is agreed between the receivers of the Sans Bois Coal Company and the defendant, the Kansas City, Mexico & Orient Railway Company, and complainant, as follows:

"(1) Said receivers have the legal title to the claim (of the Sans Bois Coal Company) set up in their intervening petition, and the right to recover whatever may be due thereon.

"(2) Between November 15, 1911, and March 7, 1912, the Sans Bois Coal Company sold and delivered to said defendant Railway Company the cars of coal shown in Exhibit A attached to the intervening petition of said receivers, of the price and value of $27,388.44, no part of which has been paid.

"(3) Said coal was sold and delivered by said Coal Company to the defendant Railway Company for use as fuel in the daily operation of its locomotives

and shops, and was necessary to the continued operation of said railway company as a going concern. All said coal was so used by said Railway Company during the time hereinbefore mentioned, except 92 cars thereof, which was on hand, unused, on March 7, 1912. Said 92 cars were taken possession of by the receivers of said defendant Railway Company, and were used by such receivers in their operation of the railroad of said Kansas City, Mexico & Orient Railway Company, subsequent to said March 7, 1912, and were of the value of $6,900.

"(4) Said coal was furnished under a contract in writing (which has been lost) providing in substance that the Coal Company, beginning with June 1, 1911, and ending with July 31, 1912, should furnish to said Railway Company such quantities of screen lump coal (describing it and naming the price per ton) all f. o. b. cars at McCurtain, Okl., as the Railway Company might order for its use. Payments for said coal to be made on the ——— day of each month for the coal furnished during the calendar month preceding. The 92 cars mentioned had been delivered to the Railway Company at McCurtain prior to said March 7, 1912, and were either en route or had actually reached the line of said Kansas Company."

On the final hearing the District Court allowed the claim of the interveners in the full amount thereof, viz., $27,388.44, and adjudged $6,900 of said amount to be prior and superior in equity to the mortgage liens upon the railroad property, and directed the receivers to pay said $6,900 from the income, if any, otherwise from the proceeds of the sale of the property, and allowed the remainder of the claim, viz., $20,488.44, with interest at 6 per cent. from May 18, 1912, as an unsecured claim against the Railway Company. The complainant appeals from the order allowing the $6,900 as prior and superior to the mortgage lien upon the railway property, which is case No. 4550; and the interveners prosecute an appeal to reverse the order decreeing the remainder of their claim to be inferior to the mortgage lien, which is case No. 4552.

The Kansas City, Mexico & Orient Railway Company, referred to in the foregoing stipulation, and in other parts of this opinion, is a railway corporation organized under the law of Kansas, and may be called the Kansas Company; another corporate defendant of the same name is organized under the law of Texas, and may be called the Texas Company. Although it appears that the Texas corporation was owned by the Kansas Company and that the two roads were operated as one system, it is claimed by the complainant that the earnings and accounts of each road and of the receivership of each were kept separately, as required by a law of Texas under which the Texas Company was organized, and that the earnings of neither road were sufficient to pay operating expenses during the receivership and for more than six months prior thereto.

[1] The appellants in No. 4550 earnestly maintain in argument that the District Court erred in allowing the interveners any part of the claim of the Coal Company as a claim against the Kansas Company prior or superior in equity to the claims of the bondholders, upon the ground that to entitle them to such preference it must appear that there was income or revenue from the operation of the railroad prior to the receivership, from which such expenses could have been paid, but was diverted to the payment of interest upon the bonds or to some other nonpreferential claim which inured to the benefit of the bondholders; that in fact there was no such income in this case. In sup-

port of such contention they rely upon Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717; Chicago & Alton R. R. Co. v. United States & Mexican Trust Co., above, and other similar cases. We are to determine whether or not the facts in the case before us fall within the rule held in those cases.

(It was said in argument by counsel for intervener that McCurtain, where the coal was to be delivered to the Kansas Company f. o. b., is not on the line of the Kansas Company, but on the line of the Ft. Smith & Western Railroad in Eastern Oklahoma, and had to be transported over that and other lines before it reached the line of the Kansas Company; but when it reached the line of that company is not definitely shown.)

In the Chicago & Alton Case, above, the claim of the interveners was for certain debts due it from the Kansas Company, a connecting carrier with the Chicago & Alton Railroad, for "traffic balances, car repairs, loss and damage claims on shipments of freight, and overcharges paid by the Chicago & Alton for the Kansas Company upon interline freight between January, 1910, and March 7, 1912, when the receivers were appointed," none of which, it was held, was within the class of debts which the receivers were authorized by the order appointing them "to pay out of any income or revenue coming to their hands." In the course of its opinion the court said:

"It is only when current income has been diverted from the payment of current expenses of the ordinary operation of the railroad for wages, supplies, and such necessities of operation, leaving a part of such current expenses unpaid, and applied to the payment of interest on bonds, or of claims for construction, or for unnecessary betterments and the like, which inure to the benefit of the bondholders, that claims for such current expenses may be paid out of the proceeds of the corpus of the property"—citing Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, and some other authorities.

That the court did not hold, or intend to hold, that claims for supplies necessary to preserve the property of the road from going to waste, or its franchises from forfeiture, and to keep it in a reasonably safe condition for operation, to preserve its business and perform its duties to the public as a common carrier, is quite evident from the further language of the opinion, which reads in this way:

"If a claim for the current expenses of the necessities of the operation of a railroad is payable in preference to the claims of secured bondholders out of the corpus of the property in any case in the absence of diversion of the income from such expenses, it is only when such preferential payment is necessary to keep the railroad a going concern, or when its preferential payment is necessary to prevent a loss at least equal to the amount of the payment."

We come, then, to consider the question directly involved in this appeal: Was the $6,900 of the interveners' claim allowed as prior in point of equity to the claim of the bondholders such a claim as might properly be allowed as an operating expense of the receivership under the facts shown by this record? It is deemed necessary to state the questions arising upon this appeal between the interveners and the Kansas Company only.

March 7, 1912, the appellant United States & Mexican Trust Company, an Alabama corporation, which will be called the complain-

ant, the International Construction Company and the Union Construction Company, Delaware corporations, and the Western Tie & Timber Company, an Arkansas corporation, filed in the court below their joint bill of complaint against the Kansas City, Mexico & Orient Railway Company, a Kansas corporation, in which it is alleged, among other things: That the complainant is the trustee in two certain mortgages or trust deeds made by the Kansas Company to said complainant February 1, 1901, upon all of its property, wherever situated, to secure the payment of a large amount of interest-bearing bonds issued and to be issued by said company; that to pay the interest already accrued on said bonds the Kansas Company borrowed money, which it has never repaid; that the Construction Companies and the Western Tie & Timber Company had severally recovered separate judgments against the Kansas Company for large amounts, which it is unable to pay; that in addition to its bonded indebtedness said company owes floating and unsecured debts of divers amounts to divers persons aggregating $1,223,000, also outstanding notes and obligations given for the purchase of equipment and rolling stock in the further sum of $1,644,000, much of which floating indebtedness is past due and the remainder fast maturing; that a large portion of said equipment obligations are past due and the balance maturing in large amounts from month to month; that the pay rolls of said company due to its employés in the various operating departments for the months of January and February are wholly unpaid; that it owes a large amount of taxes in the various jurisdictions through which its lines run, some of which taxes are past due and others maturing soon; that there are now pending in the various courts along the line of said Kansas Company in the states of Kansas and Oklahoma many suits for damages on account of the alleged negligence of its employés in the operation of its roads, which suits are being prosecuted, and many of which will in all probability soon ripen into judgments; that said defendant has no money with which to pay its said pay rolls, its floating debts, its equipment obligations, its taxes, or any of the said claims that are likely soon to ripen into judgments, is wholly insolvent, without credit, and unable to obtain the money for the purpose of discharging said obligations. (Like allegations are made as to the Texas Company.) It is further alleged that there is imminent and immediate danger that other proceedings and suits will be brought to recover judgments against said Kansas Company on account of its floating and other indebtedness, under which judgments its property will be sold and will bring nothing like its fair value.

Other allegations of similar import, not necessary to now state in detail, are made, showing the urgent necessity for the appointment of receivers to take immediate possession of the property of the Kansas Company, and operate the same under the orders of the court, and it is prayed by the complainant Trust Company that its said mortgages or trust deeds may be foreclosed and the property covered thereby sold to pay said mortgage and other indebtedness; and all the complainants join in asking the appointment of receivers of the railroad of the Kansas Company to operate the same under the orders

of the court, to the end that its property as a whole may be protected and preserved for the interest and benefit of the holders of said bonds, and the other creditors of that company, that the amount of their respective claims and demands be ascertained, the priorities of each of said creditors determined, and that the court decree and enforce the rights, liens, and priorities of all of the creditors of the said defendants as the same are finally ascertained by the court.

Upon the same day, March 7, 1912, the court appointed receivers to take possession of all the property, rights, and franchises of said Railway Company, to hold the same as officers of and under the control of the court; and said receivers were ordered and directed to take immediate possession of all of said property within the jurisdiction of the court wherever situated, to continue the operation of said road as a common carrier of passengers and property, and to discharge all duties obligatory upon said defendant, as such common carrier. By section 10 of the order of their appointment the receivers were—

"authorized to pay out of any income or revenues which may come to their hands all debts which may have been lawfully contracted by the Kansas City, Mexico & Orient Railway Company of Kansas, since the 1st day of September, 1911, for services rendered in the operation of its road; * * * also all debts lawfully contracted during the aforesaid period for materials and supplies furnished to said Railway Company and used in the maintenance and operation of its railroad, all traffic balances, if there shall be any due to connecting carriers. * * * And the court reserves to itself the power to direct the payment of such other demands against the Kansas Company, as is may deem to be of a preferential nature."

Some other allegations are deemed not material in the view we take of the case.

On February 2, 1914, a decree of foreclosure and sale was entered in favor of the complainant Trust Company and against the Kansas Company, and the Construction Companies who joined in the original proceedings either withdrew or were dismissed from the suit.

As bearing upon the facts so alleged we may cite the following cases: In Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895, which was a suit to foreclose a mortgage on a railroad, receivers were appointed and authorized to raise money upon certificates to be issued by them "to put the road and property in repair, * * * to manage and operate the road to the best advantage, so as to prevent the property from further deteriorating, and to * * * preserve the same for the benefit * * * of the first mortgage bondholders, and all others having an interest therein." The receivers obeyed the order and the court declared the amount due on the receivers' certificates to be a lien upon the property in their hands prior to that of the first mortgage bondholders. The Supreme Court sustained the decree, saying:

"The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be

seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds. * * * It is, undoubtedly, a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund. In the present case, it appears that the parties most materially interested either expressly consented to the order or offered no objection to it."

In St. Louis Trust Co. v. Riley, 70 Fed. 32, 16 C. C. A. 610, 30 L. R. A. 456, the Court of Appeals for this Circuit (Judges Caldwell, Sanborn, and Thayer), upon a full review of the authorities to that date, speaking by Judge Sanborn, said:

"From this brief review of the decisions of the Supreme Court bearing upon this question, we think these propositions may properly be deduced:

"First. There are certain claims against a mortgaged railroad company, accruing before the appointment of a receiver, which are entitled to a preference over a prior mortgage debt in payment out of the earnings of the railroad during the receivership and out of the proceeds of the sale of its property.

"Second. It is an indispensable element of every such claim that it is founded upon property furnished or services rendered to the mortgagor which either preserved or enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee.

"Third. Claims of this character have been given a preference over the mortgage debt by these decisions on one of two grounds,—either (1) on the ground that the mortgage is a lien on the net, and not on the gross, income of the railway company, and where that part of the income that is applicable to the payment of current expenses of operation, proper equipment, and necessary improvements has been diverted to pay interest on the mortgage debt or to otherwise benefit the security, and this diversion has left claims for these expenses unpaid, it is the province and duty of the chancellor to restore the diverted fund by taking an equal amount from the earnings of the railway company during the receivership, and applying it to the payment of these claims in preference to the mortgage debt: * * * or (2) *on the ground that the payment of the claims is necessary to preserve the mortgaged railroad, and to keep it a going concern.* It is indispensable that the operation of a railroad be uninterrupted in order that the travel and traffic of the public may be accommodated, and in order that the franchises of the railroad company may be preserved from forfeiture. Hence the wages of employés, who might otherwise cease from their work, the amounts due to connecting lines of railroad that might otherwise cease their business relations with the managers of the mortgaged property, *and the claims for supplies and materials necessary to keep the mortgaged railroad a going concern,* may, in proper cases, be paid out of the earnings during the receivership, or out of the proceeds of the sale of the mortgaged property, in preference to the mortgage debt." (Italics ours.)

In Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481, the Court of Appeals for this circuit again, upon a full consideration of all the cases up to that time bearing upon the question of preferential claims and when the owners thereof were entitled to payment of them from the corpus of railroad property in preference to mortgage liens thereon, said:

"A court of equity engaged in administering mortgaged railroad property under a receivership in a foreclosure suit may prefer unpaid claims for current expenses of the ordinary operation of the railroad, incurred within a limited time before the receivership, to a prior mortgage lien, in the distribution of the income or of the proceeds of the mortgaged property. * * * The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the operation of the mortgaged property,

which inured to its benefit, and which was incurred in the ordinary course of its business, within a limited time anterior to the appointment of the receiver, the claim may be preferred."

See, also, Love v. North American Co., 229 Fed. 103, 143 C. C. A. 379, and the cases there cited.

There has been no departure, so far as we can discover, from the principles so announced by the Supreme Court and the Court of Appeals for this Circuit, especially where the claim is for wages, or supplies necessary to keep a road in the hands of receivers in operation as a going concern, and the earnings of the receivership are insufficient to pay such claims. Certainly Gregg v. Metropolitan Trust Co. does not go to that extent. We do not overlook the recent decision of the Court of Appeals in United States Fidelity & Guaranty Co. v. This Complainant, 234 Fed. 238, 148 C. C. A. 140, L. R. A. 1916F, 1067, and need only say that in our opinion the facts in that case render its decision inapplicable to the facts in this case.

From the date of the appointment of the receivers in this suit to the sale of the railway property under the decree of foreclosure in July, 1914, the court was in possession of that property, operating the same through its receivers, as requested by the complainant, representing the bondholders in asking for their appointment. That the claim of the interveners to the extent of the 92 cars of coal used by the receivers was a necessary expense of keeping the road in operation cannot be doubted, in fact is admitted by all parties to this appeal, and unless said coal, or other coal of like kind and quantity, was used by the receivers, the operation of the road would necessarily have been suspended. There is a faint suggestion by counsel for the appellants that the use of this identical coal by the receivers was unnecessary, because they might have procured coal from other sources to keep the road in operation, and for this reason the claim, therefore, should not have been given priority over the bondholders. It is quite true that the receivers might have procured other coal in lieu of this; but, had they done so, they would have been compelled to pay for the coal so procured, and the result would have been the same to the bondholders. Besides, the complainant Trust Company, as the representative of the bondholders, had asked for the appointment of the receivers on or prior to March 7, 1912, because the Railway Company was then insolvent, unable to pay for the necessary fuel and other supplies that it had previously used to keep the road in operation, and requested the court to take possession of and operate the same, to relieve the Kansas Company from being presently compelled to pay its floating debts, which included the coal and other necessary supplies already used, until some arrangements or reorganization could be made that would enable it to pay such debts. The contract by which the fuel was to be furnished by the Coal Company required that it be paid for on a date named in the month following the calendar month in which it was delivered to the Kansas Company. Under such circumstances the court would not have dealt equitably with the Coal Company had it refused to direct its receivers to pay for the 92 cars of coal used by them as a claim prior to the lien of the bondholders, and in our opinion it rightly directed

the receivers to pay for such coal as a claim prior to the bondholders', and its decree so directing is affirmed, and interest on said $6,900 from the date of the decree of the District Court, June 3, 1914, is also allowed as a part of such claim, and as prior and superior to the mortgage lien.

[2] In No. 4552, the interveners challenge the correctness of the decree below denying their claim of priority in payment over the bondholders for $20,488, the remainder of their claim for the coal used by the Railway Company prior to the appointment of the receivers. Under the order of the court appointing the receivers they were authorized to pay the entire claim of the Coal Company, and had they done so the payment could not have been successfully challenged. Upon the final hearing, however, the court declined to give priority over the claim of the bondholders to the extent of $20,488, saying:

"In many matters heretofore submitted and decreed on the same proofs as now before the court in this case, it has been held there was in this case no diversion of income derived from the operation out of which the claim of the intervener could or should have been paid prior to the receivership, and this for the all-sufficient reason that there was no such income from operation derived by the road to divert; on the contrary, the property, as operated by the railway company prior to receivership, was a losing venture. Since receivership intervened, when the receivers at any time have secured from operation more than the actual cost thereof, they have been compelled to expend the same at once in the protection of the property from an entire loss through fixed liens resting on the personal property of the road at the date of their appointment, taxes, charges, assessments, and burdens laid on them by the states through which the road runs, or in protecting the road from the ravages of floods and other disasters. Hence there is in this case no room for the application of the rule of diversion of income, and under the doctrine of the case of Gregg v. Metropolitan Trust Co., 197 U. S. 183 [25 Sup. Ct. 415, 49 L. Ed. 717], and kindred cases, the power or right of a court of equity to decree payment out of the corpus of the property of the demand of intervener, in its entirety, in preference to the fixed lien of the mortgage securing the bonds resting thereon, must be denied."

[3] Counsel for the interveners concede that the case of Chicago & Alton R. R. Co. v. This Complainant controls the decision of this question, unless it can be distinguished from the Chicago & Alton Case, and they maintain that it can be so distinguished. The grounds, however, upon which they so contend, are that in this case the Kansas Company carried a large amount of freight for the Texas Company, or for construction companies building the Texas road, for which it has never been paid, and if paid to the Kansas Company that company would have received a large income, which was diverted to the payment of interest upon its bonded indebtedness, or for permanent improvements or betterment of its road, which should be restored from the corpus of the railway property, to the end that claims for supplies such as the intervener's may be paid therefrom. A great wilderness of figures has been introduced into the record before us from the monthly accounts between the Texas Company and the Kansas Company and their receivers, which it is claimed show that the Texas Company is indebted to the Kansas Company in a large amount. Admitting, without deciding, this to be true, there is no proof that the Kansas Company has in fact ever received any of this indebtedness; and unless the Kansas

Company has so received payment of such indebtedness, we are unable to perceive how it can be chargeable with income *received by it in the operation of its road;* and if not in fact so received, how it could have been diverted from the payment of current expenses to the payment of interest upon its bonded indebtedness or the permanent betterment of its road. From the brief of intervener's counsel we quote its contention upon this question:

"The Texas Railroad issued its mortgage covering the line of railroad thereafter to be constructed for it in the state of Texas, securing an issue of 6,510 bonds, all of which bonds, as well as all the stock of the Texas Railroad, were acquired by the Kansas Company pledged to said trust company as security for the bonds issued by the said Kansas Company under its mortgage aforesaid. The bondholders, therefore, of the Kansas Company, had as security for the payment of their bonds the physical property of the Kansas Company, and all the bonds and stock of the Texas Company. It is quite apparent from the record that Mr. Stillwell, as the president of the two railroads, the construction companies, and the trustee, dominated the affairs of all these companies, and that he used and appropriated the funds of any one of the companies that happened to be in funds for the benefit of any other company which happened to be in need of money. At the time of the appointment of receivers the construction companies were largely indebted to the Texas Company, and the Texas Company was indebted to the Kansas Company to the extent of $242,100. Mr. Doran, auditor of the Kansas Company (and perhaps likewise auditor of the other companies), prepared and submitted a statement, from which it was made to appear that the Kansas Company showed an actual deficit in operations in the year March 1, 1911, to March 7, 1912, of $226,221.99. It appeared, however, from his testimony on cross-examination, that this statement did not show income at all, but 'receipts and disbursements,' and that the item of $226,000 was simply the excess in cash disbursed over cash collected, and that there was uncollected from the Texas Company $242,100. He further admitted that, if the Kansas Company had collected the money due it from the Texas Company, there would have been a deficit during the period mentioned (March 1, 1911, to March 7, 1912) of only $1,349.15, while the net income for the six months period before the receivership (September 1, 1911, to March 7, 1912) showed a surplus of $37,224.72. In other words, the Kansas Company earned sufficient and would have been able to pay all its current operating accounts (including its fuel bills due this intervener), had it received payment from the Texas Company."

All of which shows, admitting this statement to be true, that the Kansas Company did not receive any of this income, even though it may have been entitled to receive it, from the Texas Company; and unless actually so received by the Kansas Company and diverted by it, such earnings cannot rightly be restored from the proceeds of the property of the Kansas Company by the receivers for the payment of the fuel, which the court declined to allow as a preference over the bondholders. Whether or not the amount said to be owing by the Texas Company to the Kansas Company can be collected by the latter company from the Texas Company is not shown by the record before us; but the court, in declining to allow this part of the intervener's claim prior to the lien of the bondholders, did so without prejudice to the right of the interveners to recover, if they can do so, from the Texas Company its claim, or any part thereof. We are of the opinion that the decree of the court denying the $20,488 as a claim prior to the lien of the bondholders should also be affirmed.

It follows that the decrees of the court below should be and are both affirmed.

The late Judge ADAMS heard the argument of these cases, participated in their decision, and concurred in the result as announced in the foregoing opinions.

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McCARTHY v. NEW YORK, N. H. & H. R. CO.

(Circuit Court of Appeals, Second Circuit. February 6, 1917.)

No. 124.

1. RAILROADS ⟸357—INJURIES TO PERSONS ON TRACK—"NEGLIGENCE."
In an action for the death of a person killed on a railroad track, plaintiff, if he is to recover, must show that the railroad failed in the performance of some duty which it owed to decedent, from which there is a reasonable probability the accident resulted, since "negligence" is the violation or disregard of some duty.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1235.

For other definitions, see Words and Phrases, First and Second Series, Negligence.]

2. RAILROADS ⟸103(1)—DUTY TO FENCE—ABSENCE OF STATUTE.
In the absence of statutory regulations, railroads are under no duty to fence their tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 315.]

3. RAILROADS ⟸361—DUTY TO FENCE—STATUTE—DUTY TO PERSONS.
Laws N. Y. 1892, c. 676, § 32, providing that no railroad need be fenced when not necessary to prevent horses, cattle, sheep, and hogs from going on its track from the adjoining lands, does not apply to persons.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1246.]

4. LANDLORD AND TENANT ⟸162—DUTY OF LANDLORD—FENCING RAILROAD TRACKS.
A railroad company, which leased premises adjacent to its tracks for a family dwelling, does not, as a landlord, owe the tenant a duty to erect a fence between such premises and the railroad tracks.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 629.]

5. RAILROADS ⟸389(1)—INJURIES TO PERSONS ON TRACK—PROXIMATE CAUSE—FAILURE TO FENCE.
The failure of a railroad company to fence its tracks cannot be held the proximate cause of the death of a boy killed on the tracks where there is no evidence that he found his way thereon at a place unfenced.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1319.]

6. RAILROADS ⟸355(1)—INJURIES TO PERSONS ON TRACK—"TRESPASSER"—CHILD.
Any person who goes on the premises of another out of curiosity, or for his own purposes, and without invitation, express or implied, and not in the performance of a duty to the owner, is a trespasser, and a child between six and seven years old, who goes upon a railroad track, is a "trespasser," notwithstanding his tender age.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1220, 1223, 1227, 1235.

For other definitions, see Words and Phrases, First and Second Series, Trespasser.]

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7. RAILROADS ⟸359(1), 376(2)—INJURIES TO TRESPASSER—EXTENT OF DUTY.
A railroad company owes no duty to exercise active vigilance to provide against injuries to trespassers on its tracks until their presence is known, but must exercise reasonable care to avoid injuring them after discovering their peril.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1238, 1276.]

8. RAILROADS ⟸359(2)—INJURIES TO TRESPASSER—TRESPASSING CHILD.
A railroad company ordinarily owes no greater duty to a trespassing child than it owes to an adult trespasser, and is not bound to use active vigilance, or to provide against injuring the child.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1239.]

9. RAILROADS ⟸376(2)—INJURIES TO TRESPASSER—DUTY AFTER DISCOVERING PERIL.
When those in charge of an engine or train realize that a trespasser will not or cannot save himself, and will be injured unless they prevent it, it is their duty to use all means at hand consistent with the safety of their engine or train to prevent injury, and their failure to do so is negligence, for which the company is liable.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1276.]

10. RAILROADS ⟸359(2)—INJURIES TO TRESPASSER—NEGLIGENCE—OPPORTUNITY TO DISCOVER TRESPASSER.
In an action for the death of a child, who was trespassing on a railroad track, the fact that the engineer had an unobstructed view for a great distance is immaterial, if in fact he did not discover the child's presence.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1239.]

11. TRIAL ⟸168—TAKING CASE FROM JURY—POWER OF COURT—MOTION FOR DIRECTED VERDICT.
In a proper case, the trial judge, in the exercise of a sound discretion, may direct a verdict, and if in such case a motion is made for directed verdict, it is error to refuse it.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376–380.]

12. TRIAL ⟸139(1)—DIRECTED VERDICT—INFERENCES FROM EVIDENCE.
A verdict can be directed for defendants only when no recovery can be had by plaintiff upon any view which can properly be taken of the facts, with all inferences that the jury could justifiably draw therefrom.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341.]

13. RAILROADS ⟸400(1)—INJURY TO TRESPASSERS—DIRECTED VERDICT—CONFLICTING EVIDENCE.
In an action for death of a child while trespassing on a railroad track, conflicting evidence as to the child's position on the track, and whether warnings were sounded, does not prevent the direction of a verdict for defendant, where there is no evidence that the engineer discovered the child's presence, or that the circumstances were such that he should have anticipated the presence of a person at that place.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365, 1367.]

14. RAILROADS ⟸367—INJURY TO TRESPASSERS—DUTY TO KEEP LOOKOUT.
Where there is reason to expect that persons may be on the track at the place where an accident occurs, the railroad company is liable for the engineer's neglect to look out for them, even if he did not see them; but, if no reason exists for expecting them there, the engineer is not negligent in not looking out for them.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1257, 1258.]

In Error to the District Court of the United States for the Southern District of New York.

Action by William J. McCarthy, as administrator of William F. Mc-

Carthy, deceased, against the New York, New Haven & Hartford Railroad Company. Judgment for the defendant on directed verdict, and plaintiff brings error. Affirmed.

The plaintiff is the duly appointed administrator of William F. McCarthy, deceased, and resides in the village of Port Chester, county of Westchester, state of New York. The defendant is a corporation organized and existing under the laws of the state of Connecticut, having an office for the transaction of business in the borough of Manhattan in the city of New York.

Charles F. Dalton, of Port Chester, N. Y. (Anthony J. Ernest, of New York City, of counsel), for plaintiff in error.

Charles M. Sheafe, Jr., of New York City (James W. Carpenter, of Brooklyn, N. Y., of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. This is an action to recover damages for causing the death of the plaintiff's son through negligence. The court below dismissed the complaint on the ground that there was no evidence showing negligence on the part of defendant. The accident which resulted in decedent's death occurred on April 24, 1902. The action was commenced in December, 1902. It was not brought on for trial until May 8, 1912, and judgment was not entered until January 11, 1916. It is understood that the long delay in the prosecution of the suit was occasioned by the plaintiff's lack of means.

The intestate resided with his father, the plaintiff, and at the time of his death was between six and seven years of age. The house they occupied was rented from defendant, the premises abutting on defendant's right of way. The decedent was on the tracks of defendant when he met his death. The objection was not taken that there could be no recovery as matter of law because of the negligence of the child's parents in letting the decedent, non sui juris, run around alone. This objection, not having been raised, will not be considered.

[1] As negligence is the violation or disregard of some duty, it is necessary that the plaintiff, if he is to recover, must show that the defendant failed in the performance of some duty which it was under as respects the decedent, and he must establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the failure to perform that duty.

[2] Defendant's tracks were not fenced where this accident occurred. But the general rule is well established, and is that, in the absence of statutory regulations imposing the duty, railroads are under no duty to fence their roads. See 11 R. C. L. p. 890; Cyc. 1170; Campbell v. N. Y., etc., R. Co., 50 Conn. 128; Morss v. Boston, etc., R. Co., 2 Cush. (Mass.) 536; Continental Imp. Co. v. Phelps, 47 Mich. 299, 11 N. W. 167.

[3] Chapter 676, § 32, of the Laws of 1892 of the state of New York, which was in force at the time of the accident, provided in part as follows:

"No railroad need be fenced, when not necessary to prevent horses, cattle, sheep and hogs from going upon its track from adjoining lands."

By implication the wording of this statute does not apply to persons, and it has been so held. See Clarke v. New York Central, 104 App. Div. 167, 170, 93 N. Y. Supp. 525.

[4] In the case at bar the railroad was the plaintiff's landlord, and leased the premises to him, to be occupied by him and his family, knowing that there was no fence at the rear, and that the tracks were within 25 or 30 feet of the back stoop; but the defendant, as landlord, owed no legal duty to its tenant, the father of the decedent and the plaintiff in this action, or to the decedent himself as a member of plaintiff's family, to erect a fence. As a landlord it fulfilled its obligations to the tenant when it surrendered to him the premises in the condition in which they were when the lease was signed.

The appellant calls our attention to the case of Hayes v. Michigan Central R. R. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410 (1884). In that case a boy between eight and nine years of age, but deaf and dumb, was struck by defendant's train, one or more wheels of a car passing over his left arm, necessitating its amputation at the shoulder. The line of railroad ran parallel with and adjacent to a public park in which the boy had been at play. The railroad company had failed to build a fence between the park and the tracks at the point where the accident occurred. The court below directed the jury to return a verdict for defendant. But the Supreme Court reversed the judgment and awarded a new trial, and held that, as the defendant railroad had failed to fence, the plaintiff could maintain an action and recover if he established the fact that the accident was reasonably connected with the failure to fence. In its opinion the court said:

"To leave the space between the park and the breakwater, traversed by the numerous tracks of the railroad company, open and free, under the circumstances in proof, was a constant invitation to crowds of men, women, and children frequenting the park to push across the tracks at all points to the breakwater, for recreation and amusement, at the risk of being run down by constantly passing trains. A fence upon the line between them might have served at least as notice and signal of danger, if not as an obstacle and prevention. For young children, for whose health and recreation the park is presumably in part intended, and as irresponsible in many cases as the dumb cattle, for whom a fence is admitted to be some protection, such an impediment to straying might prove of value and importance."

In that case the railroad company, however, had the duty imposed upon it by a municipal ordinance, which had the force of a statute, to fence within the municipal limits; and the language of the ordinance clearly indicated that the purpose of the requirement of fencing was for the protection of persons and property as well as of animals from danger. The opinion makes it plain that the decision rested on the ordinance.

[5, 6] There is nothing in this record which shows that the decedent found his way to the defendant's tracks by the way of the unfenced rear yard. There is no relation of cause and effect shown between the nonexistence of the fence and the presence of the child on the track. The decedent was a trespasser upon defendant's tracks.

Any person who goes upon the premises of another is a trespasser, if he goes there out of curiosity or for his own purposes and without invitation, express or implied, and not in the performance of a duty to the defendant. A child of tender years may be a trespasser. Holbrook v. Aldrich, 168 Mass. 15, 46 N. E. 115, 36 L. R. A. 493, 60 Am. St. Rep. 364; Thomas v. Chicago, etc., R. Co., 93 Iowa, 248, 61 N. W. 967. Although in Kansas City Suburban Belt R. Co. v. Herman (Kan. App.) 62 Pac. 543, it was held that a child four years old could not be a trespasser. And the same court in Missouri Pacific R. Co. v. Prewitt, 7 Kan. App. 556, 51 Pac. 923, held that a child two years old could not be a trespasser. The general rule, however, is that the tender age of the child cannot have the effect of raising a duty where none otherwise existed, and the fact that a trespasser is a child does not impose on the owner of property any duty to keep his premises safe. Nolan v. New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106; Rodgers v. Lees, 140 Pa. 475, 21 Atl. 399, 12 L. R. A. 216, 23 Am. St. Rep. 250; Hughes v. Boston, etc., R. Co., 71 N. H. 279, 51 Atl. 1070, 93 Am. St. Rep. 518; Wabash R. Co. v. Jones, 163 Ill. 167, 45 N. E. 50.

[7, 8] The general rule is that a railroad company is under no duty or obligation to exercise active vigilance to provide against injury to trespassers on its tracks or right of way until their presence is known. Nolan v. New York, supra; McCreary v. Boston, etc., R. Co., 156 Mass. 316, 31 N. E. 126; Chesapeake, etc., R. Co. v. Farrow, 106 Va. 137, 55 S. E. 569, 10 Ann. Cas. 12; Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. (N. S.) 283, 4 Ann. Cas. 675; Goodman v. Louisville, etc., R. Co., 116 Ky. 900, 77 S. W. 174, 63 L. R. A. 657; Ellington v. Great Northern R. Co., 96 Minn. 176, 104 N. W. 827. As to them the rule is that it must exercise reasonable care to avoid injuring them after discovering their peril. Remer v. Long Island R. Co., 48 Hun, 352, 1 N. Y. Supp. 124; Hepfel v. St. Paul, etc., R. Co., 49 Minn. 263, 51 N. W. 1049; Chesapeake, etc., R. Co. v. Nipp, 125 Ky. 49, 100 S. W. 246; Bartlett v. Wabash R. Co., 220 Ill. 163, 77 N. E. 96; Brown v. Boston, etc., R. Co., 73 N. H. 568, 64 Atl. 194; Harris v. Atlantic Coast Line R. Co., 132 N. C. 160, 43 S. E. 589; Chicago, etc., R. Co. v. Wilgus, 40 Neb. 660, 58 N. W. 1125. And as a rule the railroad owes no greater duty to a child who is a trespasser than it owes to an adult. Alabama Great Southern R. Co. v. Moorer, 116 Ala. 642, 22 South. 900. It is not bound to use active vigilance to discover its presence, or to provide against injuring it. Hamilton v. Detroit, etc., R. Co., 142 Mich. 56, 105 N. W. 82; Delaware, etc., R. Co. v. Reich, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727; Estep v. Webster Coal, etc., Co., 213 Pa. 471, 62 Atl. 1082; Wagner v. Chicago, etc., R. Co., 124 Iowa, 462, 100 N. W. 332. And, as in the case of other trespassers, it is bound only to exercise ordinary care to avoid injuring the child after discovering its peril. Felton v. Aubrey, 74 Fed. 350, 20 C. C. A. 436; Nashville, etc., R. Co. v. Harris, 142 Ala. 249, 37 South. 794, 110 Am. St. Rep. 29; Union Stockyard, etc.,

R. Co. v. Butler, 92 Ill. App. 166; Baltimore, etc., R. Co. v. Bradford, 20 Ind. App. 348, 49 N. E. 388, 67 Am. St. Rep. 252.

[9] In Shearman & Redfield on Negligence (6th Ed.) pp. 1244, 1248, what we consider the correct rule is laid down as follows:

"The rule may be thus stated, when it is realized by those in charge of an engine or train that one, though a trespasser, will not or cannot save himself, and will be injured unless they can prevent it, then it is their duty, by the use of all the means at hand, consistent with the safety of the passengers, engine, or train, to do all in their power to prevent it; and the failure to do so, when the injury could thereby have been avoided, is negligence for which the company and such employés will be liable, notwithstanding the antecedent negligence or contributory negligence of one so injured. It is universally agreed that this rule applies to all cases in which the defendant or his agent is actually aware of the plaintiff's danger. Thus a locomotive engineer or motorman, after becoming aware of the presence of any person on or dangerously near the track, however imprudently or wrongfully, is bound to use as much care to avoid injury to him as he ought to use in favor of one lawfully and properly upon the track; that is to say, ordinary care with respect to anticipating injury before it becomes imminent, and the utmost care and diligence of which he is personally capable after he knows that it is imminent. He must promptly use all the usual signals to warn the trespasser of danger, and he must also check the speed of his train, and even bring it to a full stop, if necessary, unless the circumstances are such as to justify him, acting prudently, in believing that the traveler sees or hears the train and will step off the track in ample time to avoid all danger, without any diminution of speed of the train. These rules apply to all cases, even of the most outrageous negligence on the part of a person on the track, as, for example, where a person attempts to cross in the very front of a train, or where children or drunkards have actually fallen asleep lying across the rails."

[10] The engineer testified that he did not see the decedent until within 30 feet of him. There is no evidence which contradicts him in this particular, and no evidence that the engineer was keeping a lookout prior to his discovery of the decedent, so that it might be inferred he saw him sooner, and no evidence as to how long the decedent had been on the tracks before he was seen. The duty of the defendants as respects the decedent began when the engineer discovered him 30 feet ahead of the engine. Did the defendant from that time fail in its duty toward him? That the engineer could not have stopped the train after discovering the decedent is clear, if he did not see him until he got within 30 feet of him. He put the emergency brake on and tried to stop as quick as he could. His testimony was, and it is uncontradicted, that a train running 40 miles an hour could be stopped in 300 feet, more or less.

That there was an unobstructed view of the track for half a mile or more is unimportant, unless it was the duty of the defendant to have availed itself of this unobstructed view and to have observed whether its track was clear. Such a duty might have rested on defendant if its train had been approaching a crossing or a point where the public had been permitted to use the tracks as a pathway, so that it was bound to anticipate the presence of persons on the roadbed. That, however, is not this case. The defendant did not invite, entice, allure, or induce the decedent or any other person to come upon the tracks where this accident happened, and was under no obligation to anticipate the decedent's presence or the presence of any other persons

there. The rule was correctly laid down in Felton v. Aubrey, 74 Fed. 350, 356, 20 C. C. A. 436, 441 (1896), in a case which came before the Sixth circuit in which Judge Lurton said:

"Where no statute controls, the common law must determine the legal duty of a railway company in respect of the proper and prudent movement of its trains. That such companies have the right to a clear track, except where the public have also an easement of way, must be conceded. But upon its general track, where the public have no equal easement or right of way, a railroad company may operate its trains without regard to the possibility that unauthorized persons may be trespassers thereon. It need not anticipate the presence of such intruders, either upon its general track or in its strictly private yards."

[11] At the close of the plaintiff's case the counsel for defendant moved to dismiss the complaint, on the ground that no negligence had been proven on the part of the defendant. The court granted the motion, and the plaintiff was given an exception. It cannot be denied that a trial judge, in the exercise of a sound discretion, may, in a proper case, direct a verdict; and if the defendant asks the court in such a case to direct a verdict in its favor, it would be error to refuse. Railroad Company v. Jones, 95 U. S. 439, 24 L. Ed. 506 (1877).

[12] But a verdict can only be directed when no recovery can be had by the party against whom the verdict is given upon any view which can properly be taken of the facts. See Foster's Fed. Pr. vol. 2, p. 1556. In Louisville, etc., R. Co. v. Woodson, 134 U. S. 614, 10 Sup. Ct. 628, 33 L. Ed. 1032 (1890) the Supreme Court stated the rule as follows:

"It is the settled law of this court that 'when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant' (Randall v. Baltimore & Ohio Railroad, 109 U. S. 478, 482 [3 Sup. Ct. 322, 27 L. Ed. 1003]; Gunther v. Liverpool, etc., Ins. Co., 134 U. S. 110 [10 Sup. Ct. 448, 33 L. Ed. 857]); while, on the other hand, the case should be left to the jury, unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish (Dunlap v. Northeastern Railroad Co., 130 U. S. 649 [9 Sup. Ct. 647, 32 L. Ed. 1058])."

[13] The evidence is not full. That the examination of certain witnesses was not more searching surprises us. It does not appear how long the engineer had been observing the track when he claims he first saw the decedent. If that appeared, the jury could have judged of the probability of his story that he never saw the decedent until he was within 30 feet of him. And the witness who said he saw the decedent on the track before the train hit him was not asked how far away from the train the decedent was when he first saw him there. All this might have been very important, if it had been brought out. But, taking the testimony as we find it in the record, there appears a conflict in the evidence. A witness who had his shop 185 feet from the railroad track, and could see the tracks from his shop, testified that on the afternoon of the accident he saw the decedent sitting on the track with his back to the train, and that just as he "was going to holler to him to get away from the track the train ran and struck him." He testified he heard no whistle blown or bell rung before the boy was struck.

The mother of the decedent, who was in her house near by when the decedent was killed, testified that the door was wide open at the time, and that the windows were open, and that no whistle was blown. Her testimony was: "There was no whistle blown."

The engineer testified positively that he sounded his whistle as soon as he saw the boy on the track, or alongside of the track, and that he at once put on the emergency brake. On the other hand, the engineer testified that the boy was not sitting on the track, but was running on the track right towards him when he discovered him; "the little fellow was just going over on the inside rail of my track." And he also testified that he immediately blew his whistle and put on the emergency brake.

The conflict of evidence under the circumstances is not important, for the reason that there is no evidence in the record which shows that the engineer saw the decedent before he was within 30 feet of him, and there is no evidence in the record which made it the duty of those in charge of the engine to have been looking ahead as they were approaching the locus in quo to see that the track was free from trespassers, and so sooner to have discovered the decedent. In New York, N. H. & H. R. Co. v. Kmetz, 193 Fed. 603, 607, 113 C. C. A. 471, 475 (1912), we there said:

"The engineer and fireman of the train which, according to the testimony, probably struck the plaintiff, both testified that they did not see him upon the track and did not know of the accident until some time afterwards. They are therefore left in this dilemma. If what they say is true, the jury may have found that they were guilty of negligence in not seeing the plaintiff. It is the duty of the engineer, or the fireman, * * * to look ahead, especially when passing through towns and villages, and where, as in this case, little children are constantly passing to and from school. At such a place it was clearly the duty of the engine driver to be on the alert. If, on the other hand, the engineer and fireman did see the plaintiff on the track, they should at least have endeavored to save him by blowing the whistle vigorously and ringing the bell. They did neither, and no warning of any kind was given to the plaintiff."

The facts in that case, however, show that the locus in quo was at a crossing, not a regular street crossing, but a place where residents of the neighborhood were in the habit of crossing to get to their mail, and where school children crossed four times a day, and which was used by the employés of the company. The use thus made of the tracks was open and notorious, and well known to the railroad officials. The facts in this case are entirely different, and no open and notorious use of the tracks had by long acquiescence or otherwise been permitted at the place of the accident, which made it the duty of those in charge of the engine to exercise great care in watching the tracks.

[14] In a number of cases courts have held that, when the evidence shows that there is reason to expect that persons may be upon the track at the place where an accident occurs, the company is liable for the neglect of the engineer to look out for them even if he did not see them. Chicago, etc., R. v. Cauffman, 38 Ill. 424; Chicago, etc., R. Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120; Cincinnati, etc., R. Co. v. Smith, 22 Ohio St. 227, 10 Am. Rep. 729. But if no reason exists for expecting that persons may be on the tracks, and the engineer did not

see the person who was injured, then the company is not liable for his negligence in not looking out for him. Illinois Central R. Co. v. Noble, 142 Ill. 578, 32 N. E. 684.

The company may be liable to a trespasser for its failure to exercise reasonable care to discover and avoid injuring him when it has reason to anticipate his presence. But there is no evidence in this case which indicates that this defendant had any reason to expect any person would be upon the tracks where this accident happened.

We must assume, therefore, if the decedent was not discovered until the engine was within 30 feet of the decedent, the engine could not have been stopped in time to avoid striking the decedent, and if, in the brief moment it took a train running 40 miles an hour to cover 30 feet the engineer, in pulling on the emergency brake and trying to stop his train, actually failed to blow his whistle, his omission in that respect under the circumstances would not constitute such negligence as would justify a verdict against the defendant. There is no evidence in the case of any wanton negligence.

Judgment affirmed.

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## UNITED STATES v. JOYCE et al.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1917.)

No. 4717.

1. INDIANS ⟸14—PATENT TO LANDS—EFFECT—OMISSION OF RESTRICTION.
Under Act July 4, 1884, c. 180, 23 Stat. 96 (Comp. St. Ann. 1916, § 4612), providing that patent issued thereunder for homesteads to Indians shall be of the legal effect and declare that the government shall hold the property in trust, the absence of the declaration in the patent does not defeat the trust.
[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 2, 31–36, 46.]

2. INDIANS ⟸27(4)—PATENT TO LANDS—LIMITATION OF ACTIONS—SUIT TO ENFORCE RESTRICTION.
Act March 3, 1891, c. 561, § 8, 26 Stat. 1099, as amended by Act March 3, 1891, c. 559, 26 Stat. 1093 (Comp. St. 1913, § 4992), requiring suits to vacate and annul patents to be brought within six years after the issuance of the patent, does not apply to a suit by the United States for a decree declaring that defendants, who purchased land patented to an Indian as a homestead, had no estate or interest therein, and that the title of the United States to the land was valid, except as to the rights of the patentee.

3. INDIANS ⟸14—HOMESTEAD ENTRY—LAW GOVERNING—RECITALS IN PROCEEDINGS.
Where the original application for homestead entry was headed "Indian," and the application on its face was to enter under Act July 4, 1884, permitting homestead entry by Indians under certain restrictions, the government farmer gave a certificate to the register that the applicant was an Indian, and the receiver issued a receipt referring to the application, and a final receipt containing the words "Indian homestead" immediately after the signature, it was apparent that the entry was made under Act July 4, 1884, amending Act May 20, 1862, c. 75, 12 Stat. 392.
[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 2, 31–36, 46.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. INDIANS ⊂⊃14—HOMESTEAD ENTRY—RESTRICTIONS—OMISSION FROM PATENT.
The omission from a patent of a homestead to an Indian of the restrictions imposed by Act July 4, 1884, does not relieve the land from the restrictions, and all persons are charged with notice thereof.
[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 2, 31–36, 46.]

5. INDIANS ⊂⊃27(6)—HOMESTEAD—RESTRICTION ON ALIENATION—BONA FIDE PURCHASER.
An answer alleging that defendant purchased part of an Indian homestead from the Indian's administrator, without knowledge of the error of the land agents in omitting from the patent the restrictions on the right to convey, is not sufficient to raise the defense that she was a bona fide purchaser, since it does not allege the consideration paid, or that when it was paid it was bona fide, nor does it allege that defendant had no notice that the patentee was an Indian, and that he had paid no fees on making the entry.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by the United States of America against Nellie N. Joyce and others to have the title to land patented to an Indian declared to be held in trust by the United States. Decree for defendants, and plaintiff appeals. Reversed and remanded, with directions to enter a decree for complainant.

Alfred Jaques, U. S. Atty., of St. Paul, Minn., and Elijah Barton, Asst. U. S. Atty., of Minneapolis, Minn.

Alford & Hunt, of Duluth, Minn., for appellee Joyce, now Coffey.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. John Wakemup, Sr., a Chippewa Indian, a ward of the government and in charge of an Indian agent, on April 16, 1892, entered certain public lands, that is, lands not in any Indian reservation, to wit, lots 4, 5, and 6, in section 21, township 63, range 18, as a homestead, under Act July 4, 1884, 23 Statutes at Large 76, 96, U. S. Compiled Statutes 1916, § 4612, as follows:

"That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

John Wakemup, Sr., having died, his heirs on November 25, 1903, made final proofs on his entry, and on June 16, 1905, there was issued

to them not the trust patent provided for in the act of July 4, 1884, but an ordinary form of patent of a homestead under the act of May 20, 1862, and acts supplemental thereto. In its bill the government alleges that its officers—

"failed and neglected to embody in said patent the conditions, reservations, and limitations upon the title to be granted as in said act specified, and which they are commanded to incorporate in all patents issued under said acts of Congress; and complainant avers that said officers issued said patent inadvertently, erroneously, wrongfully, and without authority of law, and that the same is void and of no effect, and that the executive officers who issued said patent could not and had not the power to dispense with the provisions of said act of Congress as aforesaid."

The bill further alleges that the defendants Nellie N. Joyce, R. W. Nichols, Edward L. Boyle, and John Helmer, who are none of them heirs of John Wakemup, Sr., each claim an interest in said lands adverse to the United States. The prayer of the bill, which, as will hereafter appear, we think is important, is as follows:

"That your honors may decree that said defendants, and each of them, have no estate or interest whatsoever in or to said lands or premises, and that the title of the complainant is good and valid, save and except any and all rights acquired by the patentees under the aforesaid act of Congress, and that the said defendants, and each of them, be forever enjoined and restrained from asserting any claim whatsoever in and to said lands and premises adverse to the complainant, and for such other and further relief as the equity of the case may require and to your honors may seem meet."

The only defendant contesting the relief sought is Nellie N. Joyce, now Nellie N. Coffey. She filed an answer in which she alleged that subsequent to the death of John Wakemup, Sr., administration was sued out on his estate and after due proceedings the administrator, with the approval of the probate court, deeded lot 4 of the property in controversy to Anna S. Joyce; that the heirs of John Wakemup, Sr., were two sons and one daughter, the last named Elizabeth Otter, and she with her husband conveyed an undivided one-third of all the lands described in the patent referred to to Anna S. Joyce; that said Anna S. Joyce and husband executed two mortgages for an aggregate of $475 upon lot 4 in question and other property to Albert Kitto, and that said mortgages are now the property of the defendant; that subsequent to the execution of said mortgages said Anna S. Joyce, who was then a widow, conveyed said lot 4 to the defendant Nellie N. Joyce by quitclaim deed; that the state of Minnesota on the 10th day of June, 1913, issued assignment certificates evidencing the taxes against said lands for the year 1911 to John Helmer, and thereafter said certificates were assigned to Nellie N. Joyce, now Coffey. She further alleged that this action was not commenced within 6 years after the date of the issuance of said patent, and said cause of action accrued more than 6 years prior to the commencement of said action. The case was tried, and the court dismissed the bill of complaint, and the government appeals.

[1] The act of July 4, 1884, provided that all patents issued thereunder "shall be of the legal effect" and "declare" that the government shall hold the property in trust, etc. The mere absence of the re-

quired declaration from the patent does not change the legal effect of the patent; that is to say, if the patent had declared that the United States would hold the property in trust for 25 years, this action could have been maintained by the government. Heckman v. United States, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820; Goat v. United States, 224 U. S. 458, 32 Sup. Ct. 544, 56 L. Ed. 841; Bowling v. United States, 233 U. S. 528, 34 Sup. Ct. 659, 58 L. Ed. 1080; United States v. Noble, 237 U. S. 74, 35 Sup. Ct. 532, 59 L. Ed. 844; United States v. Allen, 179 Fed. 13, 103 C. C. A. 1; United States v. Gray, 201 Fed. 291, 119 C. C. A. 529. As the act of Congress declared that the patent should be of the "legal effect" that the United States would hold the property in trust, the absence of the declaration to the same effect in the patent would not deprive the United States of the right to maintain the suit.

[2] The defendant pleaded the statute of limitations. The statute relied on reads as follows:

"Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." 26 Statutes at Large, 1093.

This act was passed March 3, 1891. The patent in question was issued June 16, 1905, more than 4 years thereafter, and 6 years is therefore the limitation applicable; but the chief trouble is that the government does not seek to vacate or annul the patent, as shown by the prayer to this bill which we have set out. It does seek to have a decree that the defendant, now Nellie N. Coffey, has no estate or interest in the lands, and that it be decreed that the title of complainant is good and valid, save all rights acquired by the parties under the act of Congress of July 4, 1884, and that the defendant be enjoined from asserting any claim adverse to the complainant, and for general equitable relief.

True, the United States alleges in its bill that the patent is void and of no effect in so far as it exceeds the patent prescribed by the act of July 4, 1884; but there is no prayer that it be so decreed. It may be conceded that, if this were an action to cancel or annul the patent, the statute of limitations would apply; but it becomes more manifest that this is not an action to cancel or annul the patent when it is recalled that the heirs of John Wakemup, Sr., for aught that appears, are still the owners of an undivided two-thirds of the lands described other than lot 4, and none of them are made parties to this action at all. This cannot be considered as an action to annul and cancel the patent. It is an action rather to construe the patent in accordance with the law under which it was issued. In Pitan v. United States, 241 Fed. 364, — C. C. A. —, this court held that this statute did not bar the action to recover damages against a vendee who had obtained title to government land by fraud, and in like manner it does not bar an action to construe a patent and enforce it as construed.

[3] The records of the Land Department in connection with this entry are in evidence and before us. The original application for en-

try of these lands is headed "Indian," and the application on its face is to enter under the act of Congress of July 4, 1884, which refers only to entries by Indians. The government farmer, J. K. McDonald, gave a certificate to Monroe Nichols, the register of the United States land office at Duluth, dated 3 days after the date of the application, that John Wakemup was an Indian, and entitled to an Indian homestead, and entitled to all the benefits to be derived from the Indian Homestead Act. The receiver issued a receipt in lieu of the usual receipt for fees of the register and receiver, in which it was recited that he had:

"Received of John Wakemup, Sr., the sum of *No* dollars *No* cents, being the amount of fee and compensation of register and receiver for the entry of lots 4, 5, and 6 of section 21, in township 63 north, of range 18 west 4th P. M., under section No. 2290, Revised Statutes of the United States."

Attached to this was considerable matter under the heading "Indian Homestead, Act July 4, 1884." This receipt also referred to No. 6588, which is the number of Wakemup's application heretofore referred to, in which twice, once in express words and once by necessary implication, Wakemup was referred to as an Indian. The same is true of the homestead affidavit filed by John Wakemup, Sr. The final proof filed by the heirs is headed "Indian Homestead Proof." The final receiver's receipt is for blank dollars and blank cents, being the balance of payment required by law for the entry of lots 4, 5, and 6 in section 21, township 63, range 18, and contains the words "Indian homestead" immediately after the signature. These were all part of the files before the first effort was made to convey the title originally acquired by John Wakemup, Sr., to this defendant or her grantors. It is apparent that the entry, while under the act of May 20, 1862, was under that act as amended July 4, 1884, and was of that "legal effect." The object of calling attention to these facts is clearly to point out that the lands were taken under the act of July 4, 1884, and not simply under the act of May 20, 1862, and not for the purpose of reopening the question determined in United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 67 C. C. A. 1.

[4] Now, let us see, independently of the question of the defendant being a bona fide purchaser, what is the effect of the omission of all reference to the restrictions imposed by the act of July 4, 1884, on the patent. Under the original Homestead Act (12 Statutes at Large, 392) the right to enter a homestead was limited to citizens of the United States, or those who had filed their declaration of intention to become such. Indians were not citizens and could not be naturalized, except by act of Congress. Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643. And no such authority had been generally granted at the time of the Homestead Act. Consequently an Indian could not originally enter a homestead. On March 3, 1865 (13 Stat. 541, 562, c. 127), certain Wisconsin Indians were given the right to enter land under the homestead law under restrictions. On March 3, 1875 (18 Stats. at Large, 402, 420, c. 131), all Indians who had abandoned their tribal relation were given the benefit of the homestead law, but with restrictions, and by Act Jan. 18, 1881, c. 23, 21 Stat. 315, homestead

entries by Winnebagos of Wisconsin were legalized, but with restrictions. Then came Act July 4, 1884, heretofore quoted.

In Taylor v. Brown, 5 Dak. 335, 40 N. W. 525, it appears that Thomas K. West, a Santee Sioux Indian, entered a homestead under the act of March 3, 1875. The patent issued to West was in the absolute form usually issued under the Homestead Act of May 20, 1862, and made no reference to the fact that West was an Indian, nor to the restrictions imposed by the act of 1875. The court said that the authorities uniformly held that the statutes in force at the time would prevail over recitals of the patent and that parties purchasing of Indians were chargeable with notice of the restrictions of the law. The court in that case cited with approval the learned opinion of Chancellor Kent, speaking for the Court of Errors of the state of New York, reported in Goodell v. Jackson, 20 Johns. (N. Y.) 693, 11 Am. Dec. 351. That authority was in point. This case of Taylor v. Brown, 5 Dak. 335, 40 N. W. 525, was appealed to the Supreme Court of the United States and there affirmed (Taylor v. Brown, 147 U. S. 640, 13 Sup. Ct. 549, 37 L. Ed. 313); but for aught that appears this question was abandoned in the appellate court by the defendants.

In United States v. Hemmer (D. C.) 195 Fed. 790, 801, in a very able opinion, Elliott, Judge, said:

"Even though the patent in this case had failed to show that Taylor was an Indian, and contained no limitation whatever upon alienation, the act of the executive officers of the United States issuing the patent without condition or limitation (if limitations should have been imposed upon alienation under the then existing provisions of the acts of Congress) could not affect such limitation prescribed by Congress, and the purchasers from Taylor, the Indian, were chargeable with knowledge of the limitations imposed upon his title by the acts of Congress."

That case was appealed to this court and reversed (Hemmer v. United States, 204 Fed. 898, 901, 123 C. C. A. 194, 197); this court saying:

"If, when the conveyances here in question were made and the liens were placed, Taylor's homestead was subject to the restrictions upon alienation and taxation prescribed by the act of July 4, 1884, the decree below was right (Heckman v. United States, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820), and the question whether or not it was so subject must be determined by the acts of Congress and not by the terms of the patents issued to Taylor."

The case was further appealed to the Supreme Court of the United States (United States v. Hemmer, 241 U. S. 379, 36 Sup. Ct. 659, 60 L. Ed. 1055), but neither in this court nor in the Supreme Court was the portion of the opinion by the District Court cited called in question.

In Eells v. Ross, 64 Fed. 417, 12 C. C. A. 205, in an opinion delivered in behalf of the Circuit Court of Appeals of the Ninth Circuit by McKenna, Circuit Judge, but now for many years Justice of the Supreme Court, the decision in Taylor v. Brown, 5 Dak. 335, 40 N. W. 525, on this question is expressly approved. In Frazee et al. v. Spokane County, 29 Wash. 278, 69 Pac. 779, the case of Taylor v. Brown, 5 Dak. 335, 40 N. W. 525, is expressly approved and followed. In Felix et al. v. Yaksum et al., 77 Wash. 519, 137 Pac. 1037, as in this case, a patent was issued to an Indian without restrictions. The court said:

"Nor is it of any determinative force that the patent contains no restriction against alienation. The law becomes a part of the patent, and no federal official can waive or render inoperative, because of the failure to incorporate it, any limitation which Congress has imposed upon the title."

[5] So far as the answer pleads the assignment to the defendant Nellie N. Coffey of the certificate evidencing the taxes against the lands they were not subject to taxes under the act of July 4, 1884. Frazee v. Spokane County, supra; 19 Op. Atty. Gen. 161. In her answer this defendant said:

"9. That said purchase of said lot numbered four (4) by said Anna S. Joyce from said administrator of said estate of said John Wakemup, Sr., and said sale and conveyance by said Elizabeth Otter and George Otter, her husband, unto the said Anna S. Joyce, and also said purchase by said defendant Nellie N. Joyce, now Coffey, from said Anna S. Joyce, were each and all made without any knowledge whatsoever of any error, oversight, neglect, or mistake whatsoever on the part of the complainant, its executive officers, agents, or any person or persons acting in its behalf, or otherwise; that all of the acts of the said Anna S. Joyce and the defendant Nellie N. Joyce, now Coffey, were made and done in reliance upon said patent as having conveyed said title without qualifications or limitations of any sort, and each and all of the acts of said Anna S. Joyce and Nellie N. Joyce, now Coffey, were made and done in good faith."

It will be observed that the authorities hold that the defendant Mrs. Coffey, and her grantors, were charged with notice of the restrictions upon alienation; but, even if she were not, the question next arising would be, first, has she pleaded that she was a bona fide purchaser without notice; and, second, has she succeeded in making proof of such allegation? In speaking of the defense of a bona fide purchase, the Supreme Court in Wright-Blodgett Co. v. United States, 236 U. S. 397, 403, 35 Sup. Ct. 339, 341 [59 L. Ed. 637], said:

"But this is an affirmative defense, which the grantee must establish in order to defeat the government's right to the cancellation of the conveyance which fraud alone is shown to have induced. The rule as to this defense is thus stated in Boone v. Chiles, 10 Pet. 177, 211, 212 [9 L. Ed. 388]: 'In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seised in fee, and in possession; the consideration must be stated, with a distinct averment that it was bona fide and truly paid, independently of the recital in the deed. Notice must be denied previous to, and down to the time of, paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea show how the grantor acquired title. * * * The title purchased must be apparently perfect, good at law, a vested estate in fee simple. * * * It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. * * * Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchase without notice; the case stated must be made out; evidence will not be permitted to be given of any other matter not set out.'"

Substantially the same rule was announced by this court in Northern Colorado Coal Co. v. United States, 234 Fed. 34, 148 C. C. A. 50. It will be observed there is no allegation of the consideration paid, or when the payment was made, much less that it was bona fide or duly paid. There is no allegation that the vendee had no notice that the patentee was an Indian and that he had paid no fees to the government

on making said entry. We conclude that there is no sufficient allegation that any of the grantees in these deeds were bona fide purchasers.

If we turn to the evidence we find that the allegation as made is wholly unsustained thereby. We therefore hold, first, that the various vendees of the lands were all charged with notice of the restrictions; second, that there is no allegation that any of these vendees were bona fide purchasers; and, third, there is no evidence to sustain the claim even if it had been alleged.

It follows that the decree of the District Court is reversed, and the cause is remanded, with directions to enter a new decree for the United States as prayed.

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## UNITED STATES v. CASS.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1917.)

No. 4718.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by the United States against Joseph R. Cass. Decree for defendant, and complainant appeals. Reversed and remanded, with directions to render a decree for complainant.

Alfred Jaques, U. S. Atty., of St. Paul, Minn., and Elijah Barton, Asst. U. S. Atty., of Minneapolis, Minn.

John Swinland, of Duluth, Minn., for appellee.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. This case is wholly controlled by the opinion this day filed in United States of America v. Nellie N. Joyce et al. (No. 4717) 240 Fed. 610, — C. C. A. —, save that Mr. Joseph R. Cass, who is the defendant in this action, testified as follows: "Q. Do you know John Wakemup? A. Yes. Q. Was he a Norwegian or a Swede? A. He told me he was a quarter-breed. * * * Q. Do you know John Wakemup, Jr.? A. Yes. Q. Do you know where he lived, or where his father lived? A. They all lived in the settlement. Q. In what was called Wah Ray? A. Yes. * * * Q. Did you say the man from whom you bought was a quarter-breed? A. Yes. Q. What did you understand him to mean by that? A. I don't know. Q. You don't know whether he was a half-breed or a three-quarter breed? [A. Yes] or what he was—what was his appearance as to being light or dark? A. He was dark, of course. * * * Q. What would you say as to whether or not John Wakemup, Jr., the man from whom you bought, was an Indian, or had Indian blood? The Court: When you said 'quarter-breed' you meant Indian? The Witness: Yes, sir; as I understood him."

The decree in this case is reversed, and the cause remanded, with directions to the District Court to enter a decree in favor of the United States as prayed

## BIRDSALL et al. v. DELAWARE & H. CO.

## DELAWARE & H. CO. v. BIRDSALL et al.

(Circuit Court of Appeals, Third Circuit. Jan. 10, 1917. Rehearing Denied April 10, 1917.)

Nos. 2137, 2141.

MINES AND MINERALS ⇐79(3)—MINING LEASES—CONSTRUCTION.

Plaintiffs entered into an agreement with defendant, whereby it agreed to mine and prepare for market all mineral coal of merchantable quality that could be safely and economically mined and taken from the demised premises. The demised premises at that time had only been partially opened, coal having been taken out of certain seams or veins known as "vein No. 2" and the fourteen-foot vein commonly known as "Grassy Island vein." The agreement, which provided for payment of royalties on coal mined, contained a covenant by defendant to mine from the veins known as the "Grassy Island vein" and "No. 2 vein," or to pay therefor at the prescribed rate, not less than 20,000 tons per annum, until such veins shall be exhausted, or until such time as, in the opinion of defendant, it shall have paid for such minable coal as is contained in the veins. Subsequent provisions of the lease declared that, if veins underlying the Grassy Island vein should prove of such quality and thickness that it could be safely and economically mined, defendant should mine such veins or pay at the rate aforesaid, not less than 20,000 tons of coal per annum. Other veins were discovered above the Grassy Island vein, and plaintiffs contended that the lessee should mine them at the rate of 20,000 tons per annum or pay royalties thereon. Such veins were not specified in the lease contract; defendants contending that such veins were not discovered until after its execution. *Held*, that the provisions as to minimum royalties did not apply to such veins, whether they were discovered before or after execution of the lease, for, if known before, they were omitted from its provisions, and, if unknown, the lease showed no intention that the minimum royalty provisions should apply to mining of such veins.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 209.]

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action by William S. Birdsall and others against the Delaware & Hudson Company. There was a judgment for plaintiff, and both plaintiffs and defendants bring error. Writs dismissed, judgment affirmed, and case remanded.

See, also, 216 Fed. 717.

The following is the charge of the court below:

The plaintiffs, William S. Birdsall and others, have brought this suit against the defendant, the Delaware & Hudson Company, to recover certain rentals or royalties alleged to be due and owing from the defendant, growing out of an agreement or lease for the rental and demise for a term of 99 years of the minable and merchantable coal underlying a lot or piece of land situate in the borough of Olyphant, this county, containing about 20 acres. It appears that the plaintiff and others for whom this suit was brought, being the owners of the mineral coal underlying the land in question, made, executed, and delivered on the 24th day of October, 1890, a contract or indenture with the President, Managers and Company of the Delaware & Hudson Canal Company, now the Delaware & Hudson Company, whereby the latter agreed to mine and prepare for the market all the mineral coal of merchantable quality that

could be safely and economically mined and taken from the premises in question, agreeing to pay as rental for such coal 30 cents per ton for each ton of 2,240 pounds of clean and merchantable coal mined and taken from the land larger than pea coal, 15 cents per ton for like coal of the size known as pea coal, and 7½ cents per ton for coal of the size known as buckwheat; nothing to be allowed for waste or coal smaller than buckwheat.

It furthermore appears that, at the time or date of this agreement, the defendant company was the owner of the land adjoining or surrounding the lot or land in question, upon which it was engaged in the mining and preparation of coal for the market, and that the property forming the subject of this agreement was then only partially opened; coal having been taken therefrom out of certain seams or veins known as "vein No. 2" and the fourteen-foot vein, commonly known as the "Grassy Island vein," and that it was the intent and purpose of the parties to the agreement that the coal should be mined and taken from this property by the defendant company when it could be conveniently reached in the operations and developments carried on on its own adjoining property, as appears from a clause in the lease which says: "That the coal to be mined and removed as soon as and when it can be reached and economically and conveniently worked by the lessee in connection with the coal being mined from adjoining lands in the same seam or veins, and of this the superintendent of the lessee company is to be the sole judge and his decision is to be final and conclusive."

While the agreement provides that the coal underlying the land in question should all be mined so far as it could be economically and conveniently done in connection with their mining operations on their own land, for which payment was to be made as already stated, the agreement furthermore specifically sets forth and provides for the payment of certain minimum royalties to be computed and paid on coal contained in and mined from certain specified portions of the property in question. And it is for the recovery of such minimum royalties as provided for in the contract that the suit in question has been brought, and therefore we have to do only with that particular portion of the coal contained in the property as specified and the clauses in the lease providing for the payment of such minimum royalties; and for this purpose I will first call your attention to the provisions of the lease, which, in my opinion, govern in this case.

Quoting from the lease: "The said lessees further covenant and agree to mine from the lands hereby leased, from the veins known as the 'Grassy Island vein' and 'No. 2 vein,' or pay for at the rate aforesaid, not less than 20,000 tons of prepared coal per annum, until the coal that can be safely and economically mined from the Grassy Island and No. 2 veins aforesaid has been exhausted, or until such time as in the opinion of said lessees they shall have paid for as much merchantable and minable coal as is contained in said Grassy Island and No. 2 veins in the premises hereby leased." "The payments on the minimum annual quantity of 20,000 tons shall begin on the 1st day of October, A. D. 1890; that is, the first quarter shall begin on that date, and the first quarterly payment shall be made on or about the 15th day of January, A. D. 1891."

And in the next or following paragraph it is further provided as follows: "And the said lessees further covenant and agree to and with the said lessors that, if the veins underlying the Grassy Island vein shall prove to be of such quality and thickness that they can be safely and economically mined, they will mine from such vein or veins, or pay for at the rate aforesaid, not less than 20,000 tons of prepared coal per annum, after they have commenced to mine the same; it being specifically understood and agreed that the lessees are to make no payments for the coal in the veins underlying the Grassy Island vein until they shall have actually commenced to mine the same."

Following further on in this lease is contained as follows: "And it is further agreed by and between the parties hereto that if at any time the said lessees shall have paid as rent, in addition to all coal mined by them, for as much coal which they have not mined as, in the opinion of the engineer of the said lessees, shall remain in the premises unmined and subject to be

mined under the provisions of this agreement, the said lessees may cease to make further payments until they shall have mined out the quantity for which they have advanced payment, and thereafter the said lessees shall be liable to pay rent only for the quantity of coal remaining, capable of being mined, and only as the same is mined from time to time, using due and reasonable diligence to mine and remove the same."

It appears that since the date of the agreement and from the 15th day of January, 1891, down to 1902, the defendant paid in quarterly installments, as provided by the lease, minimum annual rental for and on account of minable coal taken from and contained in the veins known as Grassy Island vein and No. 2 vein, the aggregate sum of $69,000, and that after paying these rentals the company suspended payment; it being the opinion of those in charge of its operations, as contended for by the defendant, that all the minable coal contained in said Grassy Island and No. 2 veins upon the premises of the lessors that could be safely and economically mined had been paid for. And this brings us to the first proposition which I shall submit to you for your consideration.

While it is not denied that under the terms of the lease the defendant had the right to suspend the payment of such minimum royalties when, in the opinion of the superintendent, engineer, or those in charge of the company, the payments advanced were sufficient to cover all of the coal contained in these veins, however, it is alleged on the part of the plaintiff that the defendant fraudulently pretended that it had paid for all of the coal minable in said veins or seams under said lease, and that, in fact, such coal had not been paid for, even to this time.

I will submit to you, first, the determination of the matter as to whether it was really and honestly the opinion of those in charge of the defendant company's premises, as you may determine from all of the evidence in the case, that the coal in these two veins had been covered or paid for by the advancement of the minimum royalties made up to the time when payment was suspended, or was it a mere pretense on its part, as contended for by the plaintiffs, to escape further advancements and payments. You will remember that the contract puts it within the defendant's power or opinion to suspend payments. It goes without saying, of course, that such opinion must be an honest opinion before the suspension of the advancements or the further payment of the minimum royalties provided could be excused. Now, gentlemen, if all the evidence in the case, or what has been made to appear here, convinces you that it was at the time the honest opinion in good faith of those in charge of the defendant's operations that the coal in these two veins had been covered and paid for in the royalties advanced, there can be no recovery here of minimum royalties by reason of or on account of the same, although it may now appear that the parties, having formed such an opinion at the time, were really in error. Such recovery, if plaintiffs are entitled to any more money as royalties for coal from these veins, would have to be enforced under the general provisions of this lease and in some other way.

If, upon the other hand, you are satisfied that the suspension of the payment of royalties was fraudulent, and not in good faith, not honestly believing that the coal in these two veins had been fully paid for, you will then proceed to determine whether there was more coal in these two veins, the Grassy Island and No. 2 veins, that could be conveniently and economically mined than has been paid for by the advancement of the minimum royalties of $69,000.

On the part of the plaintiffs you have the statements of the defendant company showing the amount of coal taken from these veins and the value in royalties as provided by this agreement.

Ira E. Hartwell, called on the part of the defendant, testified that, taking into account the coal recovered from these two veins, together with such as is remaining and minable from observations and estimates made by him, he has given it to you as his conclusion and opinion that the royalty value of all the coal in the two veins minable at the time of the lease amounted to $67,548.88. He further says that, in his opinion as a mining engineer, he be-

lieves that $69,000 advanced in minimum royalties more than paid for all the coal in these two veins at the time of the agreement.

A. G. Bennett was also called on behalf of the defendant company, and testified that, in his opinion as a mining engineer, and from observations made on the premises, taking into account the coal returned by the company, as well as that remaining in place, the royalty value of all the coal that was in these veins at the time of the lease amounted to $64,802.21.

On the part of the plaintiff, Mr. Rittenhouse was called, who testified that he made numerous observations, and that by calculating the coal in place in 1891, and making due allowances for the coal covered by the royalties of $69,000 paid, there still remains due in royalties, as provided by the contract, for coal minable and unaccounted for the sum of $10,565.

John I. Riegel, who was also called by the plaintiff, has also testified that, from observations and calculations made by him, after deducting the amount of minimum royalties paid, there was due and remaining as such royalties in 1902 for minable coal in these two veins the sum of $12,410.

Now, gentlemen, it will be for you to determine which of these parties you will believe, and, by putting it in this way, I would not have you to infer that I impute willful or intentional misstatement of the facts as these expert witnesses have presented them to you. They all may be, and no doubt are, sincerely convinced of the honesty and force of the facts as they have presented them to you. It is a question for you to determine which of them can be most relied upon. How have they impressed you from the manner or the means employed to arrive at the conclusion reached by them? These are matters to be weighed and considered by you in arriving at a conclusion in solving this difference of opinion laid before you. If you conclude to accept the statement of the defendant's witnesses, or taking into account all that has been made to appear in the case, that the $69,000 advance royalties cover all the minable coal in these two veins, you need not carry your investigation any further, and find for the defendant. If, however, you find in favor of the plaintiffs, and believe that all of the coal minable from these two veins has not been paid for, you will determine the amount of such royalty not covered when the payment was suspended in 1902, allowing interest on the different quarterly payments of $1,500 whenever they were due from that day down to the present time; all, of course, resting upon the assumption that you find the defendant has not exercised his opinion in suspending payments in good faith, as I have already instructed you.

Now, coming to the next and last proposition requiring attention, pertaining to the mining of the coal upon these premises under or beneath the Grassy Island vein, as provided for in the clause of the agreement which I have already recited. While there is some evidence here in these maps offered suggesting that mining was begun in these veins and upon the premises on or about the bringing of this suit, nevertheless there is no evidence here to sustain a verdict that there were any payments due under the agreement for minimum royalties on account of such mining under the terms of the contract at the time of suit, and therefore I will instruct you not to make allowances for installments of minimum royalties on account of mining in veins under the Grassy Island vein.

S. B., C. B. & J. H. Price, of Scranton, Pa., for plaintiffs.
Welles & Torrey, of Scranton, Pa., for defendant.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case William S. Birdsall and others, citizens of Pennsylvania and Connecticut, and lessors, sued the Delaware & Hudson Company, a corporate citizen of New York, and lessee, to recover coal royalties alleged to have accrued on an anthracite coal mining lease. On trial, the jury found for the plain-

tiffs, and on entry of judgment both plaintiffs and defendant sued out writs of error. We dispose of both writs in the present opinion.

The pertinent provisions of the lease and the general nature of the controversy are set forth in the charge of the court, noted above. From such charge it will be seen the lease covenanted for payment of minimum royalties on three different coal seams, viz., vein No. 2, the Grassy Island vein, and the veins under the latter. On vein No. 2 and Grassy Island the lessee was to pay a stipulated royalty on a minimum of 20,000 tons a year until the coal was exhausted, or until, in defendant's opinion, it had paid for all merchantable coal in such veins. There was also a covenant that, if the coal in the veins underlying Grassy Island proved workable, a minimum royalty of 20,000 tons should be paid after the mining of such underlying veins was begun, and after payments of the minimum royalty on No. 2 and Grassy Island veins had ceased. The royalties payable on all these three veins were recovered in the verdict, and the correctness of the judgment entered thereon is not here questioned by either party.

The question raised by the plaintiff's writ concerns its alleged right to recover an additional minimum royalty of 20,000 tons per year upon three other veins of coal, viz., the Four-Foot, the Diamond, and the Rock vein, all of which lie below the Four-Foot and above the Grassy Island veins. These veins are not specifically mentioned in the lease. It is contended by plaintiff that they were not known when the lease was made, while defendant claims they were known. Be that fact as it may, the question before us is whether the lease contains any language which binds the lessee to pay this additional minimum royalty of 20,000 tons per year upon the Four-Foot, the Diamond, and the Rock veins.

Turning to the lease, we find it is for all the coal underlying the tract, so that we may assume, as indeed is conceded, that the lease covers all veins, whether then known or unknown, and therefore these three veins in question. But, when it comes to provisions for minimum royalties, we find that only certain veins are mentioned and expressly subjected to minimum requirements, viz., vein No. 2 and the Grassy Island absolutely, and the veins underlying Grassy Island only conditionally, and not concurrently with the payment of the minimum royalty on No. 2 and Grassy Island. Apart from these three veins, viz., No. 2, Grassy Island, and the veins underlying the latter, we find in the lease no language which expressly evidences a purpose to place the obligation of the minimum royalty on any other veins; nor do we find any implication which, from the language used, constrains us to impute any such purpose on the part of the contracting parties. If, as contended by plaintiff, the Four-Foot, the Diamond, and Rock vein were not known, it is evident that the parties had not in view an annual minimum royalty of 20,000 tons on unknown veins, which are only subject to the lease by virtue of the general provisions which covered all coal under the tract. On the other hand, if, as contended by defendants, these veins were known when the lease was made, the express mention and explicit covenant of a minimum royalty on No. 2, Grassy Island, and the veins below the latter, was a virtual exclu-

sion of all the other veins from minimum royalty requirements. The lease itself, its provisions and general intent, would seem reasonably clear, and it is only by giving a very particular construction to some general terms that the construction contended for by the plaintiff would seem possible.

But such construction does not appeal to us, for it would give, by implication from such general words and terms, the precise effect given to specific expressions by the specific words and terms elsewhere in the lease. To do this is for a court to create a broad, imaginary contract, when the parties have made a restricted, specific one. When these parties wished to impose a minimum annual royalty, they knew how to select the veins and to apply their covenants to them. Having done so, and themselves expressly defined and specifically stated to what veins the minimum should apply, a court has no grounds for saying they meant to contract for some other veins which they did not mention, and did not evidence any specific intent to subject to a minimum royalty. And such a construction would be at variance with the general spirit of the lease. For by it, as we have seen, even all of the three designated veins were not treated alike. Vein No. 2 and Grassy Island are included in one and subject to a joint minimum. The veins underlying the latter are subjected to a minimum only on certain conditions, and even that minimum requirement does not begin until No. 2 and Grassy Island have ceased paying their minimum. Indeed, the uncertainty to which plaintiff's construction would lead is shown by the question, Which of these different sorts of minimum shall we apply to these other veins, Four-Foot, Diamond, and Rock vein?

We are of opinion the court below committed no error in confining the contract for minimum royalties in this lease to what the parties expressly stipulated. To have gone further would have been error.

Turning to the defendant's writ, we may say that on the argument it developed that such writ was sued out in order to compel the plaintiffs to join with them on the record all other parties in interest, so that defendant might be released, on payment of royalties embraced in the verdict, from further liability therefor.

Counsel for plaintiff having stated that they represented each and every one of the present owners of the royalties under the lease, and that they would place of record proper releases from them before the judgment was paid, and this court being satisfied that defendant can be properly protected by the court below in that regard, we are satisfied that the defendant can, by a proper procedure in the court below, be given all the protection it seeks by this writ or a reversal upon it.

We will therefore dismiss both writs of error, affirm the judgment below, and remand the case for further proceedings.

## AMERICAN NAT. BANK v. BANK OF BANDON. *

(Circuit Court of Appeals, Ninth Circuit. March 19, 1917.)

No. 2765.

BANKS AND BANKING ⟸175(3)—COLLECTIONS—ACTION FOR NEGLIGENCE—EVIDENCE—LOSS.

In an action by a bank to whom a draft was payable against its correspondent bank to whom it indorsed the draft for collection to recover damages for the latter's negligence in notifying the payee bank that the draft had been accepted by the drawee, when in fact acceptance had been refused, and in failing to protest the draft and to notify the payee bank for ten days thereafter, during which time a cargo of lumber which the payee might have attached was shipped by the drawer, evidence that the drawer was insolvent at the time and largely indebted to the drawee, and that if the lumber had been attached the drawee could have filed a petition in bankruptcy against the drawer as was done within a short time, is not admissible to show that the payee bank lost nothing because of its correspondent's negligence, since it cannot be assumed that the drawer, though insolvent, could not have secured the money to meet the draft in some way.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 640–646.]

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action by Bank of Bandon against the American National Bank. Judgment for the plaintiff, and defendant brings error. Affirmed.

The Bank of Bandon, an Oregon bank, brought action against the American National Bank in San Francisco to recover $5,887.78 and interest arising out of failure of the American Bank to notify the Bandon Bank promptly of the refusal of the drawee of a draft that the draft was dishonored. After trial by jury, verdict and judgment went for the Bandon Bank, and the American Bank brought the case to this court.

It appeared that before December 15, 1913, the American National Bank was the correspondent of the Bank of Bandon; that the Alfred Johnson Lumber Company, a customer of the Bandon Bank, was then engaged in shipping lumber between Bandon, Or., and San Francisco, Cal.; that on divers occasions before December 15, 1913, the lumber company referred to had drawn its draft in favor of the Bandon Bank on the Robert Dollar Company, a San Francisco corporation, against cargoes of lumber shipped from Bandon to San Francisco. The custom was for the Bandon Bank to forward such drafts to the American National Bank for collection, and, upon receipt from the American Bank of the notice of acceptance of the drafts sent by the Bandon Bank, the Bandon Bank would pay out money thereon to the Johnson Lumber Company, and there was an understanding between the two banks to the effect that, if any draft forwarded by the Bandon Bank to the defendant for collection should be dishonored or refused payment in excess of $500, the San Francisco bank should immediately notify the Bandon Bank by telegraph. On December 15th, the Johnson Lumber Company made its draft upon the Robert Dollar Company of San Francisco for $6,000 at 60 days sight payable to the order of the Bank of Bandon, and on December 15, 1913, the lumber company delivered the draft to the Bandon Bank, and the Bandon Bank indorsed on the back of the draft as follows: "Pay to the order of the American National Bank, San Francisco, Cal. All prior indorsements guaranteed. Bank of Bandon, Bandon, Or. F. J. Fahy, Cashier." In accordance with the custom established between the two banks, the Bandon Bank forwarded the draft to the

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied May 14, 1917.

San Francisco bank, and on December 19, 1913, the San Francisco bank notified the Bandon Bank of the acceptance of the draft by the drawee, the Robert Dollar Company. In fact, however, the draft was not accepted, for on December 19th the draft was refused by the Robert Dollar Company; but the defendant bank did not notify the Bandon Bank of refusal of acceptance until December 29, 1913.

It appeared that the defendant bank did not cause the draft to be protested until December 30th, and did not send any notice of protest or dishonor of the draft to the lumber company, the drawer, until notice of protest and dishonor was mailed to the lumber company in Bandon, Or., on December 30, 1913, the notice being received at Bandon, January 3, 1914; that the Bandon Bank paid out to the lumber company $5,887.78 for its pay roll for labor employed to produce a certain cargo of lumber of the value of $12,000, and that before December 29, 1913, and after the 19th of December, 1913, the cargo of lumber was shipped at Bandon to San Francisco; that, if the Bandon Bank had known that the draft had not been accepted, it could and would have brought suit against the lumber company for $5,887.78, and could and would have attached the cargo of lumber, but that, by reason of the advice of acceptance and for no other reason, the Bandon Bank failed to bring suit against the Johnson Lumber Company to recover, and did not attach the cargo of lumber. Shortly after December 29, 1913, the lumber company became insolvent. Before the receipt of notice of dishonor, the Bandon Bank had paid out the full amount involved in this controversy.

It appeared, also, that the cargo of lumber shipped to San Francisco about December 29th was there sold by the Robert Dollar Company for about $12,000, which sum was applied by the Dollar Company on an indebtedness of over $100,000 due by the lumber company to the Dollar Company. When the draft was refused by the Robert Dollar Company and the American Bank notified the Bank of Bandon by telegram that the draft was not accepted, it advised the Bandon Bank that it would return the paper without protest. The Bandon Bank on December 29th, by telegram, declined to accept the return of the draft, saying it had paid out on notice of acceptance of the 19th, and notice of dishonor came too late to enable it to protect itself. The next day, December 30th, the attorney for the Bandon Bank telegraphed to the American Bank that the Bandon Bank had no lien on any shipment and asked for advice. On December 30th protest for nonacceptance was formally made in San Francisco. There is evidence to show that the Bandon Bank had no knowledge of the heavy debt due by the lumber company to the Dollar Company.

Edgar C. Chapman and William P. Hubbard, both of San Francisco, Cal., for plaintiff in error.

Mastick & Partridge and John S. Partridge, all of San Francisco, Cal., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). It goes without saying it that the American Bank in San Francisco was negligent in notifying the Bandon Bank on December 19th that the Robert Dollar Company, drawee of the draft, had accepted it, when the fact was that that company had on that same day refused to accept it, and in failing until December 29th to notify the Bandon Bank of the refusal of acceptance by the drawee. The president of the Bandon Bank testified positively that when the draft was drawn he believed the lumber company solvent, and that if he had known of the dishonor of the draft upon the drawee company he could and would have attached the cargo of lumber which was afterwards, about December 24th, shipped to San Francisco. With this evidence in support of the allegations of the complaint, evidence by the American

Bank to show that as a fact the lumber company was heavily in debt to the drawee Dollar Company between December 15th and 29th could not take away liability of the American Bank for its double carelessness; nor could any statement made on the trial by the officers of the Dollar Company as to what course that company would have taken if the American Bank had correctly notified the Bandon Bank and if perchance the cargo of lumber heretofore referred to had been attached or was about to be attached by the Bandon Bank. The material question is: What was the effect of the negligence of the American Bank upon the rights of the parties to the present action? The American Bank contends that upon proof that upon January 14, 1914, the lumber company made a composition agreement for the benefit of its creditors, it was error in the District Court to reject evidence to show that on December 19th and until December 29th the lumber company was in fact insolvent, in that it then had no assets which the Bandon Bank could have seized and retained by attachment to satisfy its claim, and that therefore the Bank of Bandon would at that time have been in no better position to protect itself than it was after December 29th, and as a consequence that the negligence of the American Bank was not the direct and proximate cause of any loss sustained by the Bandon Bank. We cannot sustain this reasoning.

It may be that, if the Bank of Bandon had attached the lumber before it was shipped to San Francisco, the Dollar Company would have forced the lumber company into bankruptcy, and it may be that, if it had done so, any advantage accruing to the Bandon Bank by reason of such attachment would have been lost. But the law of mercantile transactions will not permit such an hypothesis to be constructed by the drawee of the draft for the purpose of relieving the collecting bank of performing its legal duty of presentation and protest as required by the statutes of the state in which the draft is to be paid. Sections 3155, 3224–3228, of the Civil Code of California. The specific facts here are that when the lumber company drew the draft, and the Bandon Bank put the amount of it, less a small sum, to the credit of the lumber company, the lumber company was carrying on its business and was in the good credit which it had theretofore enjoyed with the Bandon Bank, which was advised of presentation and acceptance and never knew at any time prior to December 29th that the drawee had in fact refused to accept the draft. The situation therefore was not one where the collecting agent was negligent merely in not duly presenting and then notifying the forwarding bank. The American Bank did duly present the draft and did promptly notify the Bandon Bank; but, as the notification sent was that the Dollar Company had accepted the draft, the Bandon Bank in its usual course was fully justified in acting in accord with the advice of acceptance and paying out the amount of the draft upon the checks of the lumber company. Not only nondirection, but also misdirection, is attributable to the American Bank. The lumber company was a going business concern before the notice of dishonor was sent, and evidence that it was in fact without sufficient assets to pay its debts or even insolvent was no excuse for the neglect of the American Bank. This is so because the effect of the mistake and negligence of the American Bank was to mislead the

Bandon Bank and to deprive it of right of opportunity to seek prompt recourse against the lumber company, whereby it might have obtained payment or security from the lumber company before the date when it was forced into involuntary bankruptcy. Chitty on Bills (12th Ed.) *449, lays down the rule as follows:

"The death, known bankruptcy, or known insolvency of the drawee or acceptor, or maker of a note, or an offer of composition by the acceptor not acceded to with a declaration, in the presence of the drawer and holder, that he (the acceptor) had not and should not provide for the bill, or his being in prison, or the notorious stopping payment of a banker, constitute no excuses, either at law or in equity, or in bankruptcy, for the neglect to give due notice of nonacceptance or nonpayment; because many means may remain of obtaining payment by the assistance of friends or otherwise, of which it is reasonable that the drawer and indorsers should have the opportunity of availing themselves, and it is not competent to the holders to show that the delay in giving notice has not in fact been prejudicial."

In Granite Bank v. Ayers, 16 Pick. (Mass.) 392, 28 Am. Dec. 253, where misinformation was given to a notary as to the residence and financial standing of the makers of a note, it was held to be no excuse for want of presentment and demand that the promisors had failed in business.

In Citizens' National Bank v. Third National Bank, 19 Ind. App. 69, 49 N. E. 171, the Appellate Court of Indiana considered the question whether mere insolvency of the drawer of a draft is a sufficient answer to show that the indorsee of such drawer would not be damaged by the negligence of its collecting agent in not duly presenting and giving notice. The court held that although the drawer by reason of want of funds and want of right to draw remains liable on indorsement without presentment, demand, or notice, and the indorsee's right of recourse still exists, there was still a liability of the negligent collection agent, because by neglecting to present for acceptance and giving notice, the collecting agent has deprived the indorsee of the prompt notice which would or might have enabled him to have prompt recourse on the indorser, thus giving him an opportunity or chance to have obtained payment or security from his immediate indorser before such indorser's failure, assignment, or bankruptcy. The court said:

"The law does not permit the collecting agent to decide in advance that, because the drawer may have in fact been insolvent, therefore the indorsee, from pursuit of his rights of recourse, would not have availed. If the collecting agent fails to give his principal and indorsee the benefit of such choice, he is liable."

To like general effect may be cited Hawley Dodd & Co. v. Jette & Clark, 10 Or. 31, 45 Am. Rep. 129; Grimes v. Tait, 21 Okl. 361, 99 Pac. 810; Welch v. Taylor Mfg. Co., 82 Ill. 579; Smith v. Miller, 52 N. Y. 545.

These views sufficiently cover the points involved in the errors assigned.

We find no prejudicial error, and the judgment is affirmed.

## WARNER et al. v. POWELSON et al.

(Circuit Court of Appeals, Second Circuit. February 20, 1917.)

No. 147.

1. PLEDGES ⇐56(5)—SALES OF COLLATERAL—INADEQUACY OF PRICE.
Where a note of the face value of nearly $17,000 was sold by the pledgee for $10,000, the inadequacy of price is not so great as to justify setting aside the sale, if it was fairly conducted.

2. PLEDGES ⇐36—SALE OF COLLATERAL—GOOD FAITH OF PLEDGEE.
A creditor of a corporation, holding a note for nearly $17,000 as collateral, offered the note for sale at auction. Others interested in the corporation directed a bank to bid on the note for them up to 99 per cent. of its face value, with interest. Representatives of the bank, who attended the sale to bid for the note and other collateral offered for sale, were prevented from bidding on the note because the creditor insisted that the auctioneer enforce the rule requiring a deposit from unknown persons. Such representatives of the bank were unknown to the auctioneer, but they could in a short time have established their identity, and deposits from banks in good standing were not required; but the creditor insisted that the sale be not postponed, and so the representatives were given no opportunity to bid on the note, which was bought in by the creditor for $10,000. *Held* that, as a pledgee must sell collateral fairly, and a sacrifice is a fraud upon the pledgor, the creditor is under such circumstances liable to the corporation for the sacrifice of the note.
[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 92–94.]

3. PLEDGES ⇐36—COLLATERAL—SALE OF.
Where the conduct of the pledgee in conducting a sale prevented another, whose representatives were present and were authorized to bid up to 99 per cent. of a note's face value, from bidding, and the note, which was bought in by the pledgee, was sold for only slightly more than half of its face value, the pledgee is, it not appearing whether he had disposed of the note, or at what price, liable for the difference between the price obtained and that which might have been obtained.
[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 92–94.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit by Robert L. Warner, Randolph F. Tucker, and Thomas B. Sweeny, individually and as copartners doing business under the firm name of Warner, Tucker & Co., against Wilfred V. N. Powelson and another. From a decree for defendants, complainants appeal. Reversed, with directions to enter decree against the named defendant.

Root, Clark, Buckner & Howland, of New York City (Grenville Clark, Emory R. Buckner, and Robert P. Patterson, all of New York City, of counsel), for appellants.

Simpson, Thacher & Bartlett, of New York City (Graham Sumner, of New York City, of counsel), for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a suit in equity arising out of the following facts:

There were two companies interested in certain properties in the

state of Tennessee, viz., the Tennessee Eastern Electric Company, the principal company, and the Tennessee Natural Development Company, Incorporated, the construction company. The defendant Powelson was the president and a director of the Development Company, which was indebted to him in the sum of $45,184.72, for which it delivered to him its collateral note, secured by the first mortgage bonds of the Electric Company, from which the coupons had been cut for 18 months in advance, for $20,000; the same bonds, but with coupons uncut, for $30,000; the Electric Company's note for $16,896.77, due July 15, 1914, secured by $33,000 of the Electric Company's bonds, being also security for other obligations of the Electric Company to the Development Company, amounting to $15,000. The collateral note was in the usual form, giving Powelson the right in case of default to sell the collateral at public or private sale and to become himself the purchaser, subject to the following limitation:

"The holder hereof agrees that none of the collateral accompanying this note will be sold without giving Warner, Tucker & Co., of Boston, Mass., an opportunity to bid on same."

It also appeared that the Development Company was owned, one-half by Powelson and one-half by the firm of Warner, Tucker & Co., of Boston. Payment of the Development Company's note having been refused, Powelson gave notice to Warner, Tucker & Co. that he would sell the collateral on February 11, 1914, at the auction rooms of Adrian H. Muller & Son, New York City. A member of the firm of Warner, Tucker & Co. came on to New York to see Powelson, with a view to settling the matter, and the sale was adjourned to February 18th. Warner, Tucker & Co. sent a letter to Redmond & Co., well-known bankers of New York City, asking them to attend the sale and bid up to 68 for the $20,000 lot of bonds, 78 and interest for the $30,000 lot, and up to 99 and interest for the note. In accordance with these instructions Redmond & Co. sent two clerks, who were not personally known to the auctioneer, to attend the sale and bid, without giving them any funds to make a deposit, as this was never required by the auctioneer of them or of any other bankers of New York City in good standing.

The $20,000 lot of bonds was first put up, one of Redmond & Co.'s clerks bidding 50, and on up to 69, at which price they were knocked down to Powelson. There were no other bidders. Upon the $30,000 lot of bonds the bidding began at 55, and ran up between Redmond & Co.'s clerk and Powelson to 77, at which price they were knocked down to Redmond & Co.'s clerk. He gave the auctioneer the name of Warner, Tucker & Co. as purchasers. Not knowing this firm, the auctioneer referred the same to Powelson, who said they were not acceptable. Thereupon the clerk gave them the name of Redmond & Co., with which the auctioneer was quite satisfied, but after conference with Powelson asked whether the bidders had any money to make a deposit. They replied that they had not and that none was ever required of Redmond & Co. They were then asked for their credentials, and showed the auctioneer's clerk the heading of the letter of Warner, Tucker & Co. to Redmond & Co., but refused to allow the body of the letter to

be read, because it contained the bidding instructions. Powelson, being informed by the auctioneer that their rule was to require a deposit from persons unknown to them, told him to carry out the rule. Thereupon the bonds were immediately put up again, and were knocked down to Powelson for 70; the auctioneer refusing to accept any bid from Redmond & Co.'s clerks. While the clerks were trying to communicate with Redmond & Co. with a view to satisfying the auctioneer, the note for $16,896.77 was put up, and Powelson bid $10,000, as he testified, to start the bidding. There being no other bid, it was knocked down to him. Redmond & Co.'s clerks thought that he had bid par. The collateral sold as aforesaid paid the Development Company's note in full and left a balance, for which Powelson accounted, of $1,449.49.

Warner, Tucker & Co. subsequently demanded that Powelson recognize their bid for the $30,000 of bonds at 77, and he did so, from which it resulted that the Development Company recovered $2,100 more than his bid. When they afterwards learned that he had bought the note for $10,000, and not for its face, they demanded that he account to the Development Company for $7,091, the sum they were authorized to pay over his bid, which he declined to do. The Development Company having refused to bring any suit against Powelson, Warner, Tucker & Co., whose partners are citizens of Massachusetts, as stockholders, brought this suit in the right of the company, making it and Powelson defendants, both citizens of New York. The relief prayed for is that the sale of the Electric Company's note may be declared invalid, that Powelson may be treated as still pledgee, and required to account to the Development Company for what he has received, or may receive, in excess of $10,000, the sum bid by him.

The trial judge dismissed the bill for want of equity without writing any opinion. We do not know whether he dismissed it on the ground that there was no jurisdiction in equity on any of the facts, or, if not, on which of the facts testified to he relied. Therefore we must examine the matter de novo.

[1, 2] Assuming that the note was worth par, the price paid was not so inadequate as to justify setting aside the sale, if it were fairly conducted; but a pledgee is bound to sell collateral fairly and to get for the pledgor as much for it as possible. To sacrifice the collateral is a fraud upon the pledgor. We think it quite obvious that Powelson knew that Redmond & Co. were entirely responsible for the bid made by the clerks as their representatives on the $30,000 of bonds, or any bid that they might make on the note. The only objection raised was as to whether they really did represent Redmond & Co. There was, in our opinion, not the least ground for thinking that they were mere pretenders. As the banking house was within a short distance from the auctioneer's and readily communicated with, there was no reason why Powelson should not have suspended the sale until the clerks had an opportunity of proving their authority to act for Redmond & Co. There was no other bidder for the securities, and a short delay would have made no difference whatever. We think it was unfair for the pledgee to suppress the only competition in such a summary way. He cannot transfer the responsibility for what was done to the auctioneers,

or to their rules, because they were his agents, and entirely subject to his orders.

[3] The bill prayed for general relief, which entitles the complainant to any relief consistent with its allegations. The record does not show whether Powelson still holds, or has disposed of, the note in question. If he has disposed of it, no one knows at what price, and a money judgment could not be entered. We think the company is entitled, under the prayer for general relief, to the difference between Powelson's bid of $10,000 and the amount Redmond & Co. were authorized and ready to bid, viz., 99 per cent. of the face of the note, with interest from July 15, 1914.

The decree is reversed, and the court below directed to enter a decree that the defendant Powelson, within a time to be fixed by it, surrender to the Development Company the Electric Company's note for $16,896.77 and the collateral thereto, upon receiving from or on account of the said company 99 per cent. of the note, with interest from July 15, 1914, and in default thereof that he pay to the said company the sum of $7,091, with interest from February 18, 1914, and that he pay to the complainants their costs in either case.

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## WHITNEY-CENTRAL TRUST & SAVINGS BANK v. GENERAL FIRE EXTINGUISHER CO. et al.*

(Circuit Court of Appeals, Fifth Circuit. March 9, 1917.)

No. 2996.

1. MORTGAGES ⟸151(3)—PRIORITIES—STATUTES.

Civ. Code La. art. 2775, declares that no agreement or undertaking for work exceeding $500, which has not been reduced to writing and registered with the recorder of mortgages, shall enjoy a lien. Article 3272 declares that contractors, workmen, materialmen, architects, undertakers, bricklayers, and others furnishing materials for the construction or repair of buildings, preserve their privileges only in so far as they have recorded, with the recorder of mortgages in the parish where the property is situated, the act containing the bargains they have made or a detailed statement of the amount due. Respondent furnished to a sugar company materials for its sugar house, under a contract entered into by the sugar company's acceptance of two written proposals of respondent, each of which, and the acceptance thereof, bore the date September 4th. The first of these proposals was a quotation of the prices of the various materials, and the second contained a provision allowing the sugar company to return designated appliances. The first proposal was filed for record on September 11th. The other proposal was never filed with the recorder of mortgages or recorded, though in November there was filed a list of invoices of materials sold and an affidavit of the correctness of the list. The price of the materials exceeded $500, and respondent asserted that its privilege as furnisher of materials was superior to that of an existing mortgage creditor, and that it had a vendor's privilege on movables sold, but not incorporated by the sugar company in its building. *Held*, that article 2775 applied, and respondent having failed to properly record the agreement or undertaking, though it must have known the materials would exceed $500, its privilege is not superior to that of an existing mortgage creditor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 332–336.]

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied April 28, 1917.

2. MECHANICS' LIENS ⊂=127—RIGHT TO—RECORDATION.
In such case, the recordation of only one of the two proposals, both of which constituted the contract, was not a compliance with either section.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 174–176.]

3. MECHANICS' LIENS ⊂=127—RIGHT TO—RECORDATION.
In such case, though the recording of part of the contract be regarded as sufficient, the registration was not within the time prescribed by Civ. Code La. art. 3274, declaring that no privilege shall have effect against third persons unless recorded in the manner required by law in the parish where the property to be affected is situated, and that it shall confer no preference on creditor who holds it over others who have acquired a mortgage, unless the act or other evidence of the debt is recorded within 7 days from the date of the act or obligations of indebtedness when the registry is required to be made in the parish where the act is passed, or within 15 days if the registry is required to be made in any other parish.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 174–176.]

4. MECHANICS' LIENS ⊂=136(1)—RIGHT TO—RECORDATION.
In such case, the recording, after the time prescribed for the recording, of the agreement or contract of the description of the property claimed to be subject to lien or privilege asserted, is not a compliance with the provisions of Civ. Code La. art. 3348, that in all cases of special privileges the property subject to such privileges must also be described.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 213.]

5. COURTS ⊂=347—PLEADING—AMENDMENTS.
Where the evidence showed that an intervening petitioner was entitled to a vendor's lien on certain movables, but the decree according a lien on other property was reversed, and that portion giving a lien on movables was attacked on the ground that the petition did not allege facts showing the existence of the privilege, petitioner should, under equity rules 19 and 20 (198 Fed. xxiii, xxiv, 115 C. C. A. xxiii, xxiv), declaring that the court may at any time, in the furtherance of justice, permit any pleading to be amended, and that a further and better statement of the nature of the claim may in any case be ordered upon such terms as are just, be permitted to amend the petition.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit by the Erie City Iron Works against the Cecilia Sugar Company, Limited, in which Jules Godchaux was appointed receiver, and the General Fire Extinguisher Company intervened. From a decree upholding the petition of the intervener over objection of the Whitney-Central Trust & Savings Bank, trustee, the Bank appeals. Reversed and remanded.

Charles F. Borah, of New Orleans, La. (Borah, Himel, Bloch & Borah, of New Orleans, La., on the brief), for appellant.

Henry Mooney, R. E. Milling and Solomon Wolff, all of New Orleans, La., for appellees.

Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. This is an appeal from a decree rendered in the suit of the Erie City Iron Works against the Cecilia Sugar Company, Limited, and others, on the intervening petition of the appellee, the General Fire Extinguisher Company, which adjudged that that intervening petitioner be recognized as a creditor of the Cecilia Sugar Company, Limited, for the sum of $8,610.36, and costs of the intervention, together with the privilege of a furnisher of materials, superior to that of the mortgage creditor of the Sugar Company, upon the latter's sugar house and the land upon which it stood, not exceeding one acre, and which also adjudged that the intervening petitioner be recognized as a creditor of the Sugar Company for the sum of $956.70, with a vendor's privilege on certain movables sold by it to the Sugar Company and not incorporated by the latter in the sugar house. Decrees rendered on other interventions in the same suit were before this court in the case of Whitney-Central Trust & Savings Bank v. Luck et al., 231 Fed. 431, 145 C. C. A. 425. The opinion in that case sets out and applies some of the provisions of the statute law of Louisiana which are applicable to the facts of the instant case.

The demand of the General Fire Extinguisher Company was for the price of pipe, valves, and fittings supplied by it to the Cecilia Sugar Company, Limited, under a contract entered into by the latter company in writing accepting two written proposals made by the former company, each of such proposals and the acceptance thereof bearing date September 4, 1912. One of those proposals was a quotation of prices of the several items on a long list of described pipe, valves, and fittings. The other proposal stated a discount to be allowed from the list prices, contained a provision allowing the Sugar Company to return designated pipe and fittings, specified requirements to be complied with by the Sugar Company, and stated the limit within which the Fire Extinguisher Company was to complete delivery and the terms of payment. The first-mentioned proposal, with the acceptance of it, was filed for record with the recorder of mortgages of the parish of St. Martin, in which the Sugar Company's sugar house was located, and was recorded on September 11, 1912. The other proposal was never filed with the recorder of mortgages, nor recorded. In November, 1912, there was filed with the recorder mentioned a list of the invoices of material sold by the Fire Extinguisher Company to the Sugar Company, and an affidavit showing the correctness of the list just mentioned, and stating:

"That said materials were used by said Cecilia Sugar Company, Limited, in the repair or construction of a sugar mill and appurtenances located on that certain tract of land owned by the Cecilia Sugar Company, Limited, at or near Cecilia, La."

[1] Questions are raised as to the meaning and applicability to the facts of this case of the following provisions of the Civil Code of Louisiana:

"Art. 2775. *Contracts Exceeding $500—Recordation—Privilege.*—No agreement or undertaking for work exceeding five hundred dollars, which has not been reduced to writing and registered with the recorder of mortgages, shall enjoy the privilege above granted."

"Art. 3249. *Privileges on Immovables.*—Creditors who have a privilege on immovables, are:

"1. *Vendor.*—The vendor on the estate by him sold, for the payment of the price or so much of it as is unpaid, whether it was sold on or without a credit. * * *

"3. *Material Men.*—Those who have supplied the owner or other person employed by the owner, his agent or subcontractor, with materials of any kind for the construction or repair of an edifice or other work, when such materials have been used in the erection or repair of such houses or other works.

"*Privilege on Building and Lot.*—The above named parties shall have a lien and privilege upon the building, improvement or other work erected, and upon the lot of ground not exceeding one acre, upon which the building, improvement or other work shall be erected; provided, that such lot of ground belongs to the persons having such building, improvement or other work erected; and if such building, improvement or other work is caused to be erected by a lessee of the lot of ground, in that case the privilege shall exist only against the lease and shall not affect the owner. * * *"

"Art. 3272. *Contractors, Workmen and Material Men.*—Architects, undertakers, bricklayers, painters, master builders, contractors, subcontractors, journeymen, laborers, cartmen, masons and other workmen employed in constructing, rebuilding or repairing houses, buildings, or making other works; those who have supplied the owner or other person employed by the owner or his agent or subcontractor with materials of any kind for the constructon or repair of his buildings or other works; those who have contracted, in the manner provided by the police regulations, to make or put in repair the levees, bridges, canals and roads of a proprietor, preserve their privileges, only in so far as they have recorded, with the recorder of mortgages in the parish where the property is situated, the act containing the bargains they have made, or a detailed statement of the amount due, attested under the oath of the party doing or having the work done, or acknowledgment of what is due to them by the debtor.

"The privileges mentioned in this article are concurrent."

"Art. 3274. *Where and When Recordation to be Made.*—No privilege shall have effect against third persons, unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it, over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded within seven days from the date of the act or obligation of indebtedness, when the registry is required to be made in the parish where the act was passed or the indebtedness originated and within fifteen days if the registry is required to be made in any other parish of this State. It shall, however, have effect against all parties from date of registry."

"Art. 3348. *Recordation—Authentic Acts—Under Private Signature—Affidavit of Facts—Description of Property Affected.*—Any person entitled to a mortgage or privilege on the property of another person, must cause the evidence of such mortgage or privilege to be recorded in the mortgage book of the parish where the property is situated.

"If the instrument on which the mortgage or privilege is based be an authentic act, a copy thereof shall be recorded; if it be an act under private signature, promissory note or other written instrument, it must be proved up and recorded in the manner required for acts under private signature.

"If there be no written instrument, the person claiming the mortgage or privilege, his agent, or some person having knowledge of the facts, must make affidavit of all the facts on which such mortgage or privilege is based, including the amount of the debt secured by the mortgage or privilege; and this affidavit must be recorded in the mortgage book.

"In all cases of special privileges the property subject to such privileges must also be described."

It was contended in the argument made in support of the decree appealed from that the requirement of article 2775 above quoted is not

applicable to the facts of this case, and that the lien or privilege claimed was preserved by a compliance with the requirement of article 3272 of the Civil Code as to registering for record, by those who have supplied the owner with materials of any kind for the construction or repair of his buildings or other works, "with the recorder of mortgages in the parish where the property is situated, the act containing the bargains they have made, or a detailed statement of the amount due, attested under the oath of the party doing or having the work done, or acknowledgment of what is due to them by the debtor." It seems to us that these contentions are not reconcilable with the rulings made in the case of Hibernia Bank & Trust Co. v. C. F. Knoll Planting & Mfg. Co., 133 La. 698, 63 South. 288. In that case a lien or privilege was claimed for the price of material and labor furnished under a contract entered into by the owner's acceptance of a written proposal to furnish two smokestacks at four cents per pound and the labor required in installing them at specified prices per hour. The proposal on its face did not show that the price of the material and labor called for would amount to over $500. The undertaker or contractor did not know when the contract was made the exact amount his contract would call for, but he knew then that at the prices named the material and labor called for would exceed $500. After full consideration, the court decided that the provision of article 2775 of the Civil Code was applicable, and that the privilege or lien claimed was lost as a result of the failure to reduce to writing and register the contract with the recorder of mortgages; the court's expressed conclusion being that, where the contract is one within the operation of article 2775, the provision found in article 3272 does not have the effect of enabling the contractor or undertaker to acquire and preserve his lien or privilege, superior to that of an existing mortgage, by having recorded a detailed and attested statement or the acknowledgment of the debtor of the amount due. The ruling made in the case cited was not departed from in the case of Carolina Portland Cement Co. v. Southern Wood D. & F. Co., 137 La. 470, 68 South. 831. In that case a contractor was held to be entitled to a lien or privilege for more than $1,000 for concrete furnished at a stipulated price per yard. It was held that article 2775 of the Civil Code was not applicable, as under the contract made the contractor was not obliged to furnish as much as $500 worth of concrete, by the terms of the contract he being at liberty to quit whenever he saw fit.

The facts of the instant case disclose no such reason for exempting it from the operation of the provision of article 2775. It is apparent from the evidence that the expression, "your list of pipes, valves, and fittings," found in the Fire Extinguisher Company's written proposal, and the enumeration of the articles the prices of which were quoted in that proposal, were understood and intended to include all the material of the kinds mentioned which the Sugar Company would need for the sugar house for use in which the material was furnished. The Sugar Company's acceptance of the proposals had the effect of obligating the Fire Extinguisher Company to furnish all the described pipes, valves, and fittings required to complete the structure for which

they were to be furnished. Under the contract the Fire Extinguisher Company furnished more than $9,000 worth of material. Within 10 days after its proposals were made and accepted it shipped more than $500 worth of the material called for. It is not fairly open to dispute that at the time the contract was made the contractor knew that the amount of material its contract called for would greatly exceed $500. We are constrained to give to the Louisiana statutes in question the meaning and effect accorded to them by deliberate judgments of the Supreme Court of Louisiana.

[2-4] In several respects there was a failure to comply with statutory requirements which are made prerequisites to the preservation of the lien or privilege claimed. The record of one only of the two proposals, the acceptance of both of which made the contract between the parties, was not a compliance with the requirements of articles 2775 and 3272, as they have been construed by the Supreme Court of Louisiana. Those articles require the registration for record of the agreement or undertaking, the act containing the bargain the parties have made, not merely a part or fragment of it, which fails to disclose the respective obligations of the parties. Even if the recording of part of the contract could be regarded as sufficient, the registration for record was not within the time prescribed by article 3274. And the recording, after the time prescribed for the record of the agreement or contract, of a description of the property claimed to be subject to the lien or privilege asserted, is not a compliance with the provision of section 3348 that "in all cases of special privileges the property subject to such privileges must also be described." Whitney-Central Trust & Savings Bank v. Luck, supra.

[5] The conclusion is that the decree was erroneous in so far as it adjudged that the Fire Extinguisher Company have a lien or privilege superior to that of the mortgage creditor of the Sugar Company. The evidence sufficiently supported the part of the decree which adjudged that the intervening petitioner have a vendor's privilege on certain movables. Civil Code of Louisiana, art. 3272; Whitney-Central Trust & Savings Bank v. Luck, supra. That part of the decree is attacked because of the absence from the intervening petition of allegations of facts showing the existence of a vendor's privilege. As the sufficiency of the intervening petition in that respect is questionable, the intervening petitioner will have leave to amend its petition, as it may be advised, to make a further and better statement of the nature of part of the claim relied on and supported by evidence. Equity Rules 19 and 20 (198 Fed. xxiii, xxiv, 115 C. C. A. xxiii, xxiv).

The decree appealed from is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

## GREENWOOD GUM CO. v. ZIMMERMAN et al.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1917.)

No. 2923.

1. BANKRUPTCY ⟸91(2)—INVOLUNTARY PROCEEDINGS—EVIDENCE—APPOINTMENT OF RECEIVER.
Where the record of a state court in a suit for the appointment of a receiver of a corporation showed that the appointment was made because the corporation was insolvent, both within the definition of insolvency in the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) and under the state law, creditors filing a petition for involuntary bankruptcy against the corporation need not prove its insolvency and the appointment of the receiver for that reason, except by the record of the proceedings in the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 138.]

2. CORPORATIONS ⟸559(2)—APPOINTMENT OF RECEIVER—COLLATERAL ATTACK.
A corporation, for whom a receiver was appointed by the state court because it was insolvent, cannot, in involuntary bankruptcy proceedings against it, collaterally attack the judgment of the state court by evidence that it was not insolvent, and that its president had consented to the receiver's appointment without authority from the corporation; there having been no pleadings directly attacking the judgment of the state court.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2241, 2242.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Petition for involuntary bankruptcy by W. W. Zimmerman and others against the Greenwood Gum Company. From a decree adjudging the company to be bankrupt, it appeals. Affirmed.

W. R. Stewart, of Youngstown, Ohio, for appellant.
W. C. McKain, of Youngstown, Ohio, for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. In July, 1915, De Wayne Greenwood, Jr., a creditor, filed in the court of common pleas of Trumbull county, Ohio, a petition against the Greenwood Gum Company (which we shall call the company), in which he stated in some detail the names of the creditors of the company, the amount due to them, and also the nature and amount of the company's property and business. The petition, also showed that the income of the company was not sufficient to pay its running expenses; that its assets of every kind were then insufficient to pay off and discharge its liabilities; that it was insolvent, and had not sufficient property to pay its debts, and thereupon prayed the appointment of a receiver for the company. Besides, the defendant in its answer to that petition, which was sworn to by the company's attorney, stated that the company was a corporation duly organized under the laws of the state of Ohio, admitted that it was largely in-

debted to various persons, was without funds to pay salaries, and was "without sufficient funds or working capital to carry on the business to make and earn sufficient money to meet and pay off its obligations which will fall due in the future, and that defendant is insolvent by reason of the conditions above mentioned." There was no denial in terms of the allegations of the petition that defendant's assets and property were insufficient to pay its debts.

Upon this showing the court of common pleas of Trumbull county, Ohio, on July 26, 1915, put on record an entry and judgment in part as follows:

"This cause coming on to be heard upon the petition and the motion of the plaintiff herein for the appointment of a receiver, and it appearing to the court that the allegations of the petition are true, and that the defendant * * * is unable to meet its obligations which have matured, and which are about to mature, and that said company is insolvent, * * * the court grants said motion, and by the consent of parties hereto appoints De Wayne Greenwood, Sr., of Girard, Ohio, receiver herein."

The entry then empowered and directed the receiver to take possession of all the company's property. On October 15, 1915, W. W. Zimmerman and other creditors of the company began this proceeding in the court below by filing a petition, in which, after alleging that on the 26th of July, 1915, a "receiver was appointed by the common pleas court of Trumbull county, Ohio, and put in charge of the property of said Greenwood Gum Company on the ground that said company was insolvent," it prayed, upon that act of bankruptcy, that the company might be adjudged a bankrupt. To this petition the company, on November 4, 1915, filed its answer, in which, among other things, it stated:

That "it admits a receiver was appointed by the common pleas court of Trumbull County, Ohio, at about the time mentioned in said petition, and that said receiver was put in charge of the property of said the Greenwood Gum Company on the grounds alleged in the petition."

An issue was made by the answer as to whether the requisite number of creditors with the requisite amount of indebtedness had been joined in the petition for the adjudication, and upon this issue an order was made by the court below referring the case to a special master to take testimony, find the facts and the law, and report the same and the testimony to the court. Afterwards the Sethness Company and other creditors of the company, with debts aggregating over $200, filed an intervening petition and joined in the prayer for the adjudication of the company as a bankrupt. In an answer to the intervening petition, the company, for the first time, denied that it was insolvent, or that it had committed the act of bankruptcy alleged against it. The special master took the testimony, reported that the act of bankruptcy had been committed, and recommended an adjudication accordingly.

During the proceedings before the special master the company again appeared by its attorney and offered testimony to show, first, that it was not insolvent at the time of the finding of insolvency made by the court of common pleas of Trumbull county, Ohio; second, that the proceedings by which a receiver was appointed and the finding of

insolvency made by that court were without the knowledge or authority of the board of directors of the company; third, that in fact all proceedings had with reference to the insolvency and the appointment of a receiver for the company were had against the wishes and instructions of the board of directors and those having charge and authority of such matters; fourth, that at all times since the company has been in existence it had been solvent, and at no time, by a fair valuation, had its liabilities exceeded its assets, and at the time of the appointment of said receiver and the finding of insolvency by the court of common pleas of Trumbull county, Ohio, the company was not insolvent under the laws of the state of Ohio, nor under the Bankruptcy Act of the United States; and, fifth, that at the time the proceedings were commenced in the court of common pleas of Trumbull county, Ohio, the then president of the company had received specific instructions from the board of directors of the company as to the course he should pursue in managing the affairs of the company, but that the president, instead of following and adopting the instructions of the board of directors, proceeded without advising said board of directors of his intentions to have himself appointed receiver of said company.

The special master excluded all the testimony thus proffered. Exceptions to the special master's report were filed, but, after consideration, the court overruled them, confirmed the report, and adjudged the company to be bankrupt. From this judgment the company has appealed.

Eight assignments of error were filed, but counsel for the appellant in his brief reduced the discussion to two questions which he stated as follows:

"First. Were the petitioning creditors required to prove the company insolvent?

"Second. Does the mere fact that a receiver was appointed by said state court, upon the ground of insolvency, once and for all conclude the bankrupt, so that the subject cannot be further litigated, even though the proceedings had in the state court were instituted by the president of the company who was unauthorized and entirely without authority to do so?"

[1] To the questions thus presented, one answer may suffice, and it must turn upon the construction to be given the provisions of section 3, clause a (4) of the Bankruptcy Act (Comp. St. 1913, § 9587), which defines three distinct acts of bankruptcy, namely: First, the making of a general assignment for the benefit of creditors; second, that a debtor, being insolvent, has applied for a receiver or trustee for his property; and, third, that because of insolvency a receiver or trustee has been put in charge of a debtor's property under the laws of a state or of a territory or of the United States. These acts of bankruptcy are independent of each other. The clause which makes "a general assignment for the benefit of his creditors" an act of bankruptcy on the part of the debtor has been considered in many cases. Bryan v. Bernheimer, 181 U. S. 188, 193, 21 Sup. Ct. 557, 45 L. Ed. 814, West Co. v. Lea, 174 U. S. 590, 599, 19 Sup. Ct. 836, 43 L. Ed. 1098, and Hill v. Western Electric Co., 214 Fed. 245, 246, 247, 130 C. C.

A. 613, are some of them; but, though cited in argument, they throw only an indirect light upon the questions under consideration.

That clause, which makes it an act of bankruptcy that "a debtor being insolvent has applied for a receiver or trustee for his property," has also frequently been before the courts, and counsel for appellant has cited the case of James Supply Co. v. Dayton Coal Co., 223 Fed. 991, 139 C. C. A. 367. There a petition in bankruptcy was filed in the District Court for the Eastern District of Tennessee by certain individual creditors of the Dayton Coal Company, in which, in substance, it had been alleged that the coal company, being insolvent, had applied for and obtained a receiver for its property. This being denied, the issue was tried, and the court, holding, as a matter of law, that the application did not bring the case within the Bankruptcy Act, because it had been made by creditors and not by the debtor, dismissed the petition. There had been evidence tending to show that the creditors who had applied for the receiver had done so at the instance of the debtor and for its benefit, and this court, regarding that as presenting the pivotal question, held that the court below should have heard the testimony as to whether the coal company had, in fact, procured the application for a receiver to be made, for the reason that, if the receiver had been appointed at the instance of the debtor and for its benefit, it was as effectually an act of bankruptcy as if the receiver had been applied for in the creditor's own name. But this case, like those previously cited, throws only an indirect light upon the question now in contest.

That clause of section 3a (4) which makes it an act of bankruptcy that because of the insolvency of a debtor a receiver or trustee has been put in charge of his property under the laws of a state or territory or of the United States has also been frequently subjected to judicial consideration. The authorities do not agree upon the question whether the meaning of the term "insolvency" as used in defining this act of bankruptcy shall in all cases be that prescribed by section 1, clause 15, of the act (Comp. St. 1913, § 9585), namely, that "a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts," or whether, as used in section 3a (4), that term may be adjudicated according to local laws in all cases where applications for the appointment of receivers are made to the courts of states or territories under their respective laws.

We do not find it necessary to go into that question, because the record in the suit for the appointment of a receiver filed in the common pleas court of Trumbull county, Ohio, sufficiently shows that the company was insolvent, whether the meaning of that term be tested by the law of the state of Ohio or by the definition of the term in the Bankruptcy Act. The petition in that case, as we have seen, expressly alleged that the company was insolvent, that it had not sufficient property to pay its debts, and that its assets of every kind and

description were insufficient to pay off and discharge its debts, liabilities, and obligations. The order of appointment does not show that hearing was had only on petition and answer. It in terms finds the allegations of the petition to be true and that the company is insolvent, and so appointed a receiver and put him in charge of the company's property. It thus appears of record that "because of insolvency a receiver * * * has been put in charge" of the debtors' property "under the laws of a state." The case is thus brought directly within the letter of section 3a (4) of the Bankruptcy Act. The fact that the order also recites conditions consistent with an insolvency in the sense only of inability to pay debts as they mature in the regular course of business does not alter the situation, for there is, as has been said, an express finding that the allegations of the petition (which asserted insolvency in the bankruptcy sense) are true, as well as an express finding of insolvency in general terms; and we think the other provisions of and recitals in the order fail to negative a finding of a condition of insolvency as defined in the Bankruptcy Act and as elsewhere sufficiently determined in the order. It is enough that insolvency was one of the grounds, although not the only ground, for the receivership. In re Spalding, 139 Fed. 244, 247, 71 C. C. A. 370; Hooks v. Aldridge, 145 Fed. 865, 868, 76 C. C. A. 409; Beatty v. Andersen Co., 150 Fed. 293, 296, 80 C. C. A. 181; In re Kennedy Tailoring Co. (D. C.) 175 Fed. 871. The case is thus distinguishable from Maplecroft Mills v. Childs, 226 Fed. 415, 418, 141 C. C. A. 245, In re Bohl, 224 Fed. 685, 140 C. C. A. 225, and In re Golden Malt Cream Co., 164 Fed. 326, 90 C. C. A. 258.

[2] It results, first, that the petitioning creditors in this proceeding were not required to prove otherwise than by the record and judgment of the court of common pleas of Trumbull county that the company was insolvent, and that because of that insolvency its property had been put in charge of the receiver appointed by that court under the laws of Ohio. Second, there having been no pleading directly attacking the judgment of that court, evidence in support of the collateral attack attempted to be made upon it in this case was not competent.

The judgment of the court below, adjudicating the company a bankrupt, was right, and it is affirmed, with costs.

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## R. D. COLE MFG. CO. v. MENDENHALL.

(Circuit Court of Appeals, Fourth Circuit. March 8, 1917.)

No. 1491.

1. COURTS ⟸405(17)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Under rule 11 for the Circuit Court of Appeals (150 Fed. xxvii, 79 C. C. A. xxvii), declaring that, when the error alleged is as to the admission or rejection of evidence, the assignment should quote the full substance admitted or rejected, assignments of error to the admission of evidence, which point out the questions that were propounded, but fail to state the several answers sought to be obtained, are insufficient.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. APPEAL AND ERROR ⊂231(3)—REVIEW—PRESENTATION OF GROUNDS IN COURT BELOW—NECESSITY.

Assignments of error to the admission of evidence cannot be considered on appeal, where the objections were general, and did not point out the specific grounds for the rejection of such evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 194.]

3. TRIAL ⊂419—MOTION TO DIRECT VERDICT—MODE OF MAKING.

In an action tried in the District Court of North Carolina, defendant moved to dismiss the case and direct a verdict, when plaintiff rested her case, but after denial of the motion introduced evidence, and did not renew at the close of the whole case. Revisal N. C. 1905, § 539, declares that when, on trial of an issue of fact in a civil action, plaintiff shall have produced his evidence and rested his case, defendant may move to dismiss, or for judgment as in case of nonsuit, and, if the motion is refused, defendant may except, but he may waive his exception and introduce evidence, and again move to dismiss after all the evidence on both sides is in. Rev. St. § 914 (Comp. St. 1913, § 1537), provides that federal courts shall follow the state practice in actions at law. *Held*, that defendant could not, on appeal, complain of the denial of his motion to dismiss.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982.]

4. TRIAL ⊂419—MOTION TO DIRECT VERDICT—MODE OF MAKING.

A request for a ruling that upon the evidence introduced plaintiff is not entitled to recover cannot be made by defendant as a matter of right, unless at the close of the whole evidence, and if defendant, at the close of plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error, but defendant must, to assign the same, renew the motion at the close of all the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982.]

5. APPEAL AND ERROR ⊂977(1)—NEW TRIAL ⊂6—DISCRETION—REVIEW.

Granting or refusing a motion to set aside the verdict rests in the discretion of the trial court, and cannot be reviewed on error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3860; New Trial, Cent. Dig. §§ 9, 10.]

In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro; James E. Boyd, Judge.

Action by Adeline Mendenhall, administratrix of Grady L. Mendenhall, deceased, against the R. D. Cole Manufacturing Company. There was a judgment for plaintiff, and defendant brings error. On motion to dismiss. Writ dismissed.

Garland S. Ferguson, Jr. (John N. Wilson, of Greensboro, N. C., on the brief), for plaintiff in error.

Thomas J. Jerome and William P. Bynum, both of Greensboro, N. C. (D. H. Parsons, of High Point, N. C., and Edward C. Jerome, of Greensboro, N. C., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

PRITCHARD, Circuit Judge. This action was instituted in the District Court of the United States for the Western District of North Carolina. The plaintiff seeks to recover damages on account of the alleged wrongful death of plaintiff's intestate, Grady L. Mendenhall.

There was a judgment in the court below in favor of defendant in error, from which judgment the case comes here on writ of error. The defendant in error will be referred to as plaintiff, and the plaintiff in error as defendant; such being the respective positions occupied by the parties in the court below.

The plaintiff moves to dismiss the writ of error for the following reasons:

I. That the first, second, and third assignments of error, page 49 of the record, do not comply with rule 11 of this court, in that the errors alleged are to the admission of evidence, and the said assignments of error do not quote the full substance of the evidence admitted; the question alone, and no part of the answer, being set out.

II. That the fourth assignment of error, page 49 of the record, is without merit, for the reason that the motion to nonsuit or direct the verdict, made by R. D. Cole Manufacturing Company, defendant in the court below, at the close of the plaintiff's evidence at the trial, was waived by the introduction of evidence on the part of the defendant, R. D. Cole Manufacturing Company, and that the said motion to nonsuit, or to direct the verdict, was not renewed at the close of all the evidence.

III. That the fifth assignment of error, page 49 of the record, does not comply with rule 11 of this court, and is a general assignment of error in the following words:

"That the court erred in entering judgment for the plaintiff upon the verdict of the jury for the reasons plainly apparent upon the record of the case."

IV. That the five assignments of error above mentioned are all of the assignments of error in the record in this case, and there is no means of ascertaining what errors are allowed by plaintiff in error, other than by a search through the record.

V. That the brief of plaintiff in error does not comply with rule 24 of the court, in that it contains no concise abstract, and no brief of the argument with reference to the pages of the record and the authorities relied upon.

[1, 2] The first three assignments of error pertain to the admission of evidence. They point out the questions that were propounded, but fail to state the several answers sought to be obtained. It further appears that no ground of objection was stated at the time this particular evidence was objected to, nor is any specified in the bill of exceptions. Rule 11 of this court (150 Fed. xxvii, 79 C. C. A. xxvii) among other things, requires that:

"When the error alleged is as to the admission or rejection of evidence the assignment of error should quote the full substance admitted or rejected."

One can easily appreciate the wisdom of this rule. It appears that at the time the defendant objected to the admission of the evidence in question no reason was stated as to the ground upon which such exception was taken. The rule, which requires that the specific grounds upon which objections to evidence are made, is intended to afford the trial court an opportunity to be fully advised as to the grounds of objection, in order that it may be able to intelligently de-

termine as to the relevancy of the evidence offered. Therefore it was manifestly unfair for the plaintiff to make what might properly be called a "blanket objection," and thus leave the court below, as well as this court, in doubt as to the precise grounds upon which the ruling of the trial court was made.

In this instance the first bill of exceptions, not only contains the evidence to which objection was made, but also the entire testimony of the witness Merritt, who testified on behalf of the plaintiff. This is also true of the second and third assignments of error. This court, in the case of Newman v. Virginia, T. & C. Steel & Iron Co., 80 Fed. 228, 25 C. C. A. 382, in discussing this phase of the question, said:

"Rule 11 of this court requires that, when the error alleged is as to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. No effort has been made to comply with this rule, so far as the assignment of error we are now considering is concerned; the evidence admitted, nor its substance, not being set forth. Consequently the questions referring thereto as discussed by counsel will not be disposed of by this court."

The court in that case refused to entertain certain assignments of error, because the grounds of the exceptions, upon which they were based, were not stated at the time they were taken, and where there was a failure to state the evidence to which objections were made in the bill of exceptions. In referring to this point the court said:

"An appellate court will only pass upon those questions as to which a foundation was laid by a specific objection on which the court below ruled, and concerning which an exception was not only noted at the time, but fully set forth in the bill of exceptions. * * * Nor does it appear that the exceptions to particular parts of the charge, referred to in the assignments of error, were made and the attention of the court called to them, at the time the charge was given. The reasons requiring this to be done have been so frequently stated by the courts that we must decline to again enumerate them. * * * The bill of exceptions in this case does not show affirmatively the errors alleged, and that they were prejudicial; nor does it show that timely objections were made, and the grounds thereof clearly stated, so far, at least, as the question relating to the refusal of the court to give such instructions is concerned; and therefore it is fatally defective, and will not authorize us to consider and dispose of the points based thereon presented by counsel for plaintiff in error."

In the case of Oxford & Coast Line R. Co. v. Union Bank of Richmond, Va., 153 Fed. 723, 82 C. C. A. 609, this court said:

"While it is not the policy of the court to dismiss writs of error and cases on appeal on account of slight technicalities, at the same time the rules of this court, as well as the rules of the Circuit Court, are plain and easily understood. In this instance the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys who practice in the federal courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions. In the case of Michigan Ins. Bank v. Eldred, 143 U. S. 298, 12 Sup. Ct. 452, 36 L. Ed. 162, the court, among other things, said: 'The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court. The trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed.' It is essential to the orderly pro-

cedure of the courts that attorneys should comply with the rules relating to the same; otherwise, it would be useless to promulgate rules for the guidance of those who may seek to review the action of the lower court."

Also, in the case of Burchett v. United States, 194 Fed. 821, 114 C. C. A. 525, Judge Goff, who was then the presiding judge of this court, among other things, said:

"Not only does this assignment ignore that portion of the rule, which requires that the instructions given alleged to be error should be set out in totidem verbis, but we find that the record shows that no exception was taken by counsel for plaintiffs in error to the action of the court below in giving said instructions. It is fundamental that no alleged error in law can be reviewed in an appellate court of the United States, when the record does not show that the ruling of the court complained of was excepted to at the time, and made part of the record by a bill of exceptions."

[3] The fourth assignment of error relates to the denial of the motion of the defendant to dismiss the case or direct a verdict at the time the plaintiff had introduced her evidence and rested her case. The law of North Carolina relating to the same is to be found in section 539 of the Revisal of 1905, which provides:

"*Demurrer to Evidence.* When on trial of an issue of fact in a civil action, or special proceeding, the plaintiff shall have produced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment, as in case of nonsuit. If the motion is allowed the plaintiff may except and appeal to the Supreme Court. If the motion is refused the defendant may except, and if the defendant introduces no evidence the jury shall pass upon the issues in the action, and the defendant shall have the benefit of his exception on appeal to the Supreme Court. But after the motion is refused he may waive his exception and then introduce his evidence just as if he had not made the motion. But he may again move to dismiss after all the evidence on both sides is in. If the motion is then refused, upon consideration of all the evidence, he may except, and after the jury shall have rendered its verdict, he shall have the benefit of such latter exception on appeal to the Supreme Court."

Thus it will be seen that where the defendant makes a motion at the close of plaintiff's evidence to dismiss a case (which is in the nature of a demurrer to the evidence), and where defendant then offers evidence, he is required in order to avail himself of this provision to renew the motion at the conclusion of all the evidence. This the defendant failed to do in this instance. Therefore, this assignment of error is without merit. Earnhardt v. Clement, 137 N. C. 91, 49 S. E. 49; Jones v. Warren, 134 N. C. 392, 46 S. E. 740; Blalock v. Clark, 137 N. C. 140, 49 S. E. 88. Even if the Supreme Court of the United States had not passed upon this question adversely to the contention of defendant we would be inclined, in pursuance of the Conformity Act (section 914, Revised Statutes of the United States [Comp. St. 1913, § 1537]), to follow the decisions of the Supreme Court of North Carolina as respects this point.

[4] However, the Supreme Court in the case of Columbia & Puget Sound Railroad Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, in discussing this point, among other things, said:

"The question of the sufficiency of the evidence for the plaintiff to support his action cannot be considered by this court. It has repeatedly been decided that a request for a ruling that upon the evidence introduced the plaintiff is

not entitled to recover cannot be made by the defendant, as a matter of right, unless at the close of the whole evidence, and that if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error. Grand Trunk Railway Co. v. Cummings, 106 U. S. 700 [1 Sup. Ct. 493, 27 L. Ed. 266]; Accident Ins. Co. v. Crandal, 120 U. S. 527 [7 Sup. Ct. 685, 30 L. Ed. 740]; Northern Pacific Railroad v. Mares, 123 U. S. 710 [8 Sup. Ct. 321, 31 L. Ed. 296]; Robertson v. Perkins, 129 U. S. 233 [9 Sup. Ct. 279, 32 L. Ed. 686]."

Also the case of Union Pacific Railroad Co. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597, is to the same effect.

[5] The fifth assignment of error relates to the refusal of the lower court to set aside the verdict and grant a new trial. The granting or refusing of this motion was in the discretion of the court, and is therefore not reviewable.

A careful examination of the record in this case impels us to the conclusion that, even if it had been properly brought here, the rulings of the lower court which are sought to be challenged were proper, and we would not, therefore, be inclined to disturb the verdict. However, inasmuch as there has been an utter disregard of the rules of this court in the preparation of the case, the writ of error should be dismissed.

Dismissed.

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## CITY OF GRAFTON v. GENTRY BROS.' SHOWS.

(Circuit Court of Appeals, Fourth Circuit. March 9, 1917.)

No. 1492.

1. APPEAL AND ERROR ⊜362(1)—RECORD—FILING OF ASSIGNMENT OF ERROR.

Rule 16 for the Circuit Court of Appeals (150 Fed. xxix, 79 C. C. A. xxix) declares that it shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk by or before the return day, whether in vacation or in term time, but for good cause shown the time may be enlarged. Counsel for plaintiff in error, after being served with notice of a motion to dismiss on the ground the petition in error was not accompanied by an assignment of errors, procured a certificate from the clerk of the District Court that the assignment of errors was properly filed in the court below, but by inadvertence was omitted from the record. Such certificate was filed in the Circuit Court of Appeals before the date on which the motion to dismiss was set for hearing. *Held* that, under the circumstances, it was the duty of counsel for plaintiff in error, if desiring to have the assignment of errors made a part of the record, to suggest a diminution of the record and request the Circuit Court of Appeals to grant an order directing the clerk of the District Court to transmit that portion of the record omitted, and, having failed to do so, the writ of error will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1960, 3282–3284.]

2. APPEAL AND ERROR ⊜728(2)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error complaining of the admission of evidence, which does not quote the full substance of the evidence admitted, is insufficient under rule 11 for the Circuit Court of Appeals (150 Fed. xxvii, 79 C. C.

A. xxvii), declaring that, when the error is to the admission of evidence, the assignment of errors shall quote the full substance of the evidence admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3011.]

3. APPEAL AND ERROR ⊂⊃977(1)—NEW TRIAL ⊂⊃6—REVIEW—MATTERS REVIEWABLE.

The granting or refusing of a motion for new trial is in the discretion of the lower court, which cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3860; New Trial, Cent. Dig. §§ 9, 10.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Clarksburg; Alston G. Dayton, Judge.

Action between the City of Grafton and Gentry Bros.' Shows. There was a judgment for the latter, and the former brings error. Writ dismissed.

John L. Hechmer and G. W. Ford, both of Grafton, W. Va., for plaintiff in error.

Edward G. Smith and Stephen G. Jackson, both of Clarksburg, W. Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This case comes here on writ of error from the District Court of the United States for the Northern District of West Virginia. The defendant in error at the first call of this case entered a motion to dismiss upon the grounds (1) that the record was not filed and printed as provided by rule 16 (150 Fed. xxix, 79 C. C. A. xxix); and (2) the petition for writ of error was not accompanied by an assignment of errors.

Notwithstanding the fact that the motion to dismiss was set down for hearing on February 12, 1917, and notice thereof was given to plaintiff in error, counsel failed to appear or file any brief in opposition thereto, and, further, when the case was called for argument, counsel did not appear, but filed a brief in opposition to the motion, and also a brief on the merits.

[1] Counsel insist that we ought not to dismiss the writ of error, inasmuch as the clerk of the District Court has certified that the assignment of errors was properly filed in the court below on October 4, 1916, and should have been incorporated as a part of the record, but by inadvertence was omitted therefrom, notwithstanding the assignment of errors had theretofore been properly filed and was in the papers when the record was prepared.

It appears that counsel were served with notice of motion to dismiss on the 2d day of February, and on the 7th day the clerk issued the certificate in question which was filed here on the following day, to wit, the 8th day of February. Thus it appears that this certificate was made after the motion to dismiss was filed in this court. Under the circumstances, it was the duty of counsel, if they desired to have the assignment of errors made a part of the record, to have suggested a diminution of the record and requested this court to grant an order directing

the clerk of the District Court to transmit to this court that portion of the record which had been omitted. This counsel failed to do. The clerk of the lower court, in the absence of such authority, had no right to transmit the assignment of errors after the record had been made up, transmitted, and the case docketed in this court. Thus it will be seen that counsel have utterly failed to comply with the rule as respects the preparation and filing of assignment of errors.

Among other things, rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii) contains the following provision:

"* * * But the court, at its option, may notice a plain error not assigned."

In pursuance of this provision we have carefully examined the charge of the court below, and its refusal to grant certain instructions requested by the plaintiff in error; but, being of opinion that the court did not err in either instance, we would not be inclined to disturb the judgment of the court below, even if the case had been properly brought here, and this disposes of the point sought to be raised by the second alleged assignment of error.

[2] In addition to what we have said, it appears from an examination of the alleged assignment of errors that the first assignment is not in conformity with rule 11, in that it does not quote the full substance of the evidence admitted. Newman v. V. T. & C. Steel & Iron Co., 80 Fed. 228, 25 C. C. A. 382; Cole Mfg. Co. v. Mendenhall, Adm'x (decided by this court March 8, 1917) 240 Fed. 641, — C. C. A. —.

[3] And the third assignment, which relates to the refusal of the court below to set aside the verdict of the jury, is not well taken, inasmuch as the granting or refusing of such motion is in the discretion of the trial judge, and therefore not reviewable. This disposes of the point sought to be raised by the third alleged assignment of error.

It sometimes occurs that, after an examination of the record, as in this instance, the judgment of the court below should not be disturbed, even if the case had been properly before us; but it not infrequently occurs that such is not the case, and we sincerely trust that the attorneys of this circuit will in the future conform more strictly to the rules and practice by which this court is governed.

For the reasons stated, the motion to dismiss is granted.

Dismissed.

## SOUTHERN RY. CO. v. McGUIN.

(Circuit Court of Appeals, Fourth Circuit. February 20, 1917.)

No. 1453.

1. COMMERCE ⟸27(5)—FEDERAL EMPLOYERS' LIABILITY ACT—INJURIES TO SERVANT—EMPLOYMENT—"INTERSTATE COMMERCE"—SECTION MAN.

A section man, engaged in assisting a railroad surveyor in survey made to improve the curve in a track used in interstate commerce, is employed in "interstate commerce," within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. MASTER AND SERVANT ⟸278(18)—INJURIES TO SERVANT—EVIDENCE—NEGLIGENCE OF MASTER.

In an action for the death of a railroad section man, who was struck by a train running north on the south-bound track, evidence *held* sufficient to warrant the jury in finding negligence of the engine men in failing to sound sufficient warning signals to deceased, in view of the unusual operation of the train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 971.]

3. MASTER AND SERVANT ⟸137(4)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—OPPOSITION OF TRAIN.

Running a north-bound train on the south-bound track is not negligence, but imposes on the railroad company greater precautions to warn employés of the approach of the train, since it must take notice that the employé will be somewhat less on guard against a train coming from that direction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 274, 277, 278.]

4. MASTER AND SERVANT ⟸213(4)—INJURIES TO SERVANT—ASSUMPTION OF RISK—NEGLIGENCE OF MASTER.

A railroad section man assumes the risk of the occasional necessity to run trains on tracks intended for those coming in the opposite direction, but the risk so assumed is subject to the limitation that the trains be run with the care to be reasonably expected under such conditions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 562.]

5. TRIAL ⟸296(6)—INSTRUCTIONS—REFUSAL OF REQUESTED CHARGE—REPETITION OF CHARGE.

The refusal of unobjectionable requests by defendant to charge on the subject of assumption of risk is not prejudicial, though no instruction on the subject of assumption of risk was given under that name, where another instruction, given at defendant's request, accurately and clearly stated that the employé assumed all risk of his occupancy and his situation not due to defendant's negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

Knapp, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Virginia, at Alexandria; Edmund Waddill, Jr., Judge.

Action by Virginia McGuin, as administratrix of Charles McGuin, deceased, against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

M. Carter Hall, of Fairfax, Va. (Moore, Keith, McCandlish & Hall, of Fairfax, Va., and Robert B. Tunstall, of Norfolk, Va, on the brief), for plaintiff in error.

Leo P. Harlow, of Alexandria, Va. (Charles Bendheim, of Washington, D. C., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. Charles McGuin, a section man, was struck and killed by one of the defendant's locomotives on January 22, 1912. In this action under the federal Employers' Liability Act, his administratrix recovered a verdict for $3,000 for the benefit of his wife and children.

[1] The first position taken is that the jury should have been directed to find a verdict for the defendant, because the only reasonable inferences to be drawn from the evidence were: (1) McGuin was not engaged in interstate commerce at the time of the accident. (2) His death was due to his own negligence without negligence on the part of the defendant. (3) McGuin assumed the risk.

Prior to the day of the accident, McGuin had been engaged in the usual track work done by section men. On that day, by direction of the track foreman, he was working with Parati, a road engineer, who was surveying and setting stakes with the view of improving a curve by a slight change in the track. At the point of the accident the road was double-tracked, and, owing to a broken rail in the north-bound track, a north-bound passenger train was running at about 35 to 40 miles an hour on the south-bound track. A few minutes before the approach of the train, Parati, the surveyor, had sent McGuin north to a designated point to hold a rod by means of which he intended to take a back sight. McGuin started on the north-bound track looking for the designated station. When in a cut on a curve, where he would have been able to see the approaching train only 661 feet, he was struck by the engine and killed. Parati completed the work by placing the stakes to guide the trackmen in changing the rails, but the change in the track was never made. The defendant is a carrier of both intrastate and interstate commerce.

The case of Pedersen v. Delaware, etc., R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, seems conclusive on the first point. It was there held that the work of keeping in repair the track, roadbed, and other instrumentalities of a railroad engaged in interstate commerce is so closely related to interstate commerce as to be in practice and in legal contemplation a part of it. The work held to be a part of interstate commerce was the carrying of bolts or rivets to be used in taking out an old girder of a bridge and putting in a new one. Here the work was surveying and marking the changes to be made in the position of the cross-ties and rails, so as to make a better curve. No distinction can be founded on the failure of the railroad to complete the work by actually making the changes contemplated. Making the survey was as much a part of the work as laying the rails according to the survey. The numerous cases in which the work was on things which had not at the time become instrumentalities of interstate commerce obviously have no application.

[2] The second proposition, that there was no proof of negligence on the part of the defendant, is one of difficulty. The train had passed Parati and Miller, another workman, when the accident occurred, and the question of negligence depends upon their testimony and that of Lynn, the engineer, and Daniels, the fireman. The fireman testified that he was looking out from the left side of the cab, and saw McGuin walking between the two tracks, where he would probably have been struck; he called the engineer's attention to him; the engineer blew a crossing signal; McGuin moved out of his sight; the engineer then applied the brakes and blew the alarm signal; he last saw McGuin for an instant within 8 or 10 feet of the engine, as he was coming across to the left rail of the south-bound track. The engineer testified that, upon the fireman speaking to him, he leaned out of the cab and saw McGuin between the two tracks, where he considered him safe, but he blew the station signal; McGuin looked over his shoulder, seemed to see the situation, stepped upon the north-bound track, where he was safe, and walked on, then looked straight back to the approaching train, seemed to become confused, started two or three ways in a second, and then darted across the south-bound track in front of the engine and was struck, when one more step would have put him clear. As he started across the track the alarm signal was given and the emergency brakes applied.

Miller's testimony differs in the important particular that only the alarm signal was given to McGuin. He says that, standing on the track looking at McGuin, he saw him, just as he was passing out of sight, change his course towards the south-bound track; immediately afterwards, as the train approached, but before it was in sight, it blew a station signal, which he supposed was for Springfield or Edsall; after the train had passed him, he heard only the alarm signal, and that at the same moment the emergency brakes were applied. Miller, from the conditions surrounding him and McGuin, had his attention concentrated on the train and was on the alert for its signals; and if his testimony be accepted on the point of difference between him and the engineer and fireman with respect to the signal, it would support a reasonable inference that, if McGuin heard the train, he supposed it to be on the north-bound track and so moved to the south-bound track to escape it, that, if the fireman and engineer saw him, they must have seen him on or near the south-bound track, and that the engineer gave no signal to warn him of the unusual fact that a north-bound train was approaching on the south-bound track until it was too late for him to escape.

[3] Running a north-bound train on the south-bound track is not evidence of negligence, and all the employés of the railroad must take notice of the occasional necessity to make the change. Nevertheless, as that is not the usual method of running, the railroad company must take notice that their employés will naturally be somewhat less on guard against a north-bound train running on a south-bound track, and due care requires greater precautions. The case is thus distinguished from the cases holding that under ordinary conditions an engineer may assume that a man in the apparent possession of his faculties will get

out of the way of an approaching train. Therefore it was not unreasonable to hold the railroad company guilty of negligence in this case, since it could well be inferred from Miller's testimony that the engineer, running a north-bound train around a curve on a south-bound track, saw McGuin on or very near the south-bound track, and gave him no signal till it was too late. This conclusion is so clearly consonant with common sense, and the principle has been so recently discussed and stated by this court in Southern Ry. Co. v. Cook, 226 Fed 1, 141 C. C. A. 115, that reference to the adjudicated cases seems unnecessary.

[4] These considerations also dispose of the position that McGuin's death was due to a risk assumed by him. He assumed the risk of the occasional necessity to run trains on tracks intended for trains going in the opposite direction, but the risk assumed was subject to the limitation that such trains should be run with the care to be reasonably expected under such conditions. Whether this train was so run was, as we have pointed out, a question for the jury. There is good ground to say McGuin was guilty of contributory negligence in assuming, as he probably did, that the train was on the north-bound track. Belt Ry. Co. v. Skszypczak, 225 Ill. 242, 80 N. E. 115. But contributory negligence would not prevent a recovery.

[5] It is true that the District Judge refused to charge one or more unobjectionable requests of the defendant on the subject of assumption of risk, and that no instruction on the subject of assumption of risk was given under that name. But the defendant was not prejudiced by the omission, for instruction F, given at defendant's request, is an accurate and clear statement that McGuin assumed all risks of his occupation and his situation, not due to defendant's negligence in failing to give warning after perceiving his peril.

Affirmed.

KNAPP, Circuit Judge (dissenting). I am unable to concur in affirming the judgment in this case, because of my conviction that nothing was shown which would warrant the jury in charging the railroad company with negligence. The majority opinion concedes that any additional hazard resulting from running a north-bound train on the south-bound track was a risk assumed by the employé, but holds that this somewhat unusual movement called for greater care for the protection of those at work on the right of way. Granting this to be so, the question nevertheless remains whether there was any proof which permitted an inference of failure to take every reasonable precaution which was required by the actual situation. If the testimony of the engineer and fireman, the only eyewitnesses of the accident, is to be believed, it cannot be doubted that McGuin had ample warning of the approach of the train and could plainly see that it was on the south-bound track. It is undisputed that from the point where he was struck there was an unobstructed view of the train when it was still at a distance of some 660 feet, or about an eighth of a mile. And in my judgment it does not matter whether the engineer blew a crossing signal or an alarm signal when McGuin was first seen, because the signal then

given served to warn McGuin, who at once turned about, looked at the train, and stepped to a place of safety on the north-bound track.

But the jury were permitted to disregard this testimony, and to find that no warning was given until too late, because Miller says that he heard a station whistle, probably for Edsall, and then, after an interval, a danger signal, which was doubtless the one given when the train was right upon McGuin. In other words, because Miller did not hear the crossing signal, to which the engineer and fireman testified, the jury were allowed to find that the crossing signal was not given, and therefore that McGuin had no warning that a train was coming, much less that it was on the south-bound track. This seems to be the theory upon which the recovery is sustained, although in the brief of defendant in error it is assumed and asserted that a crossing signal was given, from which it is argued that:

"If the engineer had blown the true danger signal when he blew the false crossing signal *for McGuin*, the latter would more likely be living than dead."

Moreover, Miller was at a considerable distance to the south, around the curve in a cut, and the train was still further south of him, so that he could not yet see it, when the station signal he mentions was given, and it was three or four minutes after McGuin had passed entirely out of his sight before he heard the danger signal. He could not know, and did not attempt to say, how far McGuin had gone, or where he was walking, when the train got where the engineer could see him. Yet on this alleged discrepancy between the testimony of the engineer and fireman, and the negative testimony of Miller, who does not say that a crossing signal was not given when the train was still an eighth of a mile from McGuin, the jury is upheld in ignoring the positive testimony of two reputable witnesses—convicting them in effect of deliberate perjury—and rendering a verdict which, as I see the case, has only the support of pure speculation.

I think a verdict should have been directed for the defendant.

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## CONTINENTAL LIFE INS. CO. v. SEARING.

## EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES v. SAME.

(Circuit Court of Appeals, Third Circuit. March 9, 1917.)

Nos. 2129, 2130.

1. INSURANCE ⊂⊃668(14)—LIFE INSURANCE—ACTIONS—PROOFS OF LOSS—SUFFICIENCY—QUESTION FOR COURT.

Where life policies required proofs of death as a condition precedent to recovery, the question of the sufficiency of the proofs is for the court alone, and if sufficient the case then should be submitted to the jury, and if insufficient there is no basis for action.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1747, 1749, 1750, 1766, 1768.]

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. INSURANCE ⟸659(1)—LIFE INSURANCE—ACTIONS—EVIDENCE.
In an action on a life policy, where insured's death was denied, the admission in evidence generally of proofs of death is reversible error; the proofs being self-serving declarations as to the matter in controversy.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1691, 1693.]

3. INSURANCE ⟸665(5)—LIFE INSURANCE—ACTIONS—EVIDENCE—SUFFICIENCY.
In actions on life policies, evidence *held* to warrant findings that insured was dead, having met his death through accidental drowning.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1719, 1721, 1722.]

4. DEATH ⟸1—PRESUMPTIONS—EFFECT OF.
Though there is, until the expiration of seven years, a presumption of continuity of life, in case of disappearance such presumption may be overcome by the circumstances surrounding the disappearance.
[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1–3.]

5. EVIDENCE ⟸141—SIMILAR FACTS—OTHER INJURIES.
In action on a life policy, where recovery was sought for the death of insured, who, having entered the surf in the early evening, disappeared in a short space of time, evidence of other disappearances at the same beach was inadmissible.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 406, 408–413.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. W. Thompson, Judge.

Actions by Nancie M. Searing against the Continental Life Insurance Company and against the Equitable Life Assurance Society of the United States. There were judgments for plaintiff, and defendants bring error. Reversed and remanded.

Ruby R. Vale, of Philadelphia, Pa., and William F. Kurtz, of Wilmington, Del., for plaintiff in error Continental Life Ins. Co.

George Douglas Hay, B. Gordon Bromley, and Thomas De Witt Cuyler, all of Philadelphia, Pa., for plaintiff in error Equitable Life Assur. Soc. of United States.

Wm. W. Porter and Sidney E. Smith, both of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case Mrs. Nancie M. Searing, a citizen of Pennsylvania, brought suit against each of the defendant insurance companies, corporate citizens of other states, to recover on a policy on the life of her husband. On trial by the court below she recovered verdicts, and on entry of judgment thereon each company sued out a writ of error.

As the alleged errors are the same in both cases, we dispose of both in this opinion. The questions here involved are: First, whether the court erred in refusing the companies' request for binding instructions; and, secondly, whether, if the case was one for a jury, the court erred

in the admission of certain testimony and in certain language used in its charge.

Turning to the first and underlying question, we are of opinion that under the evidence the issue here involved was one which fell within the province of a jury, and not the court, to determine. Turning to such evidence, we find, for example, that on November 10, 1914, the defendant the Continental Life Insurance Company executed and delivered its policy here sued on, whereby it covenanted to insure the life of Frederick Roe Searing and "to pay at its home office $5,000 immediately on receipt of due proof of the death of the insured, Frederick Roe Searing, of Philadelphia, Pa., while this policy is in force to the beneficiary, Nancie M. Searing, wife of the insured," etc. The allegations of the plaintiff, the beneficiary, were that her husband died on August 17, 1915, at Atlantic City; that due proofs of his death were furnished the company; that thereby a right of action had accrued to her. The defendant denied the insured's death, and also the furnishing of due proofs of death by the beneficiary. Much of the confusion in this case arises from the course pursued in the trial, and, as there must be a retrial, we indicate the course to which the plaintiff's case should be directed on a retrial.

[1] The policy provides the beneficiary furnish due proofs of death of the insured as a condition precedent to a right of action. When, therefore, proofs of death are offered in evidence, they are received by the court to enable it to determine whether the condition precedent to suit had been met. The jury have nothing to do with that question or with the contents of such proofs. The preparatory question of the sufficiency of the proofs should be so disposed of by the court itself that the contents of the proofs are not disclosed to the jury. If the court is satisfied the proofs fulfill the requirements of the policy, it is its duty to allow the case to proceed, and thereafter the jury's province begins to consider such pertinent evidence as may thereafter be produced. If the court is of opinion the proofs offered are not in due form and substance, the court so holds, and there is no issue for the jury to try. It will thus be seen that in the ordinary case the proofs are for the consideration of the court alone, and having satisfied their purpose, namely, the fulfillment of a step precedent to the right of action, they have served their purpose, and for jury purposes they disappear from the case.

[2] They are in their nature ex parte, self-serving statements, and to permit their ex parte statements to influence a jury is so clearly at variance with the principles of evidence that a court cannot too carefully in the trial of insurance cases keep wholly to itself, and keep wholly from a jury, proofs of loss. The danger of departure from this safe course is well evidenced by the record in this case, where, for example, letters of plaintiffs' counsel, which summed up the plaintiff's case and argued it in detail, were considered by the jury. So, also, affidavits of other persons, which accompanied the proofs of death, matters proper enough in themselves for the information of the company, were read to the jury, when all such matters were for the consideration of the court alone. Of course, cases may arise where

a court might have to submit to a jury some issue connected with the proofs of death, and therefore the proofs themselves would be received and considered; but it suffices to say the present was not such a case. Under the course this trial took we think it clear that substantial harm was done to the defendants' case by permitting proofs and the accompanying documents which were solely for the consideration of the court, to be also given to the jury. We cannot close our eyes to the fact that they were meant to influence, and naturally would influence, the jury in its verdict.

[3] Turning to the evidence proper for the jury, we find it tended to show that the deceased was last seen by any one as he entered the surf at Atlantic City on the evening of August 17, 1915. The contention of the plaintiff is that there were such circumstances of imminent peril incident to his subsequent disappearance as warranted submission of the question of his death to the jury. In the first place, the evidence tended to show an absence of any reason for his absconding; that he was engaged in active business in Philadelphia, and while he had financial anxieties, he was not pressed or embarrassed; that he was carrying on his business and seeking additional business in such a way as to lead to the belief that he was anxious to continue it; that he was in a bathing suit when last seen, and that he entered the water with the expectation of having a companion, who was with him, join him as soon as he could get a bathing suit; that on the return very shortly of that companion he had thus suddenly disappeared, without, so far as the proofs go, having access to any street clothes; that further proofs tended to show that, during the spring preceding his disappearance, Searing, on account of his wife's illness, had taken an apartment at Atlantic City, where his wife stayed with her mother, and where he went himself from time to time; that on the afternoon of his disappearance he left Philadelphia in an automobile in company with one Miller, and started for Atlantic City, the arrangement being that Miller should return to Philadelphia by rail the next morning, while Searing brought his wife back by the auto to see her physician in Philadelphia; that en route down he telephoned his wife they were coming, and asked her to delay dinner so as to enable him to take a surf bath. There was also proof tending to show that Searing had at one time had an accident which left the muscles of his foot so bound that overexertion tended to cramp his lower limbs; that shortly before his disappearance he had been examined by a physician and disclosed high blood pressure, indicating heart deterioration; that during that day he had complained of abdominal cramp.

Searing's auto broke down shortly before reaching Atlantic City. Some time was spent in a fruitless effort to repair it, and both he and Miller were picked up by a passing automobile and taken within a couple of blocks of Searing's apartment. From there the men hurried to that apartment and up three flights, where Searing put on a bathing suit and, leaving his clothes, started for the beach. While at the house Searing complained of being warm and tired. On leaving the apartment about 7 o'clock, the two men stopped at a bar, where they took a drink, and where it appeared that Searing had no money

with him, and Miller, who was in his street clothes, had to pay for such drinks. Searing then proceeded to the shore, while Miller started to hire a bathing suit, agreeing to meet him later. The last seen of Searing by Miller, the former was just entering the surf. The proofs showed that the temperature of the water on that day and the preceding was below normal, and lower than on any day that month before or after. Under the then existing conditions of current and tides, it was shown a body could be washed under the débris of an old pier, and if caught there was not likely to be recovered, but would be destroyed by crabs and fishes. The surf guards had left for the day. On Miller's return, in about 20 minutes, Searing had disappeared. An alarm was given, the police notified, but he was not seen again.

In view of these proofs, was the court bound to withdraw the case from the jury, and to hold as a matter of law that no inference could be drawn from these proofs that the insured was dead? We have not referred to the evidence produced by the defendant, to the contradictions of all the plaintiff's, and in view of the case going back for a retrial we refrain from any such discussion at all of it, or of the plaintiff's proofs in detail. For present purposes it suffices to say that an examination of all the proofs satisfied us that the court below would have been in error had it withdrawn the case from the jury.

[4] The law has said that after the lapse of seven years a presumption of death arises, but unless seven years have passed there is a presumption of life. This presumption of life can be met and overcome by proof of circumstances of specific peril to which the person disappearing was subjected, and we think there was evidence in this case which, if believed, tended to show such peril. Each case of disappearance has its own individual facts, and affords no controlling precedent for a case of disappearance under different facts. In support, however, of our conclusion that there existed in the present case proofs from which the presence of a specific peril could be found, to which Searing was subjected, we may refer to Fidelity v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922, and to avoid misapprehension we may say that the presence of such specific peril to Searing in this case makes our holding no departure in any respect from those firmly established Pennsylvania cases (Burr v. Sim, 4 Whart. [Pa.] 150, 33 Am. Dec. 50; Bradley v. Bradley, 4 Whart. [Pa.] 173; Whiteside's Appeal, 23 Pa. 114; Esterly's Appeal, 109 Pa. 222; Welch's Appeal, 126 Pa. 297, 17 Atl. 623; Mutual Benefit's Petition, 174 Pa. 1, 34 Atl. 283, 52 Am. St. Rep. 814), which in substance hold that mere disappearance for less than seven years creates no presumption of death when not accompanied by subjection to any special peril.

[5] Another matter remains to be noticed. Evidence was submitted of the disappearance of other persons at Atlantic City. This we think constituted error. Without here discussing each of these cases, and showing how they tended to becloud the issue in this case, we may say that every unexplained disappearance case is of necessity different in some particulars from all others, and none of those so testified to in this case involved any such general, or indeed special,

identity with the present case, as in any way threw any pertinent evidential light on the present issue. Their recital to the jury was, in our judgment, so misleading and prejudicial to the defendants' case that, if for no other reason, the judgment below should be reversed, and the cause remanded for further procedure.

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## DALY JUDGE MINING CO. v. TOWEY.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1917.)

No. 4568.

1. MASTER AND SERVANT ⊜276(4)—INJURIES TO SERVANT—EVIDENCE—CAUSE OF ACCIDENT.
   In an action for injuries to the operator of an electric mine motor, evidence *held* sufficient to support the jury's finding that the accident was caused by a loose plank in the track over which the motor was run.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959.]

2. MASTER AND SERVANT ⊜297(2)—INJURIES TO SERVANT—SPECIAL FINDINGS INCONSISTENT WITH GENERAL VERDICT.
   In an action for injuries to a mine motorman, caused by a loose plank in the track, special findings that the jury did not know how the plank became loose, or how long it had been loose, are not inconsistent with, nor insufficient to sustain, a general verdict for plaintiff.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1196.]

3. MASTER AND SERVANT ⊜118(1)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—SAFE PLACE TO WORK.
   It is the duty of a mining company to exercise ordinary care to keep the planks placed on the cross-ties between the rails of its track in a reasonably safe condition, so as not to cause an injury to an operator of the motor, and that duty is continuous.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209.]

4. MASTER AND SERVANT ⊜278(10)—INJURIES TO SERVANT—EVIDENCE—SAFE PLACE TO WORK—EXISTENCE OF DEFECT.
   In an action for injuries to a mine motorman, caused by a loose plank in the track, evidence *held* sufficient to sustain a verdict for plaintiff, notwithstanding testimony by defendant's inspector that he securely nailed the plank to the ties the day before the accident.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 964.]

5. APPEAL AND ERROR ⊜263(5)—PRESENTING QUESTIONS BELOW—EXCEPTIONS—MOTION FOR NEW TRIAL.
   The overruling of a motion for a new trial based on alleged errors in the instructions is not alone sufficient to reverse the judgment, where no exceptions were taken to any of the instructions given.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1521.]

In Error to the District Court of the United States for the District of Utah; Wm. H. Pope, Judge.

Action by Frank Towey against the Daly Judge Mining Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Robert A. Holland, Jr., of St. Louis, Mo. (William H. King, Joel Nibley, and M. E. Wilson, all of Salt Lake City, Utah, on the brief), for plaintiff in error.

E. C. Weber, of Fort Madison, Iowa (Albert J. Weber and Culbert L. Olson, both of Salt Lake City, Utah, on the brief), for defendant in error.

Before ADAMS, Circuit Judge, and REED and ELLIOTT, District Judges.

REED, District Judge. The defendant in error, who was plaintiff in the District Court, recovered judgment against the Mining Company, defendant in that court, as damages for a personal injury received by him while operating an electric motor upon a track in drawing cars to and from the defendant's mine to its mill. Two alleged grounds of negligence were submitted by the trial court to the jury:

(1) That defendant was negligent in failing to furnish a reasonably safe motor upon which the plaintiff was employed, in that it negligently left in the lower part of the motor an opening through which extraneous objects might pass and cause an injury to the motoneer.

(2) That the defendant was negligent in failing to provide a safe place or track upon which plaintiff was to work upon the occasion in question, in that it permitted a certain plank, laid upon the cross-ties on which the rails were laid, to become loose, with the result that the motor as it passed over the track caught this loose plank and carried or thrust it into the opening in the motor before referred to, where it caught and seriously injured the plaintiff's foot, necessitating its amputation.

At the close of the evidence the defendant moved for a directed verdict upon the ground that the testimony was insufficient to support either of these alleged grounds of negligence. This motion was denied, to which the defendant excepted, and the ruling is assigned as error.

The jury returned a general verdict for the plaintiff in the sum of $5,000. It also answered special interrogatories submitted by the court, which interrogatories and the answers thereto are as follows:

(1) What was the cause of the accident? A. A loose plank.
(1½) Was the motor used a reasonably safe one? A. No.
(2) Was the plank at the time and place of the accident loose? A. Yes.
(3) If so, how did it become loose? A. We do not know.
(4) How long had it been loose? A. We do not know.
(5) Did the witness Jones nail down the plank on February 14, 1912 (the day before the injury to the plaintiff)? A. No.

No objections were made to the submission of the special interrogatories; nor is either of the findings challenged as being inconsistent with the general verdict; nor was there any motion for a judgment upon the special findings because inconsistent with the general verdict; and no exceptions were taken to any of the instructions given by the court to the jury.

[1] The first assignment of error, based upon the denial of the motion to direct the verdict, is: (1) That the testimony is wholly insuffi-

cient to support the finding that the accident was caused by a loose plank in the track over which the motor was run, which caused the accident and resulting injury to the plaintiff. There is ample evidence to support this finding of the jury. It is true that defendant's track inspector, Jones, testified that he was frequently over the track in question, and was over it the day before the accident, and observed that the plank was then loose, and that he nailed it down firmly to the ties upon which the rails were laid; while one and perhaps two witnesses in behalf of the plaintiff testified that there was a loose plank in the track at the place where the accident occurred, and one of them testified that a loose plank had been there for some 10 days or more prior to the accident, that he could not definitely locate the same, but that it was in the vicinity of or close to the place in the track where the accident occurred.

[2] The finding of the jury that there was a loose plank at the time and place of the accident, and that the plank was the cause of the accident and injury to the plaintiff, is conclusive upon this question. The answer to the third interrogatory that the jury did not know how the plank became loose, and to the fourth that they did not know how long it had been loose, is not inconsistent with, nor insufficient to sustain, the general verdict. Whether or not the answer to interrogatory 1½ is sustained by the testimony is quite immaterial, for the finding that the accident was the result of a loose plank, which existed at the time of and shortly before the accident, is sufficient to sustain the verdict without the answer to this interrogatory.

[3, 4] The contention of the defendant is that there is not sufficient evidence to sustain the finding that a loose plank existed for such time before the accident that the defendant should have known of its existence. But it was the duty of the defendant to exercise ordinary care to keep the planks, which were placed upon the cross-ties between the rails, in a reasonably safe condition so as not to cause an accident to the motor (though that may have been in a reasonably safe condition) resulting in an injury to the plaintiff. This duty was continuous, and there was testimony by plaintiff's witnesses Archer and Nelson that a loose plank or planks existed in this track for some ten days, two weeks or more before the accident. Defendant's track inspector, Jones, testified that he went over the track the day preceding the accident; that he went over the track about ten times that day, which was February 14th, and said:

"I was on duty, and I did something with this plank. The planks were about 10 inches wide and about 10 feet long; 3 inches thick. I cleaned up some of the planks that were along the track there, and throwed them out of the window at this particular place, and I nailed that one down. There is ties there; that is part of the trestle, and the ties goes across the trestle, and I nailed the plank to the ties. We have single jack hammers about four pounds, and drive two nails on each end of the plank, and sometimes one in the center. On this occasion I used a 40 penny nail. I have got one in my pocket; that is the kind of nail I used. After I left that plank after driving these nails in, the plank was in good shape and it was fast to the ties. In driving these nails I met the ordinary and usual resistance that one meets in driving in good sound wood. It was after dinner on the 14th that I fastened that plank in the manner described, and by that I mean that it was along

about 1 or 2 or 3 o'clock, along in the afternoon. I passed over it on the 15th, the day of the accident. Those cars operated over the same place on the day of the 15th, all day long in the regular way, and I did not notice anything wrong with the plank with reference to its being loose or anything out of the ordinary. I gave to that plank and the track as I passed over it the usual attention that I gave it, and I discovered nothing out of the ordinary. I recall the last trip that we made on the 15th over that plank, and I recall noticing that plank, it was somewhere pretty close to 4 o'clock. Its condition then was good. It was fastened to the ties about 4 o'clock on the 15th; that was the last time I saw the plank before the accident (which was shortly after 6 o'clock on the evening of the 15th). The next morning I saw the plank in the condition in which I have described (that is, that it was badly injured, split in two, and was in the condition described by other witnesses)."

That the plank was loose on the day of the 14th is conclusively settled by the testimony of the track inspector, Jones, and by the finding of the jury. If it was loose upon that day when the track inspector passed over it, and it had been loose for some days prior thereto, as testified by the witnesses Archer and Nelson, the jury might well find that Jones did not nail the plank down as he testified that he did.

There are some other assignments of error, based upon rulings on objections to the testimony. We have examined these rulings, and find no reversible error in them.

[5] The defendant filed a motion for a new trial after judgment, in which it alleged that the court erred in some of its instructions to the jury, and assigns error in overruling that motion; but the overruling of the motion for new trial is not alone sufficient to reverse the judgment.

The judgment is affirmed.

The late Judge ADAMS heard the argument of this case, participated in its decision, and concurred in the result as announced in the foregoing opinion.

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## HIRSCH v. PEOPLE'S BANK OF PLAQUEMINE, LA., et al.

### In re LOUIS DANOS PLANTING & MFG. CO.

(Circuit Court of Appeals, Fifth Circuit. March 23, 1917.)

No. 3009.

BILLS AND NOTES ⊂=426—PAYMENT.

The holder of notes secured by a mortgage on land acquired by a bankrupt corporation, which assumed payment, demanded payment from an officer of the corporation, who was a son of the original maker. On suggestion of the officer, appellant agreed to carry such notes, whereupon the corporation paid to the holder the amount due on the notes, obtaining the money on demand notes. The notes were then delivered to appellant, and the demand notes taken up with funds paid by him. *Held* that, as the corporation merely acted as intermediary, the notes were not extinguished, the original maker never acquiring possession, under the rule that the legal result of a debtor's payment of his debt is to extinguish it,

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

and his reissue of the instrument evidencing the obligation does not revive it, or a mortgage which secured it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1223-1232.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

In the matter of the bankruptcy of the Louis Danos Planting & Manufacturing Company. From a decree disposing of the final account of Dr. J. L. Danos, trustee, on opposition of the People's Bank of Plaquemine, La., and of the petition of Emile Hirsch, the latter appeals. Reversed.

Paul G. Borron, of Plaquemine, La., and Clarence S. Hebert, of New Orleans, La., for appellant.

J. H. Pugh, of Plaquemine, La., and Walter Lemann, of Donaldsonville, La. (Edward N. Pugh, of Donaldsonville, La., on the brief), for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. In January, 1906, Louis Danos made a series of notes, each payable to his order, amounting in the aggregate to $60,000, which were secured by a mortgage and vendor's lien or privilege on the Milly plantation. Thereafter the mortgaged property was conveyed to the L. Danos Planting & Manufacturing Company, a corporation, which will be referred to as the Danos Company. By the act of sale to that company it assumed the outstanding mortgage and vendor's privilege notes, but the holders of those notes were not parties to that transaction. The Danos Company was adjudged bankrupt, and the Milly plantation was sold under orders made in the bankruptcy proceeding. Emile Hirsch presented four of the above-mentioned notes, aggregating $6,500. The People's Bank of Plaquemine, the holder of some of the secured notes, opposed the allowance of the notes presented by Hirsch as claims against the proceeds of the sale of the mortgaged property on the ground that those notes were paid by the Danos Company, it being averred that three of them, aggregating $4,000, were paid on February 8, 1912, and that the remaining note, for $2,500, was paid on February 21, 1912. This opposition was sustained as to the three notes alleged to have been paid on February 8, 1912, and was overruled as to the $2,500 note alleged to have been paid on February 21, 1912. The appeal is from a decree to this effect.

In January, 1912, the notes in question, and others of the series, were held by Dr. W. A. Holloway, and became payable by the expiration of the time for which the original dates of payment had been extended. Dr. Holloway then made it known that "he would like to have some money." Dr. J. L. Danos, who was a son of the maker of the notes and also an officer of the Danos Company, between the date of the maturity of the notes on January 2 and February 8, 1912, had several conversations with Dr. Holloway in regard to the notes held by the latter. Dr. Holloway made it known that he "could do with about $6,500," and that he was willing for some one else to take up

and carry that amount of the notes he held. Dr. Danos applied to several persons, including Emile Hirsch, to take and carry some of the notes held by Dr. Holloway. Hirsch agreed to take $6,500 of those notes. What seems to us to be the convincing preponderance of the evidence is to the effect that this agreement by Hirsch with Dr. Danos was made prior to the delivery of $4,000 of the notes by Dr. Holloway to Dr. Danos on February 8th, and that at that time the understanding between Dr. Danos and Hirsch was that the latter would on February 21st have in hand the amount in cash required to pay for $6,500 of the notes held by Dr. Holloway. The testimony of Dr. Danos to the effect that Hirsch's agreement to take the $6,500 of notes was made after February 8th is in conflict with that of several other witnesses, some of whom were disinterested, and is not in harmony with his own previously given version of his transaction with Hirsch.

Furthermore, there was evidence tending to prove that Dr. Danos was improperly influenced to change his version of the Hirsch transaction, in that he was a party to an agreement or understanding with the purchaser of the mortgaged property, which had the effect of making it to the interest of the Danos family to defeat the asserted right of Hirsch to participate in the distribution of the amount for which that property was sold. On February 8th, after Hirsch had agreed to take $6,500 of the notes on February 21st, Dr. Holloway delivered three of the notes, aggregating $4,000 principal, to Dr. Danos, and received from the latter the Danos Company's check on the People's Bank of Plaquemine for $4,032, being the amount of the notes, with interest, from January 2d to February 8th. On the date this check was drawn the drawer did not have to its credit in the drawee bank the amount required to meet the check. On February 9th the drawee bank lent $4,000 on a demand note made to it by the Danos Company, credited that company's account with that amount, and paid the check given to Dr. Holloway when it was presented on the 9th. On February 21st Dr. Danos received from Dr. Holloway another of the notes held by him, one for $2,500, gave him the Danos Company's check on the same bank for $2,527.78, being the principal and interest to that date, delivered to Hirsch that note, and also the three notes obtained from Dr. Holloway on the 8th, and received from Hirsch his check on the Iberville Bank & Trust Company for $6,572.22, payable to the order of the Danos Company. The amount of this check was the principal of the four notes, with interest thereon to February 21st. This check was deposited in the People's Bank of Plaquemine to the credit of the Danos Company, and the proceeds of it were used in paying the Danos Company's demand note of the 8th and the check given to Dr. Holloway on the 21st.

When the three notes delivered by Dr. Holloway to Dr. Danos on the 8th were delivered to Mr. Hirsch on the 21st, they were in the same condition in which they were when Dr. Holloway parted with them on the 8th. On the back of each of them was the indorsement in blank of Louis Danos and entries showing payments of interest and extensions of the time of maturity. Nothing on either of the notes indicated that the principal amount it called for had been

paid in whole or in part. No party to the transactions of the 8th, 9th, and 21st intended or understood that those transactions, or any of them, had the effect of paying or extinguishing the four notes in question, or either of them. Dr. Holloway, who was unwilling to grant further extension or indulgence as to all the notes he held, consented to transfer part of them to another, who was willing to take and hold them if such a person could be found, and, at the time of the deliveries made by him to Dr. Danos, understood that the latter was getting the notes for a third person who had agreed to buy them. Dr. Danos did not understand or intend that anything he did, individually or in the name of the Danos Company, effected a payment or extinguishment of the notes, and delivered them to Mr. Hirsch as existing secured obligations. Mr. Hirsch bought the notes as an investment, understanding that as to them he succeeded to all the rights of Dr. Holloway, the former holder. Louis Danos, the maker of the notes, never reacquired possession of them after he indorsed and delivered them to another holder, did not provide or furnish the money to meet the check given to Dr. Holloway on the 8th, and, when the notes were delivered to Mr. Hirsch on the 21st, distinctly manifested his understanding that they were still in force by signing a memorandum on each of them showing that it was extended to January 2, 1915. It was not made to appear that either Dr. Holloway or Mr. Hirsch was even aware that the Danos Company had assumed the payment of the notes. The former in accepting the Danos Company's checks, and the latter in giving his check to that company, cannot be regarded as dealing with a party whose relation to the notes was that of the maker of them.

What all the parties to the transactions intended was a transfer of the notes from one holder to another. The claim that the notes were paid contrary to the intention of all the parties to the dealings is sought to be supported by invoking the rule that the legal result of a debtor paying his debt is to extinguish it, and that his reissue of the instrument evidencing the obligation does not revive it or a mortgage which secured it. Hibernia National Bank v. Succession of Gragard, 109 La. 678, 33 South. 728. The evidence in the case negatives the existence of such a state of facts. Louis Danos, the sole maker of the notes, did not make the alleged payment, and, so far as the evidence indicates, has never had the notes in his possession since he indorsed them. The dealings of Dr. Holloway and Mr. Hirsch with reference to the notes were not with the maker of them, but with Dr. Danos, a total stranger to the notes, so far as Dr. Holloway and Mr. Hirsch knew or were concerned. Dr. Danos by his conduct manifested an interest and purpose to postpone collection of the notes, instead of bringing about the payment of them. He negotiated and arranged with Dr. Holloway and Mr. Hirsch for a transfer of the ownership from the former to the latter. Obviously the transaction with the bank was but a means adopted in bringing about this result.

The rule invoked does not stand in the way of even the maker of matured notes, or one who has assumed the obligation of the maker, arranging for a transfer of them from a holder who is unwilling to grant a desired extension of the time of payment to one who consents to buy

and hold them as an investment. The maker may act as an intermediary in carrying out such an arrangement when made, as by procuring a third person to pay to the transferor the consideration for the transfer prior to the time when the agreed transfer is to be consummated by the transferee paying the consideration and taking the notes. Where, as in this case, all the parties to the transaction clearly intended a purchase by Mr. Hirsch of notes held by Dr. Holloway, with the security unimpaired, and understood at the time that this result was accomplished by what was done, the transaction is to be given effect as a purchase without regard to the mode adopted to accomplish the intended result. Dodge v. Freedman's Sav. & Trust Co., 93 U. S. 379, 23 L. Ed. 920; Ketchum v. Duncan, 96 U. S. 659, 24 L. Ed. 868; Swope v. Leffingwell, 72 Mo. 348; Johnston v. Schnabaum, 86 Ark. 82, 109 S. W. 1163, 17 L. R. A.(N . S.) 838, 15 Ann. Cas. 876; Gernon v. McCan, 23 La. Ann. 84; Casco National Bank v. Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319; 3 R. C. L. 1268; 7 Cyc. 1025. The conclusion is that the notes held by Mr. Hirsch have not been paid, were in full force and effect when he acquired them by purchase, and remained secured by the mortgage and vendor's lien or privilege.

It follows that the decree under review should be reversed; and it is so ordered.

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## BRADY et al. v. ANDERSON.*

(Circuit Court of Appeals, Second Circuit. February 8, 1917.)

No. 149.

INTERNAL REVENUE ⟸7—INCOME TAXES—IMPOSITION.

The Sixteenth Amendment, under which Income Tax Act (Oct. 3, 1913, c. 16, 38 Stat. 166), was passed, was ratified February 28th of that year. Section 2 A, subd. 1, of the act (Comp. St. 1913, § 6319), declares that there shall be levied, assessed, collected, and paid, annually, upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States and every person in the United States, though not a citizen, a tax of 1 per cent. upon such income, etc. Subdivision D (Comp. St. 1913, § 6324) declares that the tax shall be computed upon the remainder of such net income of each person subject thereto accruing during the preceding calendar year ending December 31st, provided that for the year ending December 31, 1913, such tax shall be computed on the net income accruing from March 1st to December 31st of that year, after deducting five-sixths only of the specific exemptions and deductions provided for. Subdivision E (Comp. St. 1913, § 6325) declares that nothing in the section shall be construed to release a taxable person from liability for income tax, nor shall any contract entered into after the act takes effect be valid in regard to any federal tax, while subdivision G (a) (Comp. St. 1913, § 6327) declares that the normal tax imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint-stock company, or association, and every insurance company. Plaintiff's testator died July 22, 1913, before the enactment of the statute. His executors, contending that the tax is against persons who are citizens or residents of the United States, sought to recover income taxes paid on the ground that deceased was not a citizen or resident at the time of the passage of

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied.

the act, having previously died. *Held* that, notwithstanding the tax is against citizens and residents of the United States, yet, as it was made retroactive, the constitutional amendment having been adopted February 28, 1913, it applied to deceased, and, as he could not personally make return, his executors are bound to make the same.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10.]

In Error to the District Court of the United States for the Southern District of New York.

Action by Nicholas F. Brady and others, executors of the last will and testament of Anthony N. Brady, deceased, against Charles W. Anderson, late Collector of Internal Revenue, Second District of New York. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

Joline, Larkin & Rathbone, of New York City (John M. Perry, of Brooklyn, N. Y., and Charles A. Doolittle, Jr., of New York City, of counsel), for plaintiffs in error.

H. Snowden Marshall, U. S. Atty., of New York City (Ben. A. Matthews, Asst. U. S. Atty., of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an action against the collector of internal revenue by the executors of Anthony N. Brady, deceased, to recover taxes assessed by the Commissioner of Internal Revenue and paid by them under protest upon income received by Brady during his lifetime before the Income Tax Act of October 3, 1913, imposing a tax, had been passed.

The Sixteenth Amendment, by virtue of which the statute was enacted, was ratified February 28, 1913, and the Supreme Court has for that reason held that Congress had power to make it retroactive to March 1, 1913. Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 20, 36 Sup. Ct. 236, 60 L. Ed. 493.

Anthony N. Brady died July 22, 1913, and his executors, in accordance with the requirement of the Commissioner of Internal Revenue, made a return of the income received by him between March 1, when the act went into effect, and July 22, 1913, when he died. The Commissioner assessed a tax of $61,654.72.

The case having come on for trial before Grubb, J., and each side having moved for the direction of a verdict, he directed a verdict for the defendant. This is a writ of error to the judgment entered thereon.

The questions presented are purely of law, involving only the construction of the statute. We confine ourselves to the consideration of the provisions relating to citizens and residents of the United States.

Section II of the act reads as follows:

"A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property

owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere. * * *

"D. The said tax shall be computed upon the remainder of said net income of each person subject thereto, accruing during each preceding calendar year ending December thirty-first: Provided, however, that for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be computed on the net income accruing from March first to December thirty-first, nineteen hundred and thirteen, both dates inclusive, after deducting five-sixths only of the specific exemptions and deductions herein provided for. On or before the first day of March, nineteen hundred and fourteen, and the first day of March in each year thereafter, a true and accurate return, under oath or affirmation, shall be made by each person of lawful age, except as hereinafter provided, subject to the tax imposed by this section, and having a net income of $3,000 or over for the taxable year, to the collector of internal revenue for the district in which such person resides or has his principal place of business, or in the case of a person residing in a foreign country, in the place where his principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury shall prescribe, setting forth specifically the gross amount of income from all separate sources and from the total thereof, deducting the aggregate items or expenses and allowance herein authorized; guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals. * * *

"E. * * * Nothing in this section shall be construed to release a taxable person from liability for income tax, nor shall any contract entered into after this act takes effect be valid in regard to any federal income tax imposed upon a person liable to such payment. * * *

"The provisions of this section relating to the deduction and payment of the tax at the source of income shall only apply to the normal tax hereinbefore imposed upon individuals. * * *

"G. (a) That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships; but if organized, authorized, or existing under the laws of any foreign country, then upon the amount of net income accruing from business transacted and capital invested within the United States during such year. * * *"

The plaintiffs contend that the tax is against persons who are citizens or residents of the United States. The government contends that the tax is upon the property and not upon the person, which was the view taken by the trial judge.

The plaintiffs argue that as Brady, having died July 22d, was neither a citizen nor a resident of the United States October 3, 1913, at the time the act was passed, its language does not authorize collection of any tax upon income received by him. On the other hand, the government says that as the tax is upon the property, it makes no difference whether Brady was living or dead at that time.

In our opinion the tax is against the citizens and residents of the United States personally. They are chargeable in respect to income received by them. The statement that the tax is upon this income does not create an obligation in rem. It is only a way of saying that the owner is taxable with reference to the income. Taxable persons are spoken of throughout the act. The effect of making the act retroactive is, in

our opinion, to apply it to Brady exactly as if it had been enacted March 1, 1913, and as, by reason of his death, he cannot make a return, his executors, into whose hands his estate has come, must do so.

The judgment is affirmed.

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## JOHNSTONE v. BABB.

(Circuit Court of Appeals, Fourth Circuit. March 1, 1917.)

No. 1490.

1. BANKRUPTCY ⟸305—STATUTE—CONSTRUCTION.

Under Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 (Comp. St. 1913 § 9644), providing for the setting aside of preferential transfers, a mortgage given by a bankrupt within four months of bankruptcy will be set aside only in so far as it is a preference; but, if the mortgage be subject to attack under section 67 (section 9651), which is practically the Elizabethan statute against fraudulent conveyances, the lien itself may be vacated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 466–468.]

2. BANKRUPTCY ⟸303(3)—FRAUDULENT CONVEYANCES—EVIDENCE—SUFFICIENCY.

In a suit by a trustee in bankruptcy to set aside a mortgage given by the bankrupt within four months of bankruptcy, evidence *held* insufficient to show that it was either a preferential or fraudulent transfer, subject to attack under Bankr. Act July 1, 1898, § 60, or section 67, both of which provide for attack on such conveyances.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462.]

3. BANKRUPTCY ⟸184(1)—FRAUDULENT CONVEYANCES—ATTACK.

In such case, the mortgage cannot be questioned under the South Carolina statute against fraudulent conveyances (Civ. Code 1912, § 3455).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 275.]

4. FRAUDULENT CONVEYANCES ⟸166—BULK SALES ACT—MORTGAGE.

In such case, the mortgage which was on the bankrupt's stock of goods is not subject to attack, as violating the South Carolina Bulk Sales Act (Civ. Code 1912, § 2434); the bankrupt assuring the mortgagor the loan would enable him to pay off his debts.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 519.]

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville, in Bankruptcy; Joseph T. Johnson, Judge.

In the matter of the bankruptcy of W. C. Babb. Suit by Albert S. Johnstone, trustee in bankruptcy, against V. M. Babb. From a decree for defendant, complainant appeals. Affirmed.

A. C. Todd, of Laurens, S. C. (Haynsworth & Haynsworth, of Greenville, S. C., and H. S. Blackwell and Dial & Todd, all of Laurens, S. C., on the brief), for appellant.

R. E. Babb, of Laurens, S. C., and E. M. Blythe, of Greenville, S. C. (Simpson, Cooper & Babb, of Laurens, S. C., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

DAYTON, District Judge. [1] This case presents the nowise unusual question involved when a trustee in bankruptcy seeks, under sections 60 and 67 of the Bankruptcy Act, to assail a loan made to the bankrupt and secured within four months of his adjudication. A long line of decisions has determined that the relief sought, if granted, under section 60, extends only to an avoidance of the preference secured by the lender himself as a creditor, or as the practical agent of one who is a creditor. If such relief, however, is sought and granted, under section 67, which is practically the Elizabethan statute against fraudulent conveyances, generally adopted by the states of this country, such relief may extend to the extinguishment of the lien created, as having been so created for the purpose of hindering, delaying, and defrauding creditors.

[2] Here appeal is made to both sections by the trustee for relief. Necessarily the case must be determined by the facts disclosed. These facts briefly stated are: W. C. Babb, the bankrupt, and V. M. Babb, the appellee, are distantly related by blood and are connected by marriage, having married sisters, the daughters of J. L. Mahaffey. Both resided in Fountain Inn, S. C., and both were engaged in separate and distinct lines of mercantile business. Mahaffey, the father-in-law, was a farmer and a merchant to a limited extent, living 12 miles in the country from Fountain Inn. V. M. Babb, the appellee, was a man of means, "regarded as one of the wealthiest men of the town," and in the habit of lending considerable sums of money. W. C. Babb had been a merchant for a number of years, first in the country, but for something like four years in this town of Fountain Inn. Besides his mercantile stock, worth in the neighborhood of $5,000, in the fall of 1914, he owned three tracts of land, 127 acres, 118¾ acres, 129 acres, and a residence property in the town. In 1912, two years before, he had given a mortgage to a local bank on the 127 acres and the 118¾ acres for $2,500, and another for $4,554.36 on the town residence property. This latter debt had, however, by the fall of 1914, been reduced by him, through sale made of part of the lot, to $2,054.36. These mortgages were duly recorded at or near the time of their execution, but apparently in no way affected his financial reputation and credit in the business world. This fall of 1914 brought hard times to this community. It found the bankrupt owing between $7,000 and $8,000 independent of the mortgage debts. Some of this indebtedness was represented by notes due in banks seeking to make collections. His father-in-law, Mahaffey, was surety for him on two notes due such banks, aggregating $1,111.82. In this condition he applied to appellee, V. M. Babb, for a short loan of $2,500, telling him that—

"he had some notes that were past due, and then some bills that would be due right soon, probably some of them then, and if he could get $2,500 that he could pay up all of his bills so he could run along all right and put him in easy shape, and said he could secure me [him] all right; that there was nothing on this 129 acres of land, and nothing on his stock; would I [he] loan him the money and take a mortgage on the land and stock of goods?"

He further indicated his purpose to reduce the stock and a belief that he could make a sale of some of his lands. Appellee made in-

vestigation, found the 129 acres of land clear, as also the stock which, from casual, but personal, inspection, he thought was worth $4,000 or $5,000, and made the loan, securing the same by mortgages on this stock and 129 acres of land. The bankrupt, with the money, paid off the two notes in banks upon which the father-in-law was surety, aggregating, as stated, $1,111.82, and the residue went to pay in part clerk hire and store expenses, a small sum to the expenses incurred by his daughters away at school, and the residue substantially passed into the hands of his trustee in bankruptcy.

The appellee, V. M. Babb, states positively that, when he made the loan, he had no knowledge of Mahaffey, the father-in-law, being security on these notes; that he regarded the bankrupt as solvent; and that in effect he made the loan, not for the purpose either of securing preference of a creditor or creditors, or of hindering, delaying, or defrauding them, but for the purpose of aiding the bankrupt to meet a money stringency more or less common to business men. No single word or act of his is shown in evidence to dispute this conclusion as to his motive and good faith in the premises. It is not necessary to enter into further discussion of the facts. The referee, Mr. McSwain, filed a written opinion in the cause, which is so full, complete, accurate, and able in its discussion of both the law and the facts that little or nothing can be added thereto.

Counsel for the trustee has strongly urged that the rulings in Dean v. Davis, 212 Fed. 88, 128 C. C. A. 658, decided by this court, are determinative of the right to have the mortgages here set aside as fraudulent. We do not think so. Clear distinctions exist between the two cases. In Dean v. Davis the lender, held to have full knowledge of the bankruptcy of the borrower and that he was being pressed for payment of notes to a bank questioning the integrity of the indorsements thereon, went to the bank and advanced funds to take them up, and, upon maturity of the first of a series of notes given by the bankrupt for the advancement, took a deed of trust on all the bankrupt's property, and proceeded to its immediate enforcement. In affirming this court in this case, by an opinion handed down January 8, 1917 (242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. ——), the Supreme Court says:

"Making a mortgage to secure an advance with which the insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay, or defraud creditors. The mortgage may be made in the expectation that thereby the debtor will extricate himself from a particular difficulty and be enabled to promote the interest of all other creditors by continuing his business. The lender who makes an advance for that purpose with full knowledge of the facts may be acting in perfect 'good faith.'"

[3, 4] Appellee Babb's motives in making this loan and his expectation as to the results thereof are exactly set forth in this extract, as disclosed by the evidence here. Holding that his mortgages were taken in good faith and with no fraudulent intent renders unnecessary the discussion of appellant's contention to the effect that they were void under the South Carolina statute against fraudulent conveyances. Nor do we think they can be construed as violating the Bulk Sales Law of that state.

The decree of the court below is affirmed.

LOWE, Internal Revenue Collector, v. FARBWERKE-HOECHST CO.

(Circuit Court of Appeals, Second Circuit. February 20, 1917.)

No. 200.

1. INTERNAL REVENUE ⇐11—STATUTES—HABIT-FORMING DRUGS.
Harrison Act Dec. 17, 1914, c. 1, 38 Stat. 785, imposing a special tax on all persons producing, importing, manufacturing, etc., opium or coca leaves, their salts or derivatives, is a revenue act though also intended to prevent the unauthorized dissemination of habit-forming drugs.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 29, 36–38.

2. STATUTES ⇐245—CONSTRUCTION—REVENUE ACT.
Revenue statutes, though imposing penalties and forfeitures, are not to be construed like penal laws, but the legislative intention must be deemed to be the providing of revenue.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 326.]

3. INTERNAL REVENUE ⇐11—STATUTE—CONSTRUCTION.
Harrison Act Dec. 17, 1914, declares that every person who produces, imports, manufactures, compounds, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof shall register with the collector of internal revenue of the district his name or style, place of business, or places where such business is to be carried on, but in section 6 declares that it shall not apply to sales, etc., of preparations and remedies which do not contain more than two grains of opium or more than one-fourth of a grain of morphine, etc., or any salt or derivative thereof in one fluid ounce, or to liniments, ointments, or other preparations for external use only, except liniments, ointments, and other preparations which contain cocaine or any of its salts, or alpha or beta eucaine or any of their salts or any synthetic substitute for them. Plaintiff imported novocaine, which is made from benzol derived from coal tar. No other commercial method of manufacture existed, though novocaine might be chemically obtained from coca leaves. It is not used as a liniment, ointment, or preparation for external use, but is a local anesthetic used by injection. *Held* that, though novocaine might be used as a habit-forming drug, it cannot, the Harrison Act being a revenue measure the terms of which must be construed in their ordinary meaning, be treated as a derivative of coca leaves or as a liniment or ointment or other preparation for external use containing cocaine; for the words "other preparation" must be construed under the principle of ejusdem generis in connection with liniments.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 29, 36–38.]

In Error to the District Court of the United States for the Southern District of New York.

Action by the Farbwerke-Hoechst Company against John Z. Lowe, Jr., as Collector of Internal Revenue for the Second District of New York. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff below, hereinafter called the Farbwerke, is an importer and dealer, if not a manufacturer, of many drugs. Lowe is a collector of internal revenue, and under the provisions of the act of December 17, 1914, commonly known as the Harrison Act, required the Farbwerke to pay the special tax at the rate of $1 per annum imposed by the first section of the statute cited. The collector's action rested on the proposition that several substances dealt in by the Farbwerke, of which one, novocaine, will serve for an example were

derivatives of coca leaves, wherefore the Farbwerke could not dispense or distribute said novocaine in any way otherwise than in pursuance of said first section. The collector also assumed that novocaine was or might be a preparation containing "cocaine or any of its salts, or alpha or beta eucaine or any of their salts or any synthetic substitute for them." Section 6 of the act. The Farbwerke, having paid under protest the tax in question, brought this action to recover the same.

On the trial plaintiff below proved that novocaine was actually made from benzol, benzol from toluol, and that substance from coal tar. No other commercial method of manufacture existed, wherefore as matter of fact novocaine was not obtained from anything which also as matter of fact had ever been in coca leaves. Novocaine is not a "liniment, ointment, or preparation for external use." Section 6 of the act. It is a local anesthetic, used by injection.

Defendant offered to prove: (1) That novocaine was or might be a preparation containing "cocaine or any of its salts or alpha or beta eucaine or any of their salts or a synthetic substitute for them" (following the language of said section 6); and (2) that while novocaine was not actually obtained from coca leaves, it might be so obtained chemically, and argued from this that the word "derivative" used in the statute must be taken to mean derivable, or possibly obtainable, without any regard to the actual, physical, or commercial process of derivation or procurement. These offers of evidence were rejected, and it was likewise held immaterial to show that novocaine, however derived or derivable, and however valuable in medical or surgical usage, might be or was in fact used as a "habit-forming drug," productive of some or all of the evil results attending the "cocaine habit." The writ of error calls in question the propriety of these rulings.

H. Snowden Marshall, U. S. Atty., of New York City (Ben. A. Matthews, Asst. U. S. Atty., of New York City, of counsel), for plaintiff in error.

O'Gorman, Battle & Vandiver, of New York City (Almuth C. Vandiver, of New York City, of counsel), for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] It cannot now be questioned in any lower court that the Harrison Act is a revenue measure or tax law and is to be construed as such. United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, a decision which deprives of authority the judgment of this court in Wilson v. United States, 229 Fed. 344, 143 C. C. A. 464. This being the ruling, it makes no difference that the history of the statute as revealed by public discussions, reports of committees and contemporaneous common knowledge, proves that nothing was further from the mind of Congress than to obtain contributions to the support of government through or by means of this statute. The notorious fact that it was intended to prevent a secret or unauthorized dissemination of habit-forming drugs is no longer material. It is a revenue act, even though it "has a moral end as well as revenue in view." 241 U. S. at 402, 36 Sup. Ct. 659, 60 L. Ed. 1061.

[2] While "revenue statutes, even though embracing penalties or forfeitures, are not to be construed like penal laws generally, * * * but are to be fairly and reasonably construed so as to carry out the intention of the Legislatures" (United States v. Stowell, 133 U. S. 12, 10 Sup. Ct. 246, 33 L. Ed. 555), the intention of Congress must be deemed to be the providing of revenue, however difficult of reconciliation with the revenue theory is the "moral end" of the law. This re-

sult necessarily flows from the intimation of the Jin Fuey Case, viz. that to take any other view of the nature of the statute would, to say the least, produce grave doubts of its constitutionality.

[3] Regarding the statute in its necessary aspect, it must be held that the word "derivative" is to be taken in its commonly received or popular sense, as distinguished from special or scientific usage. Farbenfabriken v. United States, 102 Fed. 603, 42 C. C. A. 525, and cases cited.

Under this rule as to the construction of revenue or taxation laws the court below was right in holding that, even if it were possible chemically to extract from coca leaves the component parts of novocaine, the latter substance could not be called a derivative of coca leaves; it is a derivative of coal tar.

It seems equally clear that as a revenue act, the language of the exception in section 6, i. e. "liniments, ointments, or other preparations," must be held to mean other preparations ejusdem generis; and there was no offer to prove (and it is admittedly not a fact) that novocaine is of the nature of an ointment or liniment, no matter what simpler chemical elements are discoverable in its composition.

It follows that unless the defendant below was prepared to show that novocaine was a derivative of coca leaves in the ordinary practical commercial sense of that word, the Farbwerke was not liable to the tax levied by the first section of the statute, nor within the exception of the sixth section.

However foreign to the real congressional purpose the foregoing reasoning and conclusion may be, we are compelled to this holding by controlling authority.

Judgment affirmed.

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## WONG WOO v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 26, 1917.)

No. 2929.

1. ALIENS ⟸32(12)—EXCLUSION OF CHINESE—REVIEW—QUESTIONS OF FACT.
The rule that where the District Court has affirmed the findings of the commissioner that a Chinese person has not shown his right to remain in the United States by Chinese Exclusion Act May 5, 1892, c. 60, § 3, 27 Stat. 25 (Comp. St. 1913, § 4317), the Chinese person is not entitled to a rehearing on the facts on appeal, is not rendered inapplicable by the fact that the Chinese person produced no witnesses before the commissioner, but did before the District Court.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95.]

2. ALIENS ⟸32(8)—EXCLUSION OF CHINESE—EVIDENCE—SUFFICIENCY.
In proceedings for the deportation of a Chinese person, evidence *held* to justify the ruling of the District Court that defendant had not affirmatively shown his right to remain in the United States as required by Chinese Exclusion Act May 5, 1892, § 3, though three Chinese witnesses testified by deposition that he was born in this country.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84.]

Appeal from the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Proceedings by the United States against Wong Woo for the deportation of defendant as a Chinese person unlawfully within the United States. From an order of the District Court, affirming the United States Commissioner's order for deportation, defendant appeals. Affirmed.

Volney M. Brown, of El Paso, Tex., for appellant.
R. E. Crawford, Asst. U. S. Atty., of El Paso, Tex.

Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. The appeal is from an order of the District Court of the United States for the Western District of Texas, affirming an order of the United States commissioner for the deportation of the appellant under "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892 (27 Statutes at Large, p. 25). The appellant resisted the order upon the ground that he was born in San Francisco, and therefore not subject to deportation under the terms of that act.

The government's contention was that he had entered the United States from Mexico at El Paso. The appellant introduced no evidence before the commissioner. He did introduce the testimony of himself and three other Chinese persons, taken by deposition, upon the hearing before the District Court. These depositions tended to show that appellant was born in San Francisco and resided there until shortly after the earthquake, when he went to Chicago, where he lived until his arrival in El Paso. It must be conceded that the depositions contain no such contradictions as to justify their rejection, and are sufficient, if credited, to establish appellant's birth in this country. It appears from them, however, that before the witnesses in California testified, they were visited by one Wong Aloy, a former Chinese interpreter in the Immigration Service at Chicago, who, at the instance of appellant, went from El Paso to California for that purpose and remained with the witnesses whose depositions were taken for a number of days before they testified. The government introduced in evidence the statement made by the appellant to the Immigration Inspector, at the time of his arrest, together with certain letters found on the person of the appellant at that time, which were addressed to a person of Chinese name at Mexico City.

In his original statement made to the Inspector, the appellant admitted that the letters were his, denied having received them in Mexico City, denied knowing the addressee, Quong Chong, and claimed to have received the letters in El Paso upon his arrival there from Chicago. When his deposition was subsequently taken, he denied that the letters were his. The appellant upon his examination showed that he was unfamiliar with persons and localities in Chicago, though claiming to have lived and worked there before coming to El Paso. In this

state of the record, the District Judge held that appellant had not established by evidence satisfactory to the court that he was born in the United States.

Section 3 of the Chinese Exclusion Act (Comp. St. 1913, § 4317) is as follows:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

[1] In the case of Chin Bak Kan v. United States, 186 U. S. 193–201, 22 Sup. Ct. 891, 895 (46 L. Ed. 1121), the Supreme Court said of the right of appeal under this act:

"Except in cases under that section whether the question of jurisdiction alone is certified, we have power to dispose of the entire case; but, as the jurisdiction of the commissioner is sustained, we are of opinion that we cannot properly re-examine the facts already determined by two judgments below. That is the general rule, and there is nothing to take this case out of its operation, and, on the contrary, the conclusion is, a fortiori justified. The same reasoning in respect to the authority to exclude applies to the authority to expel and the policy of the legislation in respect to exclusion and expulsion is opposed to numerous appeals. And we are not disposed to hold that, where a Chinese laborer has evaded the executive jurisdiction at the frontier and got into the country, he is therefore entitled to demand repeated rehearings on the facts."

In the case of Yee Et v. United States, 222 Fed. 66, 137 C. C. A. 537, this court said:

"The rule may be considered settled that in matters of this kind, where the commissioner sees and hears the witnesses, the accused is not entitled to repeated appeals on the facts, and a judgment of the District Court affirming the commissioner will not be disturbed, except in a perfectly clear case or for error of law. Chin Bak Kan v. United States, 186 U. S. 193 [22 Sup. Ct. 891, 46 L. Ed. 1121]; Yee King et al. v. United States, 179 Fed. 369 [102 C. C. A. 646]; Eng Choy v. United States, 175 Fed. 566 [99 C. C. A. 188]; Moy Guey Lum v. United States, 211 Fed. 91 [127 C. C. A. 515]; Chew Hing v. United States, 133 Fed. 227 [66 C. C. A. 281]. In most of these cases the testimony was taken under commission by interrogatories, no representative of the government was present, and the identification of the accused was by photograph. Manifestly, evidence of this character is unsatisfactory, and where the witnesses are present in the same city as the accused and the commissioner before whom the complaint is pending, and could have testified in open court, such evidence is not above suspicion, and is entitled to very little, if any weight."

It is true that in this case no evidence was introduced by appellant on the trial before the commissioner, and all the evidence on the hearing in the District Court was by deposition; but we do not think that this necessarily renders the rule limiting the right to repeated trial of facts in cases under this statute inapplicable.

[2] A majority of the court are of the opinion that the District Judge was justified in ruling that the appellant had not satisfactorily established by affirmative proof his birth in this country, and that the facts of the case show no reason for departing from the rule that re-

peated trials of fact are not a matter of right to the Chinese person ordered to be deported.

The order of the District Court, affirming the order of deportation passed by the United States commissioner, is affirmed.

## THE APPAM.

(Circuit Court of Appeals, Fourth Circuit. February 14, 1917.)

No. 1473.

ADMIRALTY ⇐99—JUDICIAL SALES—VACATION.

In a proceeding on a libel against a steamship and its cargo, it appeared on survey that the cargo was perishable, and it was ordered sold. At the first sale of a lot of cocoa beans, they were sold on a bid of 13¼ cents per pound; but, the bidder failing to carry out his contract, the beans were resold to appellant at the risk of the original bidder. Appellant bid only 6 cents per pound, and on filing of objections by the master of the steamship the sale was ordered set aside, and on a third sale the beans were sold for 9½ cents per pound. *Held* that, as the property was personalty and had a well-known market value, it was proper, on application of the master, who tendered a bid at a considerable advance, depositing a certified check for a portion of the purchase price, to set aside the sale to appellant.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 661–669.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Chas. A. Woods, Judge.

Libel by Henry G. Harrison against the cargo of the steamship Appam. From a decree setting aside a sale of cargo to Middleton & Co., it appeals. Affirmed.

See, also, 234 Fed. 389.

D. Lawrence Groner, of Norfolk, Va., for appellant.

Floyd Hughes, of Norfolk, Va. (Hughes & Vandeventer, of Norfolk, Va., on the brief), for appellee.

Before PRITCHARD and KNAPP, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge. This case comes here on appeal from the District Court of the United States for the Eastern District of Virginia.

The steamship Appam, belonging to a British corporation, and bound from West Africa to Liverpool, was captured by the German cruiser Moewe and sent in charge of a prize crew to the port of Newport News, Va. Some time after her arrival in Hampton Roads, separate libels were filed against the steamer and her cargo by the respective British owners, and shortly thereafter the court, before whom the proceedings were pending, having ascertained as the result of a survey of the cargo that the same was perishable and subject to decay and injury, it entered an order March 31, 1916, directing the United States marshal

to offer for sale a portion of the cargo at public auction, after advertised notice, etc.

The greater portion of the cargo offered for sale consisted of cocoa, cocoa beans, and palm oil. The sale was had, mostly in lots and parcels, and realized between $600,000 and $700,000. Among the lots sold was 27,520 pounds of cocoa beans, to Louis Lustig, of New York, at 13¼ cents per pound; the total amount of his purchase being $3,682.84, on account of which he then and there paid to the marshal, as earnest money, $300. Due report of the sale, including the sale to Lustig, was made by the marshal to the court, and, no objection being filed thereto, stood confirmed. Subsequently, and on the 9th day of June, Lustig not having paid the balance of the purchase price, an order was entered, directing that he show cause why the property should not be again exposed for sale at his risk and expense, and for his account, and on June 16th, the return day thereof, no cause being shown, an order was entered by the court directing the marshal to proceed to resell, at the risk and expense and for the account of Lustig, the cocoa beans purchased by him on the 12th day of April.

The marshal proceeded to obey this order, and at the second sale appellant became the purchaser of the beans at its bid price of 6 cents per pound, and it thereupon paid to the marshal the purchase price of the same; but, upon the filing of objections by the master of the Appam, libelant, the sale to appellant was ordered set aside, and a third sale had, likewise at the expense and for the account of the said Lustig, and at this third sale the cocoa beans were sold to Snyder and Wheeler of New York for the sum of 9½ cents per pound.

The difference between the bid price of appellant at the second sale and the price paid by Snyder and Wheeler at the last sale amounted to $963.20, and is now held in the registry of the court as a special fund, subject to this appeal.

It also appears that in the main case involving the cargo of the Appam the German government, as captor of the ship and cargo resisted the jurisdiction of the court and took no part in the proceedings relating to the sale of the cargo; its counsel expressly refraining from consenting to any of the decrees, even those relating to the sale of the perishable portion of the cargo, and, at every step, taking great pains to reserve their position in resisting jurisdiction.

It is urged by appellant that the court below was in error in setting aside the sale by which it became the purchaser, and that, therefore, it is entitled to a decree directing the payment of the sum of $963.20. The sole question involved is as to whether the inadequacy of price was so gross as to warrant the court below in refusing to confirm the sale.

A careful consideration of the facts of this case impels us to the conclusion that the action of the court below in setting aside the sale was eminently proper. The learned judge who heard this case, after citing a number of authorities in support of the rule announced, made the following statement relative to the facts, which we think is conclusive:

**"The nature of the property is a very important element in deciding what is such gross inadequacy of price as to indicate an unconscionable profit at**

the expense of those whose rights are under the protection of the court. When the property sold is land, or vessels, or other things having no definite or quotable market value, and evidence of inadequacy consists of opinions of witnesses, or even of an offer to pay a greater price, made upon information derived from the sale, or after the sale, great caution should be exercised in denying to the purchaser the benefit of a bargain which he took the risk of making. On the other hand, commodities sold and quoted daily on the market have a value which can be definitely ascertained, and as to them inadequacy of price so gross as to shock the conscience is a much more definite conception. No one would doubt that the purchase of corn, or cotton, or wheat, or United States bonds, at half, or even three-fourths of the market value, would be unfair, and confer on the purchaser an unconscionable advantage.

"Cocoa beans are not so commonly known as wheat, corn, and cotton, but they are a staple article of commerce, with a definite, quoted market value, upon which they are bought and sold. It is reasonable to infer that the price of 13½ cents a pound bid at the first sale with a deposit of $300 to secure the bid, was not materially above the market value, at that time. With no evidence of decline in market value, the bid at the second sale was 6 cents a pound, less than half. This is strong evidence of a price so grossly inadequate as to give not simply a fair margin to the purchaser, but a great advantage at the expense of the owners, with practically no risk to himself. This evidence is fortified by the tender to the court, by the master, of a dealer who makes certain his offer to bid at least 9 cents a pound on a resale, by depositing a certified check for $1,000. It was said at the argument that the beans had been injured in storage, and that the market price did not exceed 10 cents a pound, but no proof was offered on these points.

"The point is not free from difficulty, but the court cannot resist the conclusion that to confirm the sale would be to give the purchaser an unconscionable advantage of the parties for whose benefit the sale was made. The exception to the sale is therefore sustained."

For the reasons stated, the decree of the lower court is affirmed.

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## DELAWARE, L. & W. RY. CO. v. TUOVINEN.

(Circuit Court of Appeals, Second Circuit. March 13, 1917.)

No. 194.

1 APPEAL AND ERROR ⟸1001(2)—REVIEW—EVIDENCE—SUFFICIENCY.

The credibility of evidence is for the jury, and where plaintiff's testimony as to an accident was not impossible, the Appellate Court cannot set aside a verdict based on his version, because it would have reached another conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3922.]

2. MASTER AND SERVANT ⟸276(10)—SCOPE OF SERVANT'S EMPLOYMENT—EVIDENCE.

In an action by plaintiff, run over by a train, who claimed that he was injured when a man on the train struck him with a lump of coal, testimony that plaintiff had seen the same man giving signals to the engineer warrants a finding that such person was a railroad employé, and acting within the scope of his employment when he struck plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 952, 959.]

3. TRIAL ⟸194(1)—PROVINCE OF COURT AND JURY.

Plaintiff, whose legs were crushed by a train, contended that one of the operatives of the train struck him with a piece of coal and that he fell from the train, lighting on his left shoulder, whereupon the train

passed over him. There was no evidence that plaintiff was treated for any injuries, but to his legs. *Held*, that the action of the court in denying a requested charge that, if the jury should find the effects on plaintiff's body of the fall were contrary to well-known physical laws, they must find that the testimony in such regard is incredible, and render verdict for defendant, was not error; the court expressly leaving all questions of fact and inferences to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439, 440, 450.]

In Error to the District Court of the United States for the Eastern District of New York.

Action by Oscar Tuovinen against the Delaware, Lackawanna & Western Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

A. J. McMahon, of New York City, for plaintiff in error.

Almy, Van Gordon, Evans & Kelly, of New York City, for defendant in error.

Before COXE, WARD, and HOUGH, Circuit Judges.

WARD, Circuit Judge. March 24, 1915, about 2:15 p. m., the plaintiff, Oscar Tuovinen, a Finn of 24 years of age, a carpenter by trade, was found sitting on the tracks of the Delaware, Lackawanna & Western Railroad near Scranton, Pa., a few minutes after defendant's train 1161, bound to Scranton, had passed, with both legs so badly crushed above the ankles that his feet had subsequently to be amputated. It is quite evident that he must have been injured while trying to board the train, or in getting off it, or in falling from it.

[1] His story is that, having been unable to get employment he had boarded one of the defendant's freight trains leaving Nicholson, Pa., with the intention of stealing a ride to New York. At first he stayed between two of the box cars on the bumpers; but, when the train was nearing Scranton, he got up on top of one of them. There a man wearing overalls and a cap, whom he had seen at Nicholson giving train signals to the engineer and waving a red flag, appeared on the car behind him, called out something, and then threw a lump of coal, which hit him in the back of the head. This stunned him, and he staggered and fell down between the cars, and from the bumpers onto the track, landing on his left shoulder. The train passed over his legs. There are many improbabilities in this story, which it is unnecessary to state; the most important being the entire absence of any evidence of such cuts, bruises, or broken bones as would naturally be expected if he had fallen from a train, even going slowly. The hospital surgeons testified that they had not treated him for anything, but the injury to his ankles. But all these objections were made to the jury, and they as triers of fact have found in favor of the plaintiff. We can consider only questions of law, and have nothing to do with the weight of evidence. We are not at liberty to substitute our opinion for that of the jury. If there were no evidence whatever to support the verdict, as was found by the court in Johnson v. Railroad Co., 173 N. Y. 79, 65 N. E. 946, we could reverse the judgment; but there was evidence which the jury chose to believe, and it makes no difference whether we would have believed it or not.

For the above reason the cited decisions of the New York Appel-

late Division, which has a right to reverse on facts, are not applicable; but the defendant seeks to bring the case within the decision of the Court of Appeals in Hunter v. N. Y., Ontario & Western R. R. Co., 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246. Although the jurisdiction of that court is limited, like our own, to the review of questions of law only, it took judicial notice of the fact that there is no authentic record of a man 9 feet high, and reversed the judgment in favor of the plaintiff because the injuries he sustained could not have happened in the way he testified, unless he had been of that height. In this case, however, the accident could have happened, allowing for errors of the plaintiff in estimating the speed of the train, and allowing for insufficient observation of the witnesses as to other injuries than those to his legs.

[2] We think that the plaintiff's testimony, if believed, sufficiently establishes the proposition that the man who assaulted him was a servant of the company employed on the train, and that the jury had a right to conclude that he was acting within the scope of his employment. Chesapeake & Ohio Ry. Co. v. Stojanowski, 198 Fed. 77, 117 C. C. A. 185.

[3] The defendant asked the court to charge the jury:

"I ask your honor to charge that, if the jury find that the effects on the plaintiff's body of the fall from the top of the car to ground are contrary to well-known physical laws, they must find that the testimony in this regard is incredible, and render a verdict for the defendant.

"The Court: I have left the questions of fact to the jury; what the inferences and the probabilities to be drawn are I leave to the jury."

We cannot say that this answer was erroneous.

The judgment is affirmed.

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## N. P. SLOAN CO. v. UNCASVILLE MFG. CO.

(Circuit Court of Appeals, Third Circuit. March 31, 1917.)

No. 2203.

1. APPEAL AND ERROR ⊜1048(6)—REVIEW—DISCRETION OF COURT—CROSS-EXAMINATION OF WITNESSES.

The range of cross-examination is committed in large measure to the discretion of the trial judge, and error in the exercise thereof must be plain and harmful before an appellate court will reverse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145.]

2. APPEAL AND ERROR ⊜1048(6)—HARMLESS ERROR—LIMITING CROSS-EXAMINATION—SUBSEQUENT ADMISSION OF EVIDENCE.

Error in limiting the cross-examination of plaintiff's witness is not prejudicial to defendant, where defendant was permitted in the course of his own case to introduce the same evidence he sought to bring out from plaintiff's witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145.]

3. SALES ⊜422—ACTION BY BUYER—VERDICT—EVIDENCE.

In an action for breach of contract for the sale of a large quantity of cotton pickings, where the jury were correctly instructed that the meas-

ure of damages was the difference between the price plaintiff was compelled to pay for pickings of the same quality in the market, and the contract price, and there was evidence on behalf of plaintiff as to numerous purchases at varying prices to take the place of the cotton contracted for, some of which purchases were of a different grade from that specified in the contract, but were claimed by plaintiff's witnesses to be the nearest to the contract grade which could be obtained at the time, defendant cannot have set aside a verdict for plaintiff for less than the total of the amounts paid by plaintiff, on the theory that the verdict was contrary to the evidence and the instruction, and the result of compromise, since the jury could have disregarded the testimony as to some purchases being the nearest to the quality contracted for that could be obtained, and could have based their verdict as to such purchases on other evidence, and the trial court cannot inquire into the method by which they did arrive at the verdict.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1204.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by the Uncasville Manufacturing Company against the N. P. Sloan Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Maurice W. Sloan, of Philadelphia, Pa., for plaintiff in error.

Wm. B. Linn, E. W. Perkins, and H. B. Gill, all of Philadephia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The Uncasville Manufacturing Company was the plaintiff below, and recovered a judgment of nearly $13,000 for the breach of a contract to deliver 1,450 bales of an article known as "cotton pickings." The Sloan Company urges a reversal for two reasons: First, because the court should have permitted a certain line of cross-examination to be pursued when the plaintiff's principal witness was on the stand; and, second, because the amount of the verdict is not supported by the evidence, and is plainly the result of a compromise.

[1, 2] 1. Of necessity the range of cross-examination is a matter of administration, and must be committed in large measure to the discretion of the trial judge. His error must be plain and harmful before an appellate court will reverse for the exercise of that kind of control. In the case before us we are not satisfied that Judge Thompson was in error in refusing to allow the cross-examination, but in any event the defendant was permitted in the course of his own case to introduce the very evidence that he sought to bring out from the plaintiff's witness; and the whole question to which this evidence applied —namely, what was the true contract between the parties?—was submitted in a careful and accurate charge. None of the defendant's testimony was excluded by the ruling complained of, and we can see no harm that was done by requiring a particular order of proof to be followed.

[3] 2. The other ground of complaint is so satisfactorily disposed of in the opinion of the District Court refusing a new trial (reproduced

in the margin [1]) that only a few words more need be said. In the present case correct instructions on the subject of the measure of damage were given, and in this vital respect the situation differs from New York, etc., Co. v. Meyersdale Co., 236 Fed. 536, —— C. C. A. ——; if the jury made a harmful mistake by departing therefrom, the remedy was by moving for a new trial, and this course has already been adopted, although without avail.

The judgment is affirmed.

[1] "Thompson, District Judge. The only ground upon which counsel for the defendant relies in support of the motion for a new trial is that the jury did not find for the plaintiff for the full amount claimed, $19,656.68, but rendered a verdict for $12,973.50.

"It is urged that the plaintiff was entitled to recover the full amount of its claim, or the verdict should have been for the defendant.

"The plaintiff does not complain of the amount found in its favor. Counsel for the defendant has very ingeniously unraveled the verdict of the jury, and declares that it is based upon the arbitrary allowance of two cents per pound upon the number of pounds of cotton sold and the deduction from the amounts so found of the price of two bales retained by the plaintiff.

"The jury was instructed to find a verdict from the evidence, and, if they found for the plaintiff, they were instructed that the measure of damages was based upon the plaintiff's right to go into the market and purchase the same quantity of the same kind of cotton which the defendant agreed to supply, and to be reimbursed by the defendant for loss covered by the difference between the contract price and the price which it was obliged to pay. They were instructed that the plaintiff was obliged to do all in its power in diminution of damages, and was not at liberty to go into the market and buy some other better sort of commodity, and charge the defendant with the difference. They were instructed that it had no right to go into the market and supply itself with a better type of cotton, or a higher priced grade of cotton, if it could, with reasonable diligence, supply itself with what would answer the description of what the defendant had agreed to supply. If the measure of damages had been based on a single purchase by the plaintiff of the whole quantity which the defendant agreed to deliver, the defendant's contention that the verdict should be for the whole of the difference in price, or nothing, would have some force.

"In the present case the evidence showed a large number of purchases at different periods, with considerable variation in price, in quality, and in description. As to all those purchases, the plaintiff's witnesses testified that the kind of cotton purchased was the nearest to the type P O N E, which the defendant had agreed to supply, which could be had in the market at the time the respective purchases were made. The jury may have believed the evidence as to some, and discredited it as to other, quantities purchased. They may have thrown out some items entirely, and based their conclusions as to cost upon other purchases made at approximately the same period. In accepting the credible testimony and rejecting that which they did not believe, they were acting within their province. Whether they arrived at the verdict by taking an average of the loss upon the entire quantity at two cents per pound is a matter concerning which it is not the function of the court to inquire. The jury was not bound by the statement prepared by plaintiff's attorney, but was under a duty, which the court cannot find they did not perform, of arriving at the damages from the evidence.

"With the wide range of possibilities of differences in the amount of the verdict, the court cannot say that the verdict in this case was against the law, against the evidence, against the weight of the evidence, or against the charge of the court.

"The motion for new trial is therefore refused."

## CALLAHAN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1917.)

No. 2845.

1. RAPE ⊂⊃31—STATUTORY RAPE—INDICTMENT.
An indictment for rape upon a girl under the age of consent is not defective for failure to allege that the act was done with her consent.
[Ed. Note.—For other cases, see Rape, Cent. Dig. § 34.]

2. CRIMINAL LAW ⊂⊃635—TRIAL—EXCLUSION OF SPECTATORS.
In a prosecution for rape on a girl under the age of consent, the exclusion from the courtroom of all persons save litigants, witnesses, jurors, counsel, officers of the court, and representatives of the press is not an abuse of the trial court's discretion.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1452.]

3. CRIMINAL LAW ⊂⊃366(3)—EVIDENCE—RES GESTÆ.
In a prosecution for rape upon a girl under the age of consent, testimony that the girl informed a girl acquaintance and friend, whom she met on the street shortly after leaving the place of the act, of the circumstances, and that she had received compensation, is not admissible as part of the res gestæ, it appearing that the act complained of was not the first act of the kind, and the statement being in the nature of interesting information between intimate friends, instead of a spontaneous exclamation produced by shock, etc.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 819.]

4. CRIMINAL LAW ⊂⊃1169(1)—APPEAL—HARMLESS ERROR.
In such case, where accused contradicted the girl, the two being the only witnesses as to the act, the admission of evidence as to her statement cannot be deemed harmless.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137.]

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge.

Daniel Callahan was convicted of rape on a girl under the age of consent, and he brings error. Reversed and remanded.

Charles J. Heggerty, of San Francisco, Cal., Thomas McGowan, John A. Clark, and Leroy Tozier, all of Fairbanks, Alaska, for plaintiff in error.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. [1] The plaintiff in error was convicted of the crime of rape committed upon a girl under the age of consent. It is contended that the court below erred in overruling a demurrer to the indictment for its failure to allege that the act was done "with her consent." We find no merit in the contention. 33 Cyc. 1444, and cases there cited.

[2] All persons who had no business before the court were by the order of the court excluded from the courtroom during the trial, but litigants, witnesses, jurors, counsel, officers of the court, and representatives of the newspapers were allowed to be present. The order

was excepted to, and is now assigned as error. We think the order was a permissible exercise of the discretion of the court. Reagan v. United States, 202 Fed. 488, 120 C. C. A. 627, 44 L. R. A. (N. S.) 583.

[3] The only assignment of error that requires extended discussion relates to the admission of certain testimony of one Laura Herrington, a girl of the age of 14 years, who was the playmate and confidential friend of Grace Carey, the victim of the alleged offense. Grace Carey had testified that the offense was committed in the house of the plaintiff in error, whither she had gone pursuant to an appointment with him for that purpose, and that she consented willingly to his act; that she had had intercourse with him on several occasions during the preceding 4 or 5 years; that she was in the house but a short time, and that when she left, the plaintiff in error gave her $3; that soon after going upon the street she met Laura Herrington, and told her what had occurred. Laura Herrington, over the objection of the plaintiff in error, was permitted to testify that Grace Carey told her what the plaintiff in error had done, and exhibited to her the money which she said he had given her. This testimony was received for the purpose of corroborating the testimony of Grace Carey, and the court instructed the jury that if they believed beyond a reasonable doubt that Grace Carey made the statement so testified to, at her first opportunity to tell any person, and that the statement was made immediately after leaving the house of the plaintiff in error, it might be considered by the jury as a corroborating circumstance tending to sustain the truth of the testimony of Grace Carey as to what had just transpired between her and the plaintiff in error. The testimony, although it was hearsay, is claimed by the government to have been admissible as part of the res gestæ. The principle on which testimony of the nature of exclamations or remarks made by the victim of an offense, at or immediately after the time of its occurrence, is said, in 3 Wigmore, § 1747, to be—

"based on the experience that under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock."

Again, in section 1749, the same author says:

"The statement must have been made under circumstances calculated to give some special trustworthiness to it; * * * that in the stress of nervous excitement the reflective faculties may be stilled, and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief. The utterance, it is commonly said, must be 'spontaneous,' 'natural,' 'impulsive,' 'instinctive,' generated by an excited feeling, which extends without let or breakdown from the moment of the event they illustrate."

In State v. Pollard, 174 Mo. 607, 74 S. W. 969, it was held that the exclamations of the parties at the time of the commission of the main act, or so nearly at the time of the act as to form part of it, are admissible. In Valdez v. State, 71 Tex. Cr. R. 487, 160 S. W. 341, it was held that declarations made by a girl to her mother not more than 15 or 20 minutes after the alleged offense, and while she was laboring under the excitement of the incident, are admissible. But in Douglas v. State, 73 Tex. Cr. R. 385, 165 S. W. 933, it was held that statements

made by a girl of 8 years of age, on her way home after the occurrence, were not admissible. In McMurrin v. Rigby, 80 Iowa, 322, 45 N. W. 877, statements made under the influence of mental excitement, and within such time after the act, and under such circumstances as to preclude the element of premeditation, were held admissible. In State v. Imlay, 22 Utah, 156, 61 Pac. 557, it was held proper to admit evidence of the statements of the prosecutrix to one who was in sight at the time when the offense was being committed, and to whom she immediately went crying. But in Williams v. State, 66 Ark. 264, 50 S. W. 517, the court excluded evidence of statements made by the prosecutrix 15 minutes after the offense, not made spontaneously, under the excitement caused by the assault, but in answer to the question why she was crying. In State v. Novak, 151 Iowa, 536, 132 N. W. 26, evidence of statements of the prosecutrix, made immediately after the offense, and made in distress and as the result of excitement and without opportunity for premeditation, was held admissible. In State v. Sargent, 32 Or. 110, 49 Pac. 889, it was held that the mother of the prosecutrix might testify as to her manner and the appearance and the condition of her person shortly after the alleged assault, and to the fact that she made a disclosure, but that the mother might not state what the injured girl told her about the alleged assault, the court holding that such testimony was simply hearsay, a narrative of a past event, and not the language of the emotion caused by the occurrence.

[4] In the case at bar there is entire absence of circumstances to justify the admission of testimony such as that given by Laura Herrington. The statement of which she testified was made to her, not as a complaint, not as the expression of outraged feeling, not under excitement produced by an external shock, but purely as a matter of interesting information in a casual conversation between two intimate friends. It cannot be said that its admission was harmless error, for the plaintiff in error and Grace Carey were the only witnesses who testified concerning what transpired between them. Their testimony was sharply contradictory, and the evidence of Laura Herrington was admitted for the purpose of corroborating the testimony of Grace Carey.

The judgment is reversed, and the cause is remanded for a new trial.

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## ROSE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1917. Rehearing Denied March 19, 1917.)

No. 2819.

1. RAPE ⇐40(5)—PROSECUTION—EVIDENCE.

On the trial of an indictment for having carnal knowledge of a female child under 16 years of age, evidence to show the moral character of the prosecutrix 2 years after the alleged offense was immaterial.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 59.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. CRIMINAL LAW ⊜1043(2)—APPEAL—ADMISSION OF EVIDENCE—SUFFICIENCY OF OBJECTION.

An objection to evidence in general terms as irrelevant, immaterial, and incompetent is too general to be considered on error if in any possible circumstances it could be deemed, or could be made, relevant, material, or competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2654.]

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge.

Criminal prosecution by the United States against J. P. Rose. Judgment of conviction, and defendant brings error. Affirmed.

Louis K. Pratt, of Fairbanks, Alaska, and Herman Weinberger, of San Francisco, Cal., for plaintiff in error.

R. F. Roth, U. S. Atty., of Fairbanks, Alaska, and John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. The plaintiff in error was indicted and convicted of the crime of having carnal knowledge of one "Grace Carey, a female child, then under the age of 16 years, to wit, of the age of 12 years," the plaintiff in error being a male person over the age of 21 years. The indictment does not charge that the carnal knowledge was with the consent of the female child. A demurrer to the indictment raised the question whether the indictment was sufficient without this allegation. The demurrer was overruled, and this action of the court is assigned as error.

1. In Callahan v. United States, 240 Fed. 683, — C. C. A. —, recently decided in this court, that question was considered, and it was held that this objection to the indictment was without merit.

[1] 2. It is assigned as error that the trial court sustained objections made to questions asked of the prosecutrix tending to show her lascivious conduct in the summer of 1915 while a passenger on a river steamer in Alaska. In support of these questions it is said that they went to the moral character of the prosecutrix. The indictment charged the crime to have been committed on June 1, 1913, and such was the evidence. We do not think that the moral character of the prosecutrix in 1915, or, indeed, at any time, was material to the questions at issue before the court on this indictment.

[2] 3. The errors assigned relating to the action of the court in overruling objections to the testimony cannot be sustained. We think, upon the issues before the court, the questions were proper; but, if subject to objection, they were not properly reserved. Sparf & Hansen v. United States, 156 U. S. 51, 57, 715, 15 Sup. Ct. 273, 39 L. Ed. 343; Examiner Printing Co. v. Taggart Aston, 238 Fed. 459, — C. C. A. —, recently decided in this court.

4. The court instructed the jury as to the law, as follows:

"You are further instructed that it is the policy of our law, as expressed in the statute, that any female under the age of 16 years shall be incapable of consenting to the act of sexual intercourse, and that any one committing the act with a girl within that age shall be guilty of rape, notwithstanding he ob-

tained her consent thereto; and whether the girl in fact consented or resisted is immaterial in this case.

"In this case neither the element of force nor the question of consent has any application. The witness, Grace Carey, could not consent, and the law resists for her."

This instruction was correct. Callahan v. United States, supra.

The judgment of the District Court is affirmed.

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RAUCH v. MANCHESTER-SMITH CO., Inc.

(Circuit Court of Appeals, Fourth Circuit. March 7, 1917.)

No. 1484.

BANKRUPTCY ⊂=407(5)—DENIAL OF DISCHARGE—GROUNDS—CREDIT BY FALSE STATEMENT.

A letter by the bankrupt to a creditor, written five months before bankruptcy, in which he stated that he was perfectly solvent, but that the extra dullness of business had put him behind, in fact there had been no business at all, and added that he was not in need of the goods previously ordered just then, and the creditor could hold them for a while, is not ground for denying discharge to the bankrupt, under Bankr. Act July 1, 1898, c. 541, § 14b, cl. 3, 30 Stat. 550 (Comp. St. 1913, § 9598), authorizing discharge unless the bankrupt has obtained money or property on credit upon a materially false statement in writing, made for the purpose of obtaining credit, even though the bankrupt was actually insolvent when he wrote the letter, since it clearly shows that it was not written for the purpose of obtaining credit, and stated facts which qualified the statement that he was solvent, and especially if the creditor did not attempt to prove that it parted with its property on the faith of the letter.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Bankruptcy; Charles A. Woods, Judge.

In the matter of Dave Rauch, bankrupt. From a decree of the District Court, sustaining objections by the Manchester-Smith Company, Incorporated, to the bankrupt's discharge, the bankrupt appeals. Reversed.

See, also, 226 Fed. 982.

J. L. Mitchell, of Norfolk, Va. (Levy & Mitchell, of Norfolk, Va., on the brief), for appellant.

Alfred Anderson, of Norfolk, Va., for appellee.

Before PRITCHARD and KNAPP, Circuit Judges, and DAYTON, District Judge.

KNAPP, Circuit Judge. The objections to the bankrupt's discharge, which were sustained by the court below, are based upon a letter written by him to the objecting creditor, in October, 1914, in which he said:

"I am in receipt of your kind letter of the 3d, and appreciate all you say, the leniency you have extended me, etc. In reply will say that while I haven't a

statement of my financial condition, as we have not taken inventory in some time, can only say I am perfectly solvent, but the extreme dullness of business has put me behind such as I have never been before. One can hardly realize how conditions are here; in fact, there has been no business hardly at all, and for that reason I have been so pushed. Have just gotten possession of a bankrupt stock, and, while I haven't done anything yet, I expect to realize some money out of it. In regard to the order I gave, am not in need of the goods now, and you can just hold same for a while yet, and in the meantime I am looking for things to open up."

The falsity of his statement that he was "perfectly solvent" is shown, as the appellee contends, by his alleged admission, when first examined in the bankruptcy proceedings, that he had been insolvent from the beginning of the year 1914. Shortly after receipt of above letter, the creditor shipped to Rauch the merchandise referred to as "the order I gave," which he says was about the previous June.

The schedules filed with the bankrupt's petition in March, 1915, show debts of nearly $13,000, and assets under $8,700, including property claimed to be exempt; and the amount realized by the trustee was insufficient to pay the landlord's claim for rent. From this it is argued that Rauch's application should be denied, under section 14, subsection b, clause 3, of the Bankruptcy Act, which provides for a discharge unless the bankrupt has—

"(3) Obtained money or property on credit upon a materially false statement in writing, made by him to any person or representative for the purpose of obtaining credit from such person."

Does this exception cover the case here presented? We are of opinion that it does not. Even if it be conceded that Rauch admitted in April, 1915, that he was insolvent for nearly a year before he wrote the letter in question, although he stoutly denies it and the contrary proof is by no means convincing, nevertheless the letter itself seems clearly to refute the idea that it was written *for the purpose* of obtaining credit. All the statements of the letter must be taken together, and the intent of the writer inferred from its entire contents. Thus considered, there appears no indication of a fraudulent attempt to get goods on trust that he could not expect to pay for. True, he says that he is "perfectly solvent"; but this is followed with an account of his condition, which shows on its face that he was badly embarrassed and doing little or no business. And then he virtually countermands the order, at least for the time being, by adding, "am not in need of the goods now, and you can just hold same for a while yet, and in the meantime I am looking for things to open up." Surely this letter, taken as a whole, fails to sustain the charge of deliberate and purposeful deception. Not only is there no definite representation as to assets or debts, or anything else, but the general assertion of solvency is so qualified by succeeding statements as to deprive it of any seriously misleading import. In short, we think the letter furnishes no evidence of that dishonest purpose to obtain credit which the law declares shall operate to prevent a discharge. Franklin v. Monning Dry Goods Co., 217 Fed. 929, 133 C. C. A. 601; Peck v. Lowenbein, 178 Fed. 178, 101 C. C. A. 498; In re Cloutier Bros. (D. C.) 228 Fed. 569;

Doyle v. First Nat. Bank of Baltimore, 231 Fed. 649, 145 C. C. A. 535.

Moreover, the record does not show that appellee proved, or even attempted to prove, that it parted with its property on the faith of Rauch's letter and in reliance upon his statement that he was perfectly solvent, and certainly no presumption that such was the case arises from the facts now disclosed.

The decree must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

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GUARDIAN TRUST CO. et al. v. SHEDD et al.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1917.)

No. 4859.

APPEAL AND ERROR ⇐71(4)—APPEALABLE ORDERS—DENYING MOTION TO VACATE RECEIVER'S APPOINTMENT.

An order denying a motion to vacate the appointment of a receiver, and to dissolve injunctions and mandatory orders in connection with that appointment, is not appealable, where there is an appeal pending from the order appointing the receiver, which latter order is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 399–401.]

Appeal from the District Court of the United States for the Western Division of the Western District of Missouri.

Suit by Edward A. Shedd and another against the Guardian Trust Company and others. From orders appointing a receiver for defendant corporations, and denying a motion to vacate the order of appointment and to dissolve the injunctions and mandatory orders in connection therewith, defendants appeal. Appeal from order denying motion to vacate dismissed, and order appointing receiver affirmed.

Haff, Meservey, German & Michaels, Delbert J. Haff, and Charles W. German, all of Kansas City, Mo., for appellants.

Henry L. Jost and Frank Hagerman, both of Kansas City, Mo., for majority stockholders.

Oliver H. Dean and J. C. Rosenberger, both of Kansas City, Mo. (Rosenberger & Reed and Warner, Dean, McLeod & Langworthy, all of Kansas City, Mo., of counsel), for appellees and intervening minority stockholders.

Before SANBORN and HOOK, Circuit Judges, and MUNGER, District Judge.

PER CURIAM. A consideration of the record in this case and the briefs and arguments of counsel has convinced the court:

(1) That the order of December 28, 1916, denying the motion to vacate the order appointing the receiver and to dissolve the injunctions and mandatory orders of August 29, 1916, is not appealable.

(2) That the order of August 29, 1916, appointing Henry C. Flower receiver herein was appealable.

(3) That while the court does not find from the record any intentional violation of any trust or duty on the part of Mr. Downing, the president of the company and chairman of its executive committee, or of the directors and members of the executive committee, other than the liquidating agent, the pleadings and evidence, including the order of October 11, 1902, in the Bierce case, sustain the order appointing the receiver and disclose no abuse of discretion by the district court in making it.

(4) That at the hearing in this court the fear of great expense in liquidating the property and distributing its proceeds seemed to possess everybody.

(5) That there seem to be two distinct parts to the present proceedings: (a) The suit to recover of the liquidating agent amounts claimed to be owing to the Guardian Trust Company by him; and (b) the sale of the property of the Guardian Trust Company and the property of its subsidiary companies and the distribution of their proceeds under the orders of the court.

(6) That in this court the defendants offered, as the court understands their offer, to do the latter part under the direction and orders of the court without fees, charges, or expense.

(7) In view of the above facts we suggest, for the consideration of the District Court, the wisdom of allowing the case to proceed for the trial of the claims against the liquidating agent, taking a bond for the payment of any award that may be made against him, securing a relinquishment of the contract of liquidation, allowing the Trust Company, under the orders and the direct supervision of the court, to conduct and complete a speedy liquidation of its property including that of the subsidiary companies and the distribution of the funds and proceeds among its stockholders without cost beyond that of mere clerical assistance, and giving all parties in interest full opportunity to be heard regarding the details of the liquidation.

Let the appeal from the order of December 28, 1916, denying the motions to vacate the order appointing the receiver and to dissolve the injunctions and mandatory orders of August 29, 1916, be dismissed, and let the order of August 29, 1916, appointing Henry C. Flower receiver be affirmed.

Let the mandate in this case issue forthwith.

## GRIESON v. WINEY.

(Circuit Court of Appeals, Eighth Circuit. March 5, 1917.)

No. 4667.

1. SPECIFIC PERFORMANCE ⟸53—RIGHT TO—NATURE OF REMEDY.
Specific performance of a contract is not of absolute right, but rests in sound judicial discretion, exercised in the light of equity and good conscience, and where, through misrepresentations of the broker that he was financially responsible and would at any time within a year relieve him of his purchase, defendant was induced to contract to purchase land, specific performance of the contract will not be decreed.
[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 160–171½.]

2. SPECIFIC PERFORMANCE ⟸53—RIGHT TO—FRAUD IN CONTRACT.
Where a real estate broker, with whom land had been listed for sale, misrepresented his financial responsibility, and by agreeing to relieve defendant of his purchase at any time within a year induced him to contract to purchase land, the fraud of the broker cannot be isolated from the principal contract, so as to authorize specific performance at suit of the owner.
[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 160–171½.]

Appeal from the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Suit by C. H. Grieson against R. M. J. Winey. From a decree denying specific performance, complainant appeals. Affirmed.

Arthur W. Fowler, of Fargo, N. D., for appellant.

George F. Skinner, of Clinton, Iowa (Victor Coe, of Clinton, Iowa, and C. M. Waterman and Joe R. Lane, both of Davenport, Iowa, on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This is an appeal by Grieson from a decree denying specific performance of a contract for the purchase of land by Winey. Briefly stated, the material facts are these: Grieson, being the equitable owner of a section of land in North Dakota, placed it with a firm of real estate agents there for sale at a specified price. One of the agents went to Iowa, where Winey lived, and led him to believe that he, the agent, was a man of means, and was the owner of a large amount of land in North Dakota which he wanted to sell. Winey was a farmer, about 77 years of age and without other business experience. The agent engaged his interest and influence to secure purchasers, and by agreeing to pay his expenses induced him to go to North Dakota with him to look over the land and so be better qualified in aiding to sell it. When they arrived there the agents showed Winey over the country, and the Grieson land in particular, and on the third and last day of his stay urged him to buy it himself. They told him his purchase would be an example to others in Iowa.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

He was reluctant to buy, but was finally persuaded to do so by an agreement, reduced to writing and signed by the agent, in whose financial responsibility he had been led to believe, that he, the agent, would, if desired at any time within a year, relieve him of his purchase and refund the money paid with interest. Winey thereupon signed the contract to purchase, the price specified being $5,798 in excess of that fixed by Grieson for the agents. The agent who agreed to relieve Winey from his bargain was in fact financially irresponsible, and his agreement was worthless. Three weeks later Winey notified the agents of his desire to be relieved, but without avail.

[1] Specific performance of a contract is not of absolute right, but rests in sound judicial discretion, exercised in the light of equity and good conscience. To justify a denial of specific performance, it is not necessary that the contract be invalid in law; it is sufficient if its terms are oppressive, unconscionable, or iniquitous, or if it was obtained by sharp practice, false artifice, or unfair means. Cathcart v. Robinson, 5 Pet. 264, 18 L. Ed. 120; Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501; Pope Mfg. Co. v. Gormully, 144 U. S. 224, 236, 12 Sup. Ct. 632, 36 L. Ed. 414.

[2] It is clear that a fraud was practiced upon Winey to overcome his reluctance and to persuade him to sign the contract. But it is urged that Grieson was a stranger to the wrongdoing; that the agreement of the agent was collateral to the contract of sale and was made by him in the interest of his firm because of their commission. We are not impressed by the effort to break up the transaction in that way, and to detach and isolate the feature that operated on Winey as the persuasive inducement. To say the artifice practiced was but to gain an agent's commission, and not to make a sale, is to ignore the substance of things. Undoubtedly a real estate agent, with due regard for his duty to his principal, may in good faith make an independent contract with a prospective purchaser, based upon acquisition of title by the latter; but, if in the guise of such an independent contract, he practices a fraud that helps the sale, the fraud inheres in the main transaction, and will not be put aside as collateral. Here the business in hand was the sale of Grieson's land, and Grieson cannot stand clear of his agent's wrongful methods in effecting it.

The decree is affirmed.

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## SHERWOOD SHOE CO. et al. v. WIX.

## In re WIX.

(Circuit Court of Appeals, Fourth Circuit. February 14, 1917.)

No. 1485.

1. BANKRUPTCY ⟸409(1)—DENIAL OF DISCHARGE—GROUNDS—FAILURE TO KEEP BOOKS—INTENT.

Under Bankr. Act July 1, 1898, c. 541, § 14b (2), 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (Comp. St. 1913, § 9598), entitling a bankrupt to discharge unless he has with intent to conceal his financial condition destroyed, concealed, or failed to keep books of ac-

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count or records from which such condition might be ascertained, the mere failure to keep books, or keeping such books as in fact deceive creditors as to the bankrupt's condition if kept without purpose to conceal, is insufficient to prevent a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 752–757.]

2. BANKRUPTCY ⊂⊃414(3)—DENIAL OF DISCHARGE—FAILURE TO KEEP BOOKS—EVIDENCE OF INTENT.

The fact that a bankrupt had for ten years adopted the same method or lack of method of bookkeeping refutes a presumption that he had adopted such method for the purpose of concealing his financial condition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 722.]

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville; Joseph I. Johnson, Judge.

In the matter of John W. Wix, bankrupt. From a decree of the District Court granting a discharge to the bankrupt over the objection of Sherwood Shoe Company and another (236 Fed. 262), the objecting creditors appeal. Affirmed.

M. L. Marion, of Chester, S. C. (J. H. Marion, of Chester, S. C., on the brief), for appellants.

David Hamilton, of Chester, S. C. (Gaston & Hamilton, of Chester, S. C., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

DAYTON, District Judge. [1] In this case creditors are objecting to the granting of a discharge to the bankrupt. Their objections are based solely upon section 14, par. "b," cl. 2, of the Bankrupt Act, providing that the bankrupt shall be granted a discharge unless he has, "with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained." Analyzing this statutory provision, it is clear that its sole purpose is to condemn a design on the part of a bankrupt to conceal his financial condition by either (a) destroying his books of accounts or records, or (b) concealing them, or (c) failing to keep them. It cannot be construed to require any particular system of bookkeeping, nor can it be construed to require the keeping of books at all. The books kept may be so faulty and deficient as to in fact deceive creditors as to the bankrupt's financial condition, yet, if they have been so kept with no purpose to conceal such condition, the inhibition of this statute does not apply. Congress emphasized this construction when by the amendments of 1903 it struck out the words "fraudulent" before the word "intent," "true" before the words "financial condition," and the words "and in contemplation of bankruptcy" following the words "financial condition." As said in Re Marcus & Scherr (D. C.) 192 Fed. 743, 27 Am. Bankr. R. 164:

"The intent to conceal one's financial condition is a separate fact from the keeping of the books. The reasonable consequences of keeping imperfect books may be a concealment of one's financial condition, if the occasion ever arises when they are scrutinized, and that fact would be enough to charge one with responsibility for that result, if the law forbade keeping imperfect books.

The general intent of the criminal law is of this kind, it only means that the actor must be aware of his acts, and then charges him with such consequences as would naturally follow from them, regardless of whether he had these in mind or not. When, however, as is sometimes the case, the law attaches no responsibility to an act unless the actor does have in mind the specific consequences, it is necessary as an additional element to prove that state of mind. This is such a case. Moreover, since the intent to conceal is different from the intent to keep imperfect books, the objectors must go further than to show merely that the bankrupts intended to keep the kind of books they kept; for they must show also that they intended these books to conceal from somebody—which must be their creditors—their financial condition. That involves not only knowledge of how the books were kept, but some anticipation that at a future time they might be examined by creditors and would then fail to enlighten them upon all the facts."

See Collier on Bankruptcy (9th Ed.) p. 346 et seq., and authorities cited.

[2] We fully concur with the court below that the fact that Wix had for ten years adopted the same method or lack of method of bookkeeping refutes the presumption that he had adopted such method for the purpose of concealing from his creditors his financial condition. The use of the word "deceiving" by the court below in this connection we regard as merely inadvertent. We do not desire to be understood as denying that the books kept, or the methods of bookkeeping adopted, in some cases may present internal evidence of this forbidden intent to conceal; but the case here is not of that character.

The decree of the court below must be affirmed.

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## BABBITT v. READ et al.

(Circuit Court of Appeals, Second Circuit. February 8, 1917.)

No. 234.

1. BANKRUPTCY ⊂=299—JURISDICTION—FEDERAL COURTS—INTERVENTION.
Where the trustee in bankruptcy, appointed by the federal District Court for the Eastern Division of the Eastern District of Missouri, instituted an action on behalf of the bankrupt estate in the District Court for New York, the District Court for Missouri, which is charged with the duty of collecting and distributing the bankrupt's estate, alone has jurisdiction to allow other persons to intervene as parties and prosecute the action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 448.]

2. BANKRUPTCY ⊂=467—MATTERS APPEALABLE—DISCRETION.
Where a trustee in bankruptcy, suing on behalf of the bankrupt's estate was defeated, not only in the District Court, but in the Circuit Court of Appeals, the denial by the District Court of a petition to allow a creditor to intervene to apply for certiorari to the Supreme Court is not reviewable, being a matter of discretion; there being no contention that the trustee had not efficiently prosecuted the claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929.]

Appeal from the District Court of the United States for the Southern District of New York.

Action by Byron F. Babbitt, as trustee, etc., against Caroline S. Read

and others, as executors, etc. From an order denying the petition of George T. Hollister to intervene as a party and apply for a writ of certiorari to the Supreme Court, he appeals. Appeal dismissed.

See, also, 215 Fed. 395; 236 Fed. 42, — C. C. A. —.

C. A. Boston, of New York City, for appellant.

P. T. Bryan, of St. Louis, Mo., and C. E. Rushmore, of New York City, for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. [1] This is an appeal from an order of Judge Mayer refusing to allow certain creditors of the Randolph-Macon Coal Company, a bankrupt, to intervene as parties and apply for a writ of certiorari to the Supreme Court. The case having been instituted and conducted by the trustee in bankruptcy, an officer of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, which is charged with the duty of collecting and distributing the bankrupt estate, we think that court alone has jurisdiction to authorize other persons to intervene as parties.

[2] Assuming, however, that the District Court had authority in the premises, we think its refusal to grant the petition was a matter of discretion not appealable. There is no pretense that the trustee in bankruptcy has not honestly and efficiently asserted the petitioners' claims both in the District Court and in this court. Having been defeated in both courts, the District Judge might very properly refuse to further delay proceedings by authorizing an application to the Supreme Court for a writ of certiorari. With such an exercise of discretion we have no right to interfere.

The appeal is dismissed.

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## GOOD PINE LUMBER CO. v. DUKE.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1917. Rehearing Denied March 20, 1917.)

No. 2901.

1. JURY ⊂⊃28(17)—WAIVER OF JURY—MOTION TO VACATE.
   A motion to vacate waiver of a jury and award a trial by jury, made after hearing and submission of the case on the merits, comes too late.
   [Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 194–196.]

2. APPEAL AND ERROR ⊂⊃846(5)—REVIEW—ACTION TRIED TO COURT.
   When a cause is submitted to the court without a jury, under Rev. St. § 649 (Comp. St. 1913, § 1587), and only a general finding is made, no special findings being requested, the facts are not reviewable by the appellate court.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3351–3355.]

In Error to the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Action at law by John Gip Duke against the Good Pine Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. H. White, of Alexandria, La., for plaintiff in error.

George Wear, Jr., of Jena, La., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. [1] The motion to vacate waiver of jury and award a trial by jury, filed and made after hearing and submission of the case on the merits, comes too late to predicate error on denial of the same.

[2] As the finding of the court was general, and no agreement of facts nor special finding by the court was asked or made, the facts of the case are not reviewable on this writ.

We have examined the record in the light of the briefs filed, and we find no reversible error assigned or patent of record.

Judgment affirmed.

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## EVANS v. WARREN BROS. CO.

(Circuit Court of Appeals, Third Circuit. March 9, 1917.)

No. 2173.

PATENTS ⊂=328—INFRINGEMENT—PAVEMENT.

The Warren patent, No. 727,505, for a pavement, covers a pavement consisting of broken stone of graded sizes, from two inches in diameter down to dust, combined with a comparatively soft binder, as asphalt, and is not infringed by a pavement in which a single grade of large pieces of stone, of comparatively uniform size, is used, and the spaces filled in with sand.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by the Warren Bros. Company against W. C. Evans. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 234 Fed. 657.

Walter B. Saul, of Philadelphia, Pa. (Cornelius D. Ehret, of Philadelphia, Pa., of counsel), for appellant.

Edward G. McCollin, of Philadelphia, Pa., and Head, Drinkwater & Crafts, of Boston, Mass. (W. K. Richardson and James M. Head, both of Boston, Mass., of counsel), for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Warren Bros. Company, the owner of patent No. 727,505, granted May 5, 1903, to Frederick J. Warren, for a new and useful improvement in pavements, brought suit against W. C. Evans, charging infringement of claims 5, 6, 9, and 11 thereof. On final hearing that court, in an opinion reported at 234 Fed. 657, held said claims valid and infringed. From a decree so adjudging the defendant took this appeal.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

This patent has been considered by various federal courts, and its validity established. An attack on its validity is made in this case, and certain evidence not produced in these prior cases is here involved. As the present case turns on the question of infringement, we will for present purposes assume, without discussing or adjudging, the validity of the claims here involved.

The specification of Warren's patent shows that the object of his alleged invention was to make a road "as dense, as free from voids as possible." His alleged discovery in making was that he had found:

"That what has ordinarily been supposed to be the best provision for eliminating voids and establishing stability has, as a matter of fact, been almost the poorest provision for accomplishing these purposes."

He then states that:

"The provision usually accepted as the best is that in which the mineral matter used as a basis of the pavement and united by the plastic asphalt vehicle shall be in the shape of a sand or fine gravel."

He then states that this has been an error, and that he had discovered:

"That there is a smaller percentage of voids in a pavement which contains mineral components which are of relatively large size."

He further states that:

The former method has been "to exclude from its composition all pieces of stone or sand larger than one-tenth of an inch in diameter," and that, following this method, the smallest percentage of voids that it "has been possible to produce has been 21 per cent. of the aggregate, while by the use of the larger sizes, grains, or pieces—say up to those which will pass through a two-inch ring—and employing with these larger grains proper quantities of the smaller sizes down to an impalpable powder, it is possible to reduce the voids of the mineral base below 10 per cent. of its bulk, and such a mixture, when assembled and compacted together, will form a dense, solid, homogeneous, compact body, with the smallest percentage of voids and possessing the highest degree of stability, * * * because of the sizes of the pieces and their arrangement with respect to each other, offers the smallest areas of surfaces for the attachment of the plastic composition to them, so that not only is a superior binding effect or union obtained by the plaster composition, but a smaller quantity of it is necessary for the purpose of obtaining the superior result or product."

From this description it will be seen that the gist of his invention consisted, first, of the use of stone larger than one-tenth of an inch in diameter; second, the employment with these larger sizes of proper quantities of smaller sizes down to an impalpable powder; and, third, the discovery that by the use of these graded sizes it was possible to reduce the voids between the mineral base elements below 10 per cent. of its bulk.

The suggested use by him of these variant ingredients he gives as follows: Impalpable powder, 1 to 3 per cent.; material between impalpable powder and one-fourth of an inch, 10 to 30 per cent.; material larger than one-fourth of an inch, 50 to 80 per cent. Using these proportions, he states:

"I have found that these ingredients, when associated together, produce a mass or body having less than 20 per cent. of voids."

He further states the benefits arising from the use of these several grades of mineral ingredients as follows:

"Because of the inherent stability obtained by me by the careful selection and proportioning of *several* grades of mineral ingredients, I am enabled to use an asphalt or bituminous uniting medium of a softer nature and at a lower temperature than could otherwise be used."

Such was the disclosure, and in substance the whole disclosure, made by Warren. He made clear what he regarded as his invention, and he pointed out a way which he calls the preferable way, but which is, in fact, the only way he had found, of making use of his invention, and that way consisted in substance of the use of different grades of stone and in the suggested proportions of the different materials which went to make up his road. Assuming that the disclosure thus made constituted invention, he was allowed a number of claims which specifically covered the mixture which he had suggested. It is quite apparent that, measuring Warren's patent by its disclosure and limiting its claims to the specific proportions indicated by him, or substantially equivalents thereof, the defendant in this case, who has not been sued for infringement of any of such claims, did not in fact infringe them, and the plaintiff was compelled to sue upon claims of a broader character.

The defendant is using a composition in road making called "Filbertine," which has been in use in Pennsylvania for many years, and which it described in the specifications of its state highway department, and we assume the defendant is making a pavement which conforms to such specifications. In that regard, the state specification requires:

"The mineral aggregate in the Filbertine mixture shall be composed of sound, hard, crushed trap rock, with a coefficient of wear of not less than 15, or limestone with a coefficient of wear of not less than 10; hard grained sand, such as required for asphalt wearing surface mixture; and limestone dust or Portland cement, which shall be combined with the asphaltic cement within the following proportions best suited for making a dense mixture:

| | |
|---|---|
| Bitumen | 6.0 to 8.0 per cent. |
| Limestone dust, or Portland cement | 4.0 to 6.0 " " |
| Stone, ¾-inch hard crushed | 55 to 60 " " |
| Sand, coarse to fine | 30 to 35 " " |
| Other ingredients | Not over 1 per cent." |

From this specification it will be seen that the defendants are using sand, which, of course, they were permitted to do without objection, which sand was 30 to 35 per cent. of the mixture. When it came to stone, however, by this specification, instead of using stone of different and varying grades, the contractor was called upon to use stone of one grade only, viz., ¾-inch, 55 to 60 per cent., which was not the run of the crusher. It will thus be seen that the Filbertine specified was not the composition, so far as varieties of stone were concerned, of the Warren specification. Indeed, the Warrenite, which is made under this patent, was recognized by the state under a different head and requirement, in the same specification, and as embodying graded stone and a freedom from voids. Thus, in its specifications for Warrenite, the state says:

"*Mineral Aggregate.*—The several grades or sizes of stone, sand, and filler composing the mineral aggregate shall be accurately measured and weighed

in such proportions as may be determined by laboratory tests to give the wearing surface a useful degree of density, rigidity, inherent stability, and freedom from voids:

Material passing 1¼-inch screen and retained on No. 2 sieve, 40 to 60 per cent.

Material passing No. 2 sieve and retained on No. 4 sieve, 10 to 20 per cent.

Material passing No. 4 sieve and retained on No. 10 sieve, 10 to 5 per cent.

Material passing No. 10 sieve and retained on No. 30 sieve, 10 to 5 per cent.

Material passing No. 80 sieve, at least 25 per cent. of which will pass a No. 20 sieve, 10 to 5 per cent.

The balance to pass No. 30 sieve and be retained on No. 80 sieve."

It will thus be apparent that from 40 to 60 per cent. of the Warrenite mineral is between the sizes of 1¼-inch and ½-inch; from 10 to 20 per cent. it is ¼ to ½ inch, from which it will be seen that from 50 to 80 per cent. of the mineral material is ¼ of an inch in size, or in excess thereof, while in the Filbertine the only stone ingredient is of ¾-inch size. It is thus very clear that Filbertine is not the Warrenite described in the patent, and that it does not fall within any of the specific claims which have not been sued on.

Does it fall within the more general claims 5, 6, 9 and 11,[1] which have been sued on? In considering them, a vast amount of discussion has been injected into this case as to what is meant by inherent stability, and as though a monopoly could be granted for inherent stability. It is quite evident from the claims that, where the phrase "inherent stability" is used, it means simply the self-contained stability of the composition, its inherent power to make itself stable, and that the use of inherent stability in the several claims is a description of the type of pavement which Warren disclosed and claimed. For instance, on line 55, he says that:

His mixture, "when assembled and compacted together, will form a dense, solid, homogeneous, compact body, with the smallest percentage of voids and possessing the *highest degree of stability.*"

On line 73 of page 2 he says:

"Because of the inherent stability obtained by me by the *careful selection* and proportioning of *several* grades of mineral ingredients, I am enabled," etc.

It is quite evident, therefore, that what is described by him as inherent stability is a result derived from the ingredients and proportions which he has disclosed. In the very nature of things, he could not

[1] "5. In a street pavement, a bituminous mineral structure, the mineral ingredients of which are mixed and of several grades, so graded as to give the structure an inherent stability.

"6. A bituminous street pavement structure containing mixed mineral ingredients of such grades as to give the structure an inherent stability."

"9. A street pavement wearing section composed of a mineral structure of inherent stability formed of several grades of material so proportioned as to have a per cent. of voids less than 21 per cent. of the whole, in combination with a comparatively soft bituminous binder filling said voids and rendering the whole permanent in nature and elastic and waterproof in character."

"11. A street paving structure composed of a mixture of mineral or wearing ingredients, and a plastic binder, the space between the mineral ingredients being less than 21 per cent. of the whole, and the plastic binder occupying said space."

have a monopoly of a physical characteristic, such as the quality of inherent stability.

Turning, now, to the claims of a more general nature, which are here sued upon, No. 5 reads as follows:

"In a street pavement, a bituminous mineral structure, the mineral ingredients of which are mixed and of several grades, so graded as to give the structure an inherent stability."

It is quite evident that the stone mineral mixtures in Filbertine are not, in the words of the claim, "so graded as to give the structure an inherent stability," for the simple reason that they are not graded at all, and that the specified stone item in Filbertine, viz. stone, ¾-inch hard crushed, 55 to 60 per cent., is not graded; consequently, there is no infringement of claim 5.

Claim 6 reads as follows:

"A bituminous street pavement structure containing mixed mineral ingredients of such grades as to give the structure an inherent stability."

This is but a modification of claim 5, and is based on a graded mineral composition. The pertinent element is "mineral ingredients of such grades as to give the structure an inherent stability." No grades are used in Filbertine, and consequently, no grades being used, any inherent stability Filbertine has is not due to the use of grades of mineral ingredients.

Claim 9 reads as follows:

"A street pavement wearing section composed of a mineral structure of inherent stability formed of several grades of material so proportioned as to have a per cent. of voids less than 21 per cent. of the whole."

The fact simply is that Filbertine does not have the several grades of material, and consequently no proportioned grades, and while Filbertine as a structure may have a percentage of voids less than the 21 per cent. of the claim, yet that percentage of voids thus claimed is based on a mineral structure of several grades, and consequently, whatever voids Filbertine has is a void that is obtained by a different method than the graded material method of claim 9.

Claim 11 reads as follows:

"A street paving structure composed of a mixture of mineral or wearing ingredients, and a plastic binder, the space between the mineral ingredients being less than 21 per cent. of the whole, and the plastic binder occupying said space."

If this claim is to be construed as a monopoly for any structure that contains less than 21 per cent. of voids, it is not a patentable, allowable claim, for it would be a claim for a mere physical fact. If the claim is to be allowed at all, it should be restricted to the graded mineral composition which the specification discloses, and which, so far as the proportion of voids goes, was the basis of his patent. For example, the specification says:

"I have found that these ingredients, when associated together, produce a mass or body having less than 20 per cent. of voids."

It would seem, therefore, that such graded ingredient was his disclosure, and his only disclosure, and that a structure, even though it

has less than 20 per cent. of voids, but which does not contain "these ingredients," was something that Warren neither discovered nor disclosed.

In view of these considerations, we feel that the claims of Warren should be restricted to the proportions which he disclosed, or their substantial equivalents. Indeed, the general problem of the use of graded stones to reduce voids was a fact already known to road builders. Thus, Codrington in his book, Maintenance of Macadamized Roads, after describing certain experiments which resulted in finding "that by packing irregularly shaped broken stone in a chest the empty space could be reduced to as little as 40 per cent. of the whole," had stated:

"As a general result, the size of the stones was without sensible influence on the proportion of the empty space if the stones were of an even size, but stones of various sizes, mixed together, gave a smaller proportion of void, which diminished as the variety in the size of the stones was greater."

It seems quite clear this teaching that various sizes of stone mixed together gave a smaller proportion of void, and that that void diminished as the variety in the size of the stone was increased, was well known previous to Warren, and that, if his disclosure be held inventive, it must be confined to the particular proportions which he disclosed. And an examination of the decided cases, which are so strongly relied on here to influence our decision, shows they concerned roads where different grades of minerals were used. None of them involved a case, as here, where the mineral was confined to one grade of stone. In the Owosso Case, 166 Fed. 312, 92 C. C. A. 230, Judge Lurton says:

"Warren's invention, shortly stated, consists in the discovery that an aggregate of *large and small pieces of stone, together with a certain proportion of stone dust*, all mixed together and thoroughly permeated with bitumen or asphalt, results, when set, in a compact, stable structure. * * * Under the evidence, the particles are more compact in their relation to each other, and there is a minimum of friction in their interaction. The larger pieces of stone withstand the tendency of the small grains or dust to slip by each other and change the form of the pavement. * * * The fundamental idea of Warren is, not that the '*density*' of his composition gives the stability which he claims, but that the *mineral aggregate* should of itself resist displacement by traffic."

The judge (see 166 Fed. 317, 92 C. C. A. 227) further says:

Warren's "real discovery was that, by the use of a *large proportion* of mineral in pieces *as large* as two inches in diameter, *mingled* with small pieces *graded* down to dust, less bitumen was needed to act as a binder, because the mineral ingredients so graded and mingled furnished stability as well as density, *which relieved the carrying strain upon the bitumen.*"

It will be observed that there is no discussion in the case of the particular form of the infringing road, but we must assume that it was one in which the stones consisted of several graded sizes, because of the emphasis in the opinion of graded stones as an element of the invention. This Owosso Case was simply followed in Warren v. Montgomery (C. C.) 172 Fed. 415.

In Warren v. New York City, 187 Fed. 834, 109 C. C. A. 594, it is quite clear that the stone ingredients were of a graded character. Thus Judge Coxe says:

"In the present instance, however, the particles of stone must pass through a screen 'with a one-inch mesh, and consequently the largest pieces must be less than an inch, and vary *from the maximum down to the smallest pieces.*'"

It will thus appear that the mineral, including, as it did, everything that passed through a one-inch mesh, was the resultant run of the crusher, which would necessarily have smaller grades of stone.

In Warren v. Grand Rapids (D. C.) 216 Fed. 367, the infringing requirements were that:

"The *mineral aggregate* shall consist of broken stone, or broken stone and sand, of a fairly uniform *grading from the largest to the smallest particles*, in such proportions as to give the mixture a maximum degree of density and low percentage of voids."

It will thus be seen that in all these cases there was a series of graded stones. In the present case there is but a single grade of stone, namely, that which passes through a ¾-inch mesh, and that which is caught on a half-inch mesh. All the grades from ½ inch down to sand are excluded, and there is a jump or step, as distinguished from intermediate serial grading, directly down to a fine void-filling mineral material whose coarsest component is sand. It seems to us, therefore, that the object in using different grades of stone was to fill up the interstices or voids between larger pieces of stone by smaller pieces of stone, and that this is a very different structure from one where a single grade of large pieces of stone and of substantially uniform sizes, namely, from ¾ to ½ inch, is filled with particles of sand, for, as stated by Codrington:

"The size of the stone was without sensible influence on the proportion of the empty space, if the stones were of an even size; but stones of various sizes, mixed together, gave a smaller proportion of voids, which diminished as the variety and the size of the stones was greater."

From these views, it seems to us quite clear that Filbertine does not come within the claims of this patent. The decree below must therefore be vacated, and the cause remanded, with instructions to dismiss the bill on the ground of noninfringement.

# RIVERSIDE HEIGHTS ORANGE GROWERS' ASS'N et al. v. STEBLER.

# STEBLER v. RIVERSIDE HEIGHTS ORANGE GROWERS' ASS'N et al.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1917.)

No. 2772.

1. EQUITY ⊂=410(4)—MASTERS—EXCEPTIONS TO REPORT.
Exceptions to reports of masters in chancery are in the nature of a special demurrer, and the party objecting must point out the error; otherwise, the part not excepted to will be taken as admitted.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 910.]

2. EQUITY ⊂=410(1)—MASTERS—OBJECTIONS TO REPORT.
Proper practice requires that objections to a master's report shall be taken in the trial court, that any errors discovered therein may be rectified by the court itself, or by a reference to the master for correction.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 905, 914.]

3. PATENTS ⊂=308—SUIT FOR INFRINGEMENT—PROCEDURE.
When complainant claims infringement by a modified structure made by defendant after the granting of an interlocutory injunction, the better practice is to present the issue by a motion for a supplemental decree, extending the injunction to the new structure.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 504–506.]

4. PATENTS ⊂=328—INFRINGEMENT—FRUIT GRADER.
The Strain reissue patent, No. 12,297 (original No. 730,412), for a fruit-grading machine, used chiefly for sorting oranges, *held* not infringed by a modified machine made by defendant after his original structure was held an infringement.

5. PATENTS ⊂=234—INFRINGEMENT.
A construction which, if earlier, would not anticipate, cannot infringe.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370, 381.]

6. PATENTS ⊂=235—INFRINGEMENT.
If the device of a defendant shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement is avoided.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371.]

7. PATENTS ⊂=318(4)—INFRINGEMENT—MEASURE OF DAMAGES.
Where a patent covers but one feature of a machine, which does not contribute to the whole machine its entire value as a marketable article, and the cost of the manufacture and sale of the patented feature and the net profit thereon are separately ascertainable, the damages recoverable by the owner of the patent from an infringer are limited to the profits he would have made on the sale of such feature.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 572, 573.]

8. PATENTS ⊂=318(6)—INFRINGEMENT—MEASURE OF DAMAGES.
Where complainant was engaged in the manufacture and sale of such machines, in determining the net profits realized from the patented part, it is proper to charge against the sale price of such part a proportionate share of his overhead expenses.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 576.]

9. PATENTS ⊂=319(1)—INFRINGEMENT—ACCOUNTING FOR PROFITS AND DAMAGES.
On an accounting for profits and damages for infringement, where the profits made by defendant were less than the damages sustained by complainant by reason of the loss of sales of the patented machine, he is en-

titled to recover the difference as damages, in addition to defendant's gains and profits.

[Ed. Note.—For other cases, Patents, Cent. Dig. §§ 578, 580.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benj. F. Bledsoe, Judge.

Suit in equity by Fred Stebler against the Riverside Heights Orange Growers' Association and George D. Parker. Decree for complainant, and both parties appeal. Modified.

Suit to restrain infringement of plaintiff's patent for a combination of certain elements in a fruit-grading machine and to recover damages for the infringement thereof. Plaintiff, Stebler, commenced suit on May 24, 1910, in the United States Circuit Court for the Southern District of California, Southern Division, against the Riverside Heights Orange Growers' Association, George D. Parker, and Parker Machine Works, to restrain the infringement of claims Nos. 1 and 10 of letters patent reissue No. 12,297 for a fruit-grading apparatus invented by one Robert Strain, plaintiff's assignor, and to recover damages for the infringement thereof. The defendants answered, denying the validity of the claims and the alleged infringement. The case thereafter came on for trial before the District Court for the Southern District of California, Southern Division, where a decree was entered on September 17, 1912, in which the court held reissue letters patent No. 12,297 to be good and valid in law, but found that the defendants had not infringed the same and dismissed the bill with costs to the defendants. Plaintiff appealed to this court, where the decree of the lower court was reversed, upon the ground that defendants' machine was an infringement of plaintiff's patent, and the cause remanded, with instructions to grant the relief prayed for. 205 Fed. 735, 124 C. C. A. 29. Thereafter, on November 7, 1913, pursuant to the mandate of this court, an interlocutory decree was entered in the District Court, setting aside the decree dismissing the plaintiff's bill theretofore entered in that court, and awarding plaintiff a perpetual injunction to restrain the infringement of his patent, decreeing that plaintiff "recover of the defendants, and each of them, the profits, gains, and advantages which said defendants, and each of them, have or has derived, received, or made, by reason of said infringement, and that complainant recover of the said defendants, and each of them, any and all damages which complainant has sustained or shall sustain by reason of said infringement by defendants, or either of them," together with costs, and appointing a master to take and state the account of said gains, profits, and advantages, and to assess such damages, and report thereon.

The plaintiff thereupon brought 27 or more suits in equity against a number of defendants, including the defendants, Riverside Heights Orange Growers' Ass'n and George D. Parker, appellants herein, charging them as infringing users of fruit graders which had been manufactured and sold by the defendants named, prior to the entry of the interlocutory decree in the court below. Thereupon the defendants petitioned the court below, alleging, among other things, that all the defendants in the suits were customers of the defendants named, and that the acts of infringement complained of and sought to be enjoined by the suits were the use by the said defendants of fruit graders manufactured by the defendants named and sold by them to the other defendants in the suits mentioned in the petition; that all such machines were subject to the accounting against the defendants to be had under the interlocutory decree. The prayer of the petition was that the plaintiff be enjoined from further prosecuting the suits set forth in the petition, and from bringing any additional suits of like nature against the customers of the defendants for the infringement of the letters patent owned by the plaintiff. The petition was heard and granted by the court below, restraining the prosecution of said suits and enjoining the filing or commencement of additional suits against the users of machines manufactured in substantial accordance with plaintiff's letters patent. Thereupon an appeal was taken to this court from the order so made, and upon a hearing this court sustained the order of the lower court,

with a modification limiting its operation to infringements of plaintiff's patent by machines constructed under the Parker patent and by him sold to the users. Stebler v. Riverside Heights Orange Growers' Ass'n, 214 Fed. 550, 131 C. C. A. 96, L. R. A. 1915F, 1101.

Returning now to the proceedings under the interlocutory decree and the reference to a master to hear the evidence and to take and state an account and report thereon: The master proceeded with such hearing, and on September 29, 1914, submitted a report in which he found, among other things, the following facts:

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| Gross profits which would have been realized by plaintiff on 105 sizers sold by defendant Parker | $12,286.05 |
| Less estimated overhead expense to plaintiff on these sales | 815.85 |
| Net profit which would have been realized by plaintiff | $11,470.20 |
| Total gross profits realized by defendant Parker from the sale of the 105 machines complete with distributing systems, etc. (including 20 machines sold since date of the issuance of injunction) | $ 9,352.90 |
| Less estimated overhead expense to defendant Parker on these sales | 4,120.05 |
| Net profit realized by the defendant Parker | $ 5,232.85 |
| Damages to plaintiff (i. e., profits he would have made by the manufacture and sale of the 105 sizers which defendant Parker manufactured and sold, reduced by the sum of the net profits realized by the defendant Parker) | $ 6,237.35 |

The master's conclusion upon the above findings was that plaintiff should recover from the defendant Parker the sum of $5,232.85 gains and profits, and the sum of $6,237.35 damages, or a total of $11,470.20. Of this amount, $585.05 represented the gains, profits, and damages resulting from the sale of 5 of the infringing machines by defendant Parker to the defendant Riverside Heights Orange Growers' Association, and it was accordingly found that plaintiff should recover this sum from those defendants jointly.

Both parties excepted to this report—the defendants excepting to the finding that the 20 machines of a modified type sold by Parker subsequent to the interlocutory decree and injunction infringed plaintiff's patent, and the allowance of gains, profits, and damages resulting from the sale thereof; and the plaintiff excepting to the allowance of $4,120.05 for defendant's overhead expense, to the finding that the damages suffered by plaintiff are to be measured, not by the sale of the machine as a whole, but by simply the patented "sizers, independent of the bins and distributing system," to the deduction of $815.85 for plaintiff's overhead expense, and to the conclusion that plaintiff was not entitled to recover both the profits made by or accrued to defendant Parker ($9,352.90) and the damage suffered by plaintiff ($12,286.05).

The court approved the report of the special master in its entirety, confirming the allowance of damages and profits to plaintiff in the sum of $11,470.20 and awarding a decree against the defendant Parker for $2,340.20 additional as exemplary damages, because of the sale of 20 infringing machines since the issuance of the injunction. From this decree both parties appeal.

N. A. Acker, of San Francisco, Cal., for appellants.

Frederick S. Lyon, of Los Angeles, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1, 2] 1. It is contended by the appellee that appellants' second and third assignments of error, attacking the judgment of the lower court approving the allowance by the master of damages in excess of nominal damages, and of profits upon the entire machines sold by the defend-

ant Parker, complete with bins and distributing systems, instead of upon the patented grader only, are defective, in that they raise objections which were not presented to or considered by the lower court. Other than this, there is no answering argument made by appellee with respect to the questions discussed in appellants' brief under these assignments. It is a well-settled rule of law that:

"Exceptions to reports of masters in chancery are in the nature of a special demurrer, and the party objecting must point out the error; otherwise, the part not excepted to will be taken as admitted." Story v. Livingston, 13 Pet. 359, 366, 10 L. Ed. 200 (citing Wilkes v. Rogers, 6 Johns. [N. Y.] 566). "A party neglecting to bring in objections cannot afterwards except to the report." Id.; McMicken v. Perin, 18 How. 507, 510, 15 L. Ed. 504. "Proper practice requires that objections to a master's report shall be taken in that [the trial] court, that any errors discovered therein may be rectified by the court itself, or by a reference to the master for a correction of his report, without putting parties to the delay and expense of an appeal to this court." Topliff v. Topliff, 145 U. S. 156, 173, 12 Sup. Ct. 825, 832 (36 L. Ed. 658).

See, also, Sheffield, etc., Railway Co. v. Gordon, 151 U. S. 285, 290, 14 Sup. Ct. 343, 38 L. Ed. 164.

After a careful reading of appellants' exceptions to the master's report, we are of opinion that they refer specifically to the right of the master to find, and his finding, that the modified machines, manufactured and sold by the appellant Parker since the entry of the interlocutory decree herein, infringed appellee's patent, and to the allowance of *any* profits and damages for such infringement. They clearly furnish a basis for the first, sixth, and seventh assignments of error, which relate to the question of infringement by the modified Parker machines, but are restricted by their terms to that question alone. It is further apparent from its opinion that the lower court so construed these exceptions. There is nothing in the record to show that any of the points now urged by appellant under the second and third assignments were ever presented to or considered by the lower court, and this court will not review a master's report upon objections taken here for the first time.

[3, 4] 2. This brings us to the consideration of the decree of the court in sustaining the master's report holding that the new apparatus placed on the market by the defendant Parker since the date of the interlocutory decree was an infringement of the plaintiff's invention. The first objection is that this Parker apparatus is claimed by the defendants to be a new device, differing from the apparatus held valid by this court in Stebler v. Riverside Heights Orange Growers' Ass'n, 205 Fed. 735, 124 C. C. A. 29, to such an extent as not to be an infringement of plaintiff's invention; that the question whether this new device was an infringement of plaintiff's invention was a matter of substantial dispute, and the issue should have been determined upon a motion by the plaintiff for a supplemental decree. Such a motion, or an application to the court to enjoin the use of the new apparatus, would, we think, have been the better practice; but, as the issue appears to be fairly presented by the master's report and by the proceedings resulting in the decree of the court below confirming it, we shall consider the question on its merits. The master in his report says:

"That the defendants were guilty of infringing the plaintiff's patent prior to November 7, 1913, was fully determined by the interlocutory decree entered herein on that date. Since that decree, by a modified construction of the infringing device, I find the defendant Parker has further infringed the plaintiff's patent."

The court, in confirming this report, held:

"That the parts of the last-mentioned machine operate in substantially the same manner as to produce substantially the same result attained by plaintiff's invention, and that, as I understand it, is sufficient to justify, and in fact require, the master to make a finding of infringement."

This conclusion we believe to be error. The invention held valid by this court is a machine described in reissue letters patent No. 12,297 to R. Strain, dated December 27, 1904, for grading or assorting fruit with reference to size, and is used exclusively in the orange industry, where, in order to secure a uniform pack, it is necessary that all oranges in a box shall be practically the same size. Assortment by hand is too slow and inaccurate to meet the requirements of the industry, and hence the need and value of the invention. In the opinion of this court (205 Fed. 735, 124 C. C. A. 29) the prior state of the art was reviewed, and among other devices referred to was the machine known as the California grader, based upon a patent, No. 458,422, granted to J. T. Ish, August 25, 1891. Referring to this machine, the court said:

"While efficient beyond any device theretofore invented and of great practical value, in actual use the Ish machine disclosed certain weaknesses or defects. It was wanting both in adaptability to fluctuating grade sizes and adjustability in relation to bin space for the assorted fruit. It is obvious that, if the sorting is dependent upon and controlled by the several steps of a single roller, the grade spaces must sustain fixed and unalterable relations to each other. While possibly the operator might increase or diminish the size of all the spaces alike by increasing or diminishing the distance between the belt and the roller, he could not alter the width at one step without in like manner altering it at all other steps. And necessarily the precise difference in size between the several grades could not be left to the option or discretion of the packer, but must be predetermined by the manufacturer of the machine, for if the step down in the roller is one-half inch or one-fourth of an inch, the difference between the sizes of two successive grades must likewise be one-half or one-quarter of an inch. One lot may run largely to one size, and another lot to a different size. It follows that if the roller in the Ish machine was graduated for nine sizes, and if of a given lot of oranges one half were of one such size and one of another, the corresponding bins would be congested, while other bins would receive little, if any, of the fruit. In the operation of packing it is necessary that the oranges be assorted, not only according to size, but also according to quality, and this latter process must be performed by hand. They must also be wrapped in paper and placed in boxes. Each size being handled separately, one of the problems is to provide adequate bin space to give access for the requisite number employed in these several operations. If the bins were of equal capacity, and the run happened to be confined to two or three sizes, the number of attendants having access to such bins might be too small to handle and pack the fruit and keep the machine from clogging, while those attending other bins would have little, if anything, to do. If under such conditions a part of the dominant grade could be carried forward and delivered into other bins, the difficulty might be obviated. Some relief was secured by elongating the runway, through the use of two or more graduated rollers, instead of one; but the expedient was not wholly satisfactory, even in solving the problem of bin space, and in no wise affected the objectionable fixity of grade relations.

"In this state of the art Strain conceived the invention covered by the claims in suit. In effect it may be described as a modification of or addition

to the Ish machine, by cutting the roller into as many pieces as there are steps, and separately mounting them, all in line longitudinally; each being independent and transversely adjustable. More accurately, several short rollers of uniform diameter are arranged in line, to take the place of the one long graduated roller of the Ish machine, and the required grading space in the case of each roller is secured by adjusting the roller toward or from the traveling belt. It is apparent that with such a construction the rollers may be so arranged as to form a true alignment, and the grading aperture thus be made of uniform width throughout the entire length of the runway, or they may be so adjusted that the opening has as many widths as there are rollers, or for half the distance it may be of one width and the other half another width, and so on. As a consequence, the operator may at will adopt such grade sizes as he sees fit, and, subject to certain limitations, may deliver any size into any bin."

Referring to the defendant's apparatus, held to be an infringement of plaintiff's invention, the court said:

"As in the Strain invention, the other wall or side of the grading space or aperture is made up of a short independent roller rotating upward and outward to avoid pinching the oranges; also, like the Strain machine, this roller is mounted upon brackets of its own, and is transversely and independently adjustable at the will of the operator. * * * The defendants have appropriated the plaintiff's invention, the essence of which is the combination with a traveling belt (common to the Ish, Strain, and Parker machines) *of a series of independent rotating units arranged in longitudinal succession parallel with the belt, each transversely adjustable.*"

It clearly appears from this opinion that the apparatus held to be an infringement of plaintiff's invention was so held by reason of the fact that each series of independent rollers constituted a separate and distinct member of the fruit grader was *independently adjustable,* transversely toward and from the fixed member of the runway, and the end to end rollers were *independently rotatable,* one with respect to the others, each adjustable and rotatable roller being mounted in *independent brackets of its own.* Under this construction, any one roller or grade unit of the series of rollers arranged in longitudinal succession was adjustable transversely without disturbing the position of an adjacent roller, and adjusted in the same manner as the individual rollers of the grader of the reissued patent. This construction resulted in an apparatus the rollers of which could be so arranged as to form a true alignment, and the grading aperture could be made of uniform width throughout the entire length of the runway, or they could be so adjusted that the openings would have as many widths as there were rollers, or for half the distance it could be of one width and the other half another width, or there might be as many openings for each width as desired.

The master in his report describes the modified construction of the infringing apparatus, charged in these proceedings as an infringement, as follows:

"The modified device is a series of end to end rollers all so connected that they are positively driven from the roller at the head end of the machine, while in the Strain reissue patent each roller is driven by a separate belt from the common shaft."

He thereupon draws the conclusion that:

"The function in regard to the rotation of the rollers is the same in each case, since they all rotate together in either case."

And his reason for this conclusion is that:

"Practically, inasmuch as these rollers are all so connected that they rotate together, they constitute a single roller."

The master says further:

"The essence of each of these inventions is the combination with a traveling belt of a series of independent rotating units arranged in longitudinal succession, parallel with the belt, each transversely adjustable."

The master continues:

"There is this about the modified Parker grader: *That the series of connected rollers, driven in unison and constituting the outer wall member of the fruit runway of the grader, are not independently adjustable with respect to each other, nor are they independently rotatable with respect to each other; whereas in the plaintiff's invention the rollers on the graders are absolutely independently adjustable.*" "It may be true," says the master, "that in the modified Parker machines the adjustment of the initial or forward end of the roller does affect the rear end of the preceding roller; but this is immaterial, as the rear end of the roller does not, in operation of the machine, form any part of the grade opening."

But all this was before this court in 205 Fed. 735, 124 C. C. A. 29, and in considering the state of the prior art this court said:

"There was at that time in practical use what was commonly known as the California grader, based upon a patent (No. 458,422) granted to J. T. Ish, August 25, 1891. The essential members of this device were (1) a long horizontal roller, with graduated sections or steps, turned down from a large diameter to a smaller one, resembling an inverted telescope; and (2) a flat endless belt, so adjusted that it was longitudinally parallel with the axis of, but a little lower than, and with a slight lateral inclination from the horizontal toward, the roller. The oranges were fed or delivered at a point near the large end of the roller, and by the moving belt were carried along, with one side resting upon the belt and the other upon the roller, until a point was reached where the space between the edge of the belt and the roller section was large enough to permit them to fall through into bins or receptacles provided for that purpose. It will be seen that thus the oranges of the smallest size were first eliminated, and then those a little larger, and so on; the largest being carried to the largest opening, which, of course, was opposite the smallest and last step."

[5] The distinction here made between the patent in suit and the prior art is substantially the distinction we find, from the master's report and the evidence upon which it is based, between the patent in suit and the modified device placed on the market by defendant Parker since the entry of the interlocutory decree. The construction of the grade opening formed by the rollers in the defendant's modified apparatus is a return in its substantial construction to the prior art, which this court differentiated from the invention in suit to such an extent that it held that the latter had not been anticipated by such prior art. The rule applicable to the question thus presented is that a construction which would not anticipate cannot infringe. Cook v. Sandusky Tool Co. (U. S. Supreme Court) 28 L. Ed. 124; American Tobacco Co. v. Streat, 83 Fed. 700, 706, 28 C. C. A. 18; Cleveland Co. v. Chicago Co., 135 Fed. 783, 68 C. C. A. 485; Grever v. United States Hoffman Co., 202 Fed. 923, 926, 121 C. C. A. 281.

[6] But there is a further rule also applicable to this question, and that is:

"If the device of the respondents shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement is avoided." Cimiotti Unhairing Co. v. American Fur Ref. Co., 198 U. S. 399, 414, 25 Sup. Ct. 697, 702 (49 L. Ed. 1100).

The conclusion we reach is that under the distinction drawn by this court in its opinion (205 Fed. 735, 124 C. C. A. 29) the defendant's modified apparatus is not an infringement of the patent in suit.

The foregoing will necessitate reducing defendant's gains and profits and plaintiff's damages, as found by the master and confirmed by the decree of the court, by the amounts derived from the sales of the 20 modified Parker machines, held by the master and the court below to infringe plaintiff's patent, now held not to be an infringement. Defendant's gains and profits must therefore be reduced from $9,352.90 to $6,852.16, the difference of $2,500.74 being the profits allowed upon the 20 graders of the modified type.

Allowance must also be made for the overhead expense charged against these twenty graders. It is stipulated that "the gross overhead expense of the defendant Parker for the period from March, 1912, to and including March, 1913, * * * amounted to the sum of $8,684.59, while the gross business of said Parker during said time amounted to the sum of $83,000," and that "this stipulation with respect to the volume of business and the gross overhead expense for the period between March, 1912, to and including March, 1913, may be taken as an average of the overhead expense *during the period covered by the first and original statement of account filed on behalf of defendant Parker herein*"—i. e., the period from October or November, 1909 (when Parker first commenced manufacturing the infringing grader), to November 7, 1913 (the date of the interlocutory decree herein), during which time the 72 whole sizers and 13 half sizers, held by this court to be an infringement of plaintiff's patent, were manufactured and sold. In other words, the proportion of overhead expense to be charged against these sales is based upon the figures $8,684.59, gross overhead expense, and $83,000, gross business, or 10.46 per cent.

The sales, exclusive of the modified apparatus, amount to $35,404, the overhead expense chargeable against which amounts to $3,703.26. Deducting this item from defendant's profits of $6,852.16, there is left the sum, $3,148.90, representing the net profits realized by defendant from the sales of the 85 infringing graders.

Plaintiff's damages, based upon the loss of the sales of 105 sizers at $175 each, $18,375, must likewise be reduced by the amount of such loss held to have been occasioned by the sale of the 20 modified Parker machines. Eliminating these 20 machines, the loss of sales, amounting to $18,375, must be reduced by $3,500 (i. e., 20 sizers at $175 each), leaving $14,875, instead of $18,375. The manufacturing cost must also be reduced by $1,159.80 (i. e., 20 sizers at $57.99 each), leaving $4,929.15, instead of $6,088.95, for this item; the loss of profit occasioned by the sales of the 85 infringing sizers amounting to $9,945.85, exclusive of overhead expense.

Plaintiff's overhead expense, fixed by stipulation at 4.44 per cent. of sales, must for the same reasons be reduced from $815.85 (based upon

total sales of $18,375) to $660.45 (based upon total sales of $14,875), leaving a net loss to plaintiff of $9,285.40, instead of $11,470.20. The net gains and profits realized by defendant and the net damages suffered by plaintiff by reason of the sale of the 85 infringing graders may therefore be summarized as follows:

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|---|---|---|
| Defendant's profits on 72 whole sizers and 13 half sizers, "Parker patent" type | $ 6,852 16 | |
| Less overhead expense amounting to 10.46 per cent. of sales: 10.46 per cent. of $35,404 | 3,703 26 | |
| Net profits to defendant upon 85 infringing machines | | $ 3,148 90 |
| Selling price of 85 sizers, if they had been sold by plaintiff ($175 each) | $14,875 00 | |
| Net manufacturing cost to plaintiff, had they been manufactured by him, (exclusive of overhead expense), $57.99 each sizer | 4,929 15 | |
| Profit | $ 9,945 85 | |
| Less overhead expense amounting to 4.44 per cent. of sales: 4.44 per cent. of $14,875 | 660 45 | |
| Net loss (damages) to plaintiff upon sales of 85 infringing sizers, based upon the evidence that, in the absence of such infringement, he would have himself made the sales and realized profits thereon amounting to | | $ 9,285 40 |

3. The 20 graders of the modified Parker type having been held not to infringe plaintiff's patent, it follows that the further award of damages, amounting to $2,340.20, made by the lower court upon the assumption that the manufacture and sale of these 20 machines constituted a willful infringement, should not be added to the foregoing damages.

4. Turning now to the cross-appeal taken by the plaintiff, Stebler, the first assignment of error attacks the allowance of overhead expense of the defendant Parker. Defendant Parker being engaged in the general manufacture and sale of packing house machinery and supplies, the stipulation, above referred to, was entered into by the parties for the purpose of fixing the proportion of overhead expense to be charged against the grader business of this defendant. It is insisted by counsel for plaintiff that this stipulation is rendered ineffective and void by reason of the failure of the parties to stipulate as to the amount of grader business transacted during the stipulated period taken as a test, in order to secure the percentage or pro rata of overhead expense chargeable to the grader business.

We are unable to see how the fact that the exact amount of grader business for the period between March, 1912, and March, 1913, is not shown, could affect the ratio which the gross overhead expense bears to the gross sales for that period, which ratio is, by virtue of the stipulation above referred to, determinative of the proportion of overhead expense chargeable upon the grader business for the period during which the 85 infringing graders were manufactured and sold. We have heretofore, in this opinion, held that the proportion of overhead expense to be charged against these sales should be based upon the figures $8,684.59, gross overhead expense, and $83,000, gross business, or

10.46 per cent. This is, we think, in accordance with the terms and intention of the stipulation.

[7] 5. Plaintiff, Stebler, next assigns error in the limiting of his damages to the profits he would have realized from the sale of the patented sizers, instead of from the sale of the fruit-grading machines complete with bins and distributing systems. It is not denied that the claims involved (Nos. 1 and 10 of reissue letters patent No. 12,297), although for a combination of elements, apply only to such combination of elements in a fruit grader or fruit-grading machine; the remainder of the fruit-grading machine, or so much thereof as was patented, including the distributing system sold by Stebler in connection with the grader, being covered by other claims and other patents not involved in this suit. This being so, the burden of apportionment was then logically with the plaintiff, since he was entitled to recover only for such part of the commingled profits as was attributable to the use of his invention. As said by Mr. Justice Field in Garretson v. Clark, 111 U. S. 120, 121, 4 Sup. Ct. 291, 28 L. Ed. 371:

"When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated. The rule on this head is aptly stated by Mr. Justice Blatchford in the court below: 'The patentee,' he says, 'must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.'"

In the present case there is clear and convincing proof of the selling price of the patented feature in plaintiff's fruit grader, and of the cost of manufacture and sale of the same, wherefrom the profit derived by plaintiff is easy to ascertain; whereas, upon the other hand, we do not deem the evidence sufficient to justify a finding that the entire value of the whole fruit-grading machine, as a marketable article, is properly and legally attributable to the patented feature.

The selling price of the 85 patented sizers, $14,875, when reduced by the manufacturing cost of $4,929.15 and the overhead expense of $660.45, leaves a net profit to plaintiff of $9,285.40, which, having been lost because of the infringement, becomes the proper measure of plaintiff's damages.

[8] 6. Plaintiff's third exception to the master's report, and upon which is based his third assignment of error, relates to the deduction as for overhead expense of plaintiff from the damages awarded. Plaintiff's contention in this behalf is that it would have cost him no more than the price of materials and labor (i. e., $153.41 for each grader) to have manufactured and sold the graders made and sold by the appellees, and that his overhead expense would not have been increased at all thereby. Plaintiff, Stebler, like Parker, was engaged in the general manufacture and sale of packing house machinery and

supplies. It is contended by him that no additional buildings, machinery, or tools would have been required to handle this additional business, and no additional insurance or taxes would have resulted therefrom. Yet it is apparent the various other items of overhead expense would have been increased thereby; and not only this, but the ratio which the grader business bore to the gross business would have been increased thereby, resulting in a greater proportion of the overhead expense properly chargeable to the grader business. The allowance as for overhead expense on the part of plaintiff, which we have reduced in this opinion to $660.45, seems reasonable, and one which is fairly deducible from the evidence.

[9] 7. The next objection to the decree of the lower court relates to the profits and damages which the plaintiff is entitled to recover in this case. Section 4921, R. S. U. S. (Comp. St. 1913, § 9467), provides as follows:

"Upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case."

The bill of complaint filed by the plaintiff asked that the defendants be decreed to account for and pay over unto plaintiff the gains and profits realized by the defendants from and by reason of the infringement, and, further, that the defendants be decreed to account for and pay over unto the plaintiff the damages suffered by him by reason of the infringement. In Stebler v. Riverside Heights Orange Growers' Ass'n, 205 Fed. 735, 740, 124 C. C. A. 29, this court directed the lower court to "grant the relief prayed for." The interlocutory decree entered pursuant to this direction provided:

"That complainant recover of the defendants, and each of them, the profits, gains, and advantages which said defendants, and each of them, have or has derived, received, or made by reason of said infringement, and that complainant recover of the said defendants, and each of them, any and all damages which complainant has sustained or shall sustain by reason of said infringement by defendants, or either of them."

In accordance with this decree, the matter was referred to the master, to ascertain and report to the court the amount of such damages, and also the amount of such gains, profits, and advantages. It is this report of the master, upon which the final decree is based, and from which the present appeals by both plaintiff and defendants have been taken. The report of the master upon this question is as follows:

"In determining the amount of the damages which the plaintiff has suffered by reason of defendant Parker's infringement of plaintiff's patent, the profits which the defendant Parker made from his infringing acts, being less than the amount of the profits which the plaintiff might have gained by the manufacture and sale of the same number of machines as were made by the defendant, are to be subtracted from the amount of the gains which the plaintiff might have gained by supplying the demand for the machines supplied by the defendant Parker. It is not proper, however, to take the entire profits, which the plaintiff would have made but for the infringement, and add

thereto the defendant's profits. The damages do not consist solely in what profits the defendant made, but if the plaintiff recovers from the defendant all the profits which the defendant made, and the damages which the plaintiff suffers by reason of the difference between what he could have manufactured the articles for at less expense than the defendant, or sold them at a higher price, the plaintiff is fully compensated by reason of the acts of infringement of the defendants."

In support of this determination the master cites Westinghouse v. New York Air Brake Co. (C. C.) 131 Fed. 607, where the court said:

"The rule is clear that the profits which the complainant might have gained by supplying such demand are recoverable as damages which it suffered thereby. It is also clear that, if such sum exceeds the profits which the defendants gained, such profits can be enlarged until they equal the complainants' losses, but that the two amounts cannot be added together and charged up to the defendants."

It is contended by the plaintiff in his cross-appeal that the report of the master is not in accordance with the opinion of this court in Stebler v. Riverside Heights Orange Growers' Ass'n, 214 Fed. 550, 131 C. C. A. 96, L. R. A. 1915F, 1101. That was an appeal from a temporary restraining order entered February 18, 1914, enjoining the prosecution by plaintiff of other suits for infringement of the Strain reissue patent, No. 12,297. What was involved in that case was a review of the temporary restraining order, and that only. The cause as a whole was not, and could not be, transferred to the appellate court upon the question of the validity of the temporary restraining order or prior to a final decree. Ex parte National Enameling Co., 201 U. S. 156, 161, 26 Sup. Ct. 404, 50 L. Ed. 707. But this court, referring to the prior interlocutory decree entered November 7, 1913, said:

"There was thus distinctly provided a method whereby the plaintiff might recover all losses suffered by him by reason of the infringement of his patent —those in the nature of damages as well as those in the nature of profits received by the infringing defendants. * * * The plaintiff derives his profits from the manufacture and sale of the fruit-grading machines covered by the patent. These profits consist of the difference between the cost of manufacture and the prices for which he sells the machines. These profits are therefore the only compensation which he receives for the machines manufactured and sold by him during the entire life thereof. When final judgment is entered against the defendants, pursuant to the accounting which has been ordered against them, the plaintiff will receive thereunder full compensation for the use of the machines by the vendees of the defendants herein for such period as they are capable of being used, in the same manner and to the same extent as he would have done had he sold the machines himself."

This was not determining the particular elements of "full compensation," nor was it deciding the question as upon a final decree; but a careful reading of the language of the opinion will show that it follows the rule laid down in Birdsall et al. v. Coolidge, 93 U. S. 64, 69 (23 L. Ed. 802), where the Supreme Court said that under this section of the Revised Statutes:

"Where the suit is at law, the measure of damages remains unchanged to the present time; the rule still being that the verdict of the jury must be for the *actual* damages sustained by the plaintiff, subject to the right of the court to enter judgment thereon for any sum above the verdict, not exceeding three times that amount, together with costs. 16 Stat. 207. Damages of a compen-

satory character may also be allowed to the complainant, suing in equity, in certain cases, where the gains and profits made by the respondent are clearly not sufficient to compensate the complainant for the injury sustained by the unlawful violation of the exclusive right secured to him by the patent. Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent, in which event the provision is that the complainant 'shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby.'"

In other words, this holding is that, in a case where the infringer's gains and profits, if used as the measure of damages, would be insufficient to compensate patentee for the injury sustained by reason of the infringement, such additional damages will be awarded as will compensate him for the actual loss sustained. Mr. Justice Matthews, delivering the opinion in Root v. Railway Company, 105 U. S. 189, 213, 26 L. Ed. 975, and referring to this section of the Revised Statutes, states that:

"Under the act of Congress of 1870, he [the patentee] may recover damages in addition to the profits to be accounted for by the defendant; but, as the recovery is limited by the act to the actual damages, it is manifest that the recovery of damages and profits is not intended to be double, but that, when necessary, the damages are to supplement that loss of the complainant which the profits found to have been received are insufficient to compensate, subject to the power of the court as to their increase, as in case of verdicts."

That the additional damages are to compensate patentee only for such loss as he may have sustained in excess of the infringer's gains and profits is stated in clear and unambiguous terms in the opinion in Tilghman v. Proctor, 125 U. S. 136, 149, 8 Sup. Ct. 894, 901 (31 L. Ed. 664), where the Supreme Court, referring to section 4921, R. S. (Comp. St. 1913, § 9467), said that it—

"expressly affirms the defendant's liability to account for profits, as well as authorizes the court sitting in equity to award and to treble any damages that the plaintiff has sustained in excess of the defendant's profits."

It will be observed that the power of the court to increase the damages in its discretion, as in an action at law, is not involved in this feature of the report, or in the final decree of the court confirming it. The action of the lower court in fixing plaintiff's damages at a sum sufficient to compensate him for the injury he has sustained by the infringement is therefore not only in accordance with the established rule in this regard, but also with the opinion of this court upon the temporary restraining order.

The foregoing requires a decree in favor of plaintiff for such sum as will fully compensate him for all losses occasioned by defendants' infringement (such losses exceeding the amount of defendants' profits), which will be, as heretofore stated, the sum of $9,285.40, and the costs of these appeals in favor of the appellants, defendants in the court below; and it is so ordered.

KINTNER et al. v. ATLANTIC COMMUNICATION CO. et al.

(Circuit Court of Appeals, Second Circuit. February 20, 1917.)

No. 76.

1. PATENTS ⟸328—INVENTION—WIRELESS SIGNALING.
The Fessenden patent, No. 918,306, for an improved method of wireless signaling, claims 1 and 3, *held* not to include as an element of the invention regularity in the timing of sparks, so as to produce a musical note, and, so construed, *held* void for want of invention.

2. PATENTS ⟸165—CONSTRUCTION—INVENTION—CLAIMS.
The patentee is conclusively presumed to know what he invented or discovered at the time he applied for a patent, though subsequent students may perceive that he disclosed methods or processes having capabilities surpassing his claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241.]

3. PATENTS ⟸109—AMENDMENT OF CLAIMS—NEW ELEMENTS.
Where an applicant for patent amended his claim, so as to include an element not theretofore stated therein, such amendment is valid, if the element was always a part of his invention; but, if it was a departure from the original invention, it was invalid, unless supported by the statutory oath.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 152.]

4. PATENTS ⟸157(1)—CONSTRUCTION—INCONSISTENT MEANING.
A patent may be of doubtful meaning, or contain several meanings suitable to varying expected conditions; but it cannot have separate meanings inconsistent with each other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229, 230.]

5. ESTOPPEL ⟸68(2)—CONSTRUCTION OF PATENT—THEORY OF INVENTOR—CHANGE OF THEORY.
Where a patentee had secured a decree from one court sustaining his patent on a particular theory advanced by him, he cannot in another suit, in which the evidence disclosed anticipation on that theory, abandon it, and successfully contend for an inconsistent theory.

Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 166, 169.]

6. PATENTS ⟸157(1)—CONSTRUCTION OF CLAIMS—"DEFINITE."
In a claim in a patent for method of wireless signaling, including as an element waves having a definite frequency, in groups having a definite group frequency, "definite" means fixed and determined, but does not mean regular, nor indicate uniform recurrence in point of time.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229, 230.

For other definitions, see Words and Phrases, First and Second Series, Definite.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit by Samuel M. Kintner and another, as receivers, against the Atlantic Communication Company and others, for infringement of a patent. From a decree dismissing the bill (230 Fed. 829), complainants appeal. Affirmed.

Plaintiffs appeal from a final decree in equity, entered in the District Court, dismissing a bill brought for alleged infringement of claims 1 and 3 of patent No. 918,306, issued April 13, 1909, to Reginald A. Fessenden, upon an application filed July 1, 1907. In the court below suit was not only on the patent above named, but also on No. 918,307, which covers an apparatus em-

bodying the "method of wireless signaling" set forth in the claims presented by this appeal. No appeal was taken from so much of the decree as dismissed the bill in respect of the apparatus patent.

The opinion of Mayer, District Judge, on granting the decree under review, is reported in 230 Fed. 829, and deals with the evidence in such detail as to render unnecessary further extended reference to the same. The claims in suit were considered and sustained in the Third circuit. National E. Signaling Co. v. Telefunken W. Tel. Co., 208 Fed. 679, 125 C. C. A. 647.

J. Edgar Bull, of New York City, and Frederick W. Winter, of Pittsburgh, Pa., for appellants.

Frederick P. Fish, Harry E. Knight, and Harrison F. Lyman, all of New York City, for appellees.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). This court is not required to give, and the parties may be spared, any description or history of the art of radio communication, as a preface to the consideration of this appeal. The case at bar does not raise for decision questions affecting the fundamentals of that art; and in so far as it does attack defendant's right to use a certain method of producing ether waves, the historical relation of the method in question to the art in general, and many details of commercial practice said to prove or disprove infringement, are sufficiently treated in the opinion of Judge Mayer. In that careful and illuminating review of a record unusually extended, the efforts of counsel have pointed out no omissions, however divergent their arguments as to the force or probative value of the facts there summarized.

[1] In expressing agreement with the result below we shall confine ourselves to (1) a consideration of the scope and meaning of the patent in suit, (a) from its own language and office history, (b) from the circumstances surrounding the efforts or experiments said to have given it birth; and (2) a comparison of the statement or theory of invention now insisted upon, with (a) that urged in the Third circuit and our own views derived from the above described sources, and (b) the proven acts of others, antedating the patentee's invention, whether such acts consisted in the practical use of radio appliances or prior patents or publications.

[2] 1. (a) The specification, drawings, and claims of the patent, considered alone, offer no difficulties to the investigator, and the patentee is conclusively presumed to have known what he invented or discovered, better than did any one else, at the time he applied for a patent. This is true, even though subsequent students may perceive, through the imperfect or ignorant language of the applicant, that he disclosed methods, means, or processes having capabilities surpassing the inventor's dreams at the time attempt was made to put achievements into words.

Fessenden describes and pictures an arrangement of radio appliances not unfamiliar at date of application, and for which he claims no patentable novelty; he then states as the problem successfully attacked by him the "annulment" or "prevention of atmospheric and other disturbances," which in the "tropics" and "even in the more northern climates" cause "great difficulty * * * in wireless signaling."

This means that he had overcome "static," and is plain enough, though inaccurate; for no one has prevented, or as yet can prevent, the electrical phenomena accompanying, e. g., a thunderstorm, in sultry weather. The conditions are inherent in nature; what Mr. Fessenden desired was to minimize or overcome the observed effects of such disturbances upon radio communication.

To accomplish his purpose he suggests as a voltage source an "alternating current dynamo" giving its voltage "at a frequency of 500 periods per second," and both justifies the suggestion, and explains his method, by disclosing that while "experimenting with a high frequency alternator" he had noted that, when "the trains [of waves] succeeded each other at a frequency above the normal frequencies used for alternating current work, the signals became more distinct in the presence of atmospheric disturbances"; and especially had he observed that signals given with a spark frequency of 250 per second were useless under conditions that permitted the operator to "easily read" them "when the spark frequency was raised to 900."

It being understood that "reading signals" presupposes the production of sounds, depending for their nature and existence upon a chain of natural phenomena starting with the generation of ether waves by the sparks resulting from condenser discharges, the statement quoted from the specification plainly means that, the more sparks per second were produced, the more easily the resulting sounds were heard.

To explain this ease, it is further taken as understood that "the lower noises" are made by "atmospheric disturbances," while "higher notes" resulted from "higher frequencies," which means that high frequency in sparks, when translated or transmuted into sound waves, gave a higher pitch than low frequency similarly translated, for the equally understood reason that rapid oscillations of ether became (so to speak) correspondingly rapid vibrations of the atmosphere, and the more rapid such vibration the higher the note, within the limitations of the auditory nerves of man.

The patentee then assigns, as a reason for the asserted ease in hearing the sounds which represented sparks with a frequency of 900, the "physiological phenomenon" that a hearer could "concentrate" his "attention" on higher notes, so that the lower noises of static "ceased to affect consciousness." This is called a "novel physiological effect, discovered by the applicant"; but, however dressed out in long words, it is no more than an observation in acoustics familiar to any one who has heard the whistle of a fire engine dominating and piercing through the rumble of a city and the roar of a crowded street.

This "freedom from disturbance" the patentee calls "selectivity," and states that his "physiological method of selectivity" renders tuning, either electrical or mechanical, "not always advantageous" and he expressly excludes it from his "present invention"; that is, he uses for hearing or receiving purposes an ordinary telephone receiver.

Upon these quite simple disclosures, of which the inaccuracies or overstatements above noted would not affect the substantial facts, are based the two claims in suit, which may fairly be compressed into the following statement of invention, viz.: A method of overcoming or

dominating static consisting of signal production by ether waves of definite frequency, having a definite group frequency[1] of not less than 250 per second, and preferably approximately 1,000 per second, and then reading said signals with or by an ordinary telephone receiver. The file wrapper shows that the original application nowhere used the word "definite," expressed a preference for a receiver tuned both electrically and mechanically, and asked to cover by claim "the production of signals by groups of impulses having a group frequency higher than commercially used alternating current frequencies," which means (as explained by the specification) that Mr. Fessenden thought himself the first to "get through" static by means of frequencies rising to about 900 per second, or at any rate exceeding 250.

The application stood substantially thus until March 13, 1909, when, in order to "bring out more clearly the distinction between applicant's invention and the method" of the references cited by the examiner, the specification and claims took their final form, the patentee arguing that the receivers of the references accomplished "selectivity by rendering the receiver responsive to only one definite group frequency" (that is, they were tuned, at least partially, as Fessenden preferred to have his tuned when he filed the application); but, as changed by the amendment of 1909, the patentee declared that he attained "selectivity by utilizing the physiological discovery referred to in the specification."

[3] Of these undoubted occurrences it is to be noted that, if definiteness was always a part of Fessenden's method, the belated appearance of the word "definite" in the description or definition thereof does not deprive him of the benefit of the same; but if, in truth, the requirement of "definite group frequency"[2] constituted a departure from an addition to the original disclosure, it was not supported by the statutory oath and the claims are unlawful. National Elec. Signaling Co. v. Telefunken W. Tel. Co., 208 Fed. 692, 125 C. C. A. 647. The solution of this problem obviously depends on the meaning of "definite."

It is further observable that nowhere in the patent as issued, or the file wrapper, is there mention of any special spark gap, or arrangement therefor. Fessenden pointed to his drawing and in the application said, "*37* is a spark gap"; the drawing indicates (if it means anything definite) a fixed gap; so the matter has stood since application filed.

Finally, we note that not until March, 1909, did the patentee in argument with the office describe the sound producible by ether waves as a "musical note," and he then speaks of the "musical notes produced by atmospheric disturbances," as well as those produced "by waves from the sending station." His assertion was that, because the "pitch" of the two musical notes was "different," his physiological selectivity enabled the operator, using an untuned receiver, to distinguish signals from static.

(b) Mr. Fessenden conducted his experiments, and evolved the method under consideration, while employed by the National Electric Sig-

[1] Or "spark frequency" or "wave train frequency."

[2] The definite wave frequency of the claims may be disregarded; by uncontradicted evidence, any given circuit arrangement produces waves both fixed, regular, and predetermined.

naling Company, at Brant Rock, Mass.; this is undenied. The primary purpose of the Brant Rock station, as early as 1905, was to establish radio communication with Scotland. To that end it was provided with the best apparatus then procurable, and the patentee was striving to improve that best.

The testimony as to what this station could and did do has been so thoroughly considered in the court below that we find it unnecessary to go into details. It is enough to say that in 1905 the station had no appliances capable of producing 250 sparks per second, and it used a synchronous rotary gap, a device not common among radio workers, not invented by Fessenden, not new, and known as producing mechanical regularity in timing discharges. This apparatus did produce or ultimately cause an even persisting series of sounds, which were noted as musical as early as December, 1905, by an operator who heard them at San Juan, Porto Rico.

Mr. Fessenden was anxious, long before he filed his application, to get and use dynamos capable of at least 500 sparks per second; he evidently wanted high frequency, but there is no evidence that prior to the date of his application he spoke or wrote of the desirability of having high frequency with spark regularity, or of a resulting musical quality in sound producible by such a method. There is, however, ample proof that, substantially at the date of application, he discovered his principle of physiological selectivity, and we consider it shown beyond a doubt (dehors the patent itself) that his belief in the value of that idea impelled him to file application. Not only the patent as it exists, but the wording of the original application, fortifies this conclusion.

2. The tenor of plaintiff's evidence (especially Kintner's), the argument below so plainly reflected in the opinion of the District Court, and the presentation of this appeal, all compel belief that throughout the present litigation appellants have thought themselves entitled to succeed only if it could be held that the "gist of the patent is the generation of waves having a definite—i. e., regular—group frequency, above 250 per second, preferably of the order of approximately 1,000 per second, and the reception of such groups with an indicator resonantly unresponsive to said group frequency." To quote further from plaintiff's final brief:

> "The invention overcomes static by generating waves in groups of definite recurring period, and at such high frequency that the sound produced thereby in the receiving telephone will be a musical tone or note, clearly distinguished from the noises" of static.

We accept as the final position of plaintiffs that the patent discloses one inventive thought dominating and distinguishing the method claimed, viz., regularity or uniform periodicity in spark production, at frequencies so high as to make the resultant sound musical because of the regularity, and high-pitched because of the high frequency. If the claims in suit do not embody and describe this thought, they cover nothing worth contest.

[4] (a) A patent, like any other instrument of conveyance or grant, may be of doubtful meaning, or it may contain several meanings suit-

able to varying expected conditions; but it cannot have two meanings inconsistent with each other.

[5] This patent was sustained in the Third circuit because, as was declared by Buffington, Circuit Judge, it disclosed, from date of application filed, high frequency, an untuned receiver, and physiological selectivity. 208 Fed. 685, 693. The union of these ideas or elements produced the method. This reading of the claims is now totally abandoned; it was wrong, because, as is now admitted, the physiological phenomenon of the specification was well known before the application, if not before radio communication itself, while high frequencies in radio work also antedated Fessenden, and ordinary receivers were used before 1905.[8]

The present reading of the claims makes the word "definite" contain the one vitalizing idea. It is said to mean "regular," in the sense of uniform recurrence (of wave groups) in point of time. On this point the patent itself, its office history, and the evidence surrounding its evolution lead us to observe that there is no reason why the same word should have unexplained differences of meaning in the same document. Fessenden speaks of the "definite periodicity" of the vibrations of a tuning fork when expounding his supposed discovery in physiology (page 2, line 119), and in both the claims both "wave frequency" and "group frequency" are described as "definite." No reason at all appears why he should be held to have assigned different meanings to the same word, thus used. Yet such must be the holding on appellants' contention.

[6] Further, if words are to be taken in their usual acceptation as reflected in lexicons of approved authority, definite does not mean regular, nor indicate uniform recurrence in point of time; it does signify fixed and determinate, but without reference to regularity in recurrence. This meaning is entirely appropriate to its use in respect of waves and tuning fork vibrations.

Finally, there is no evidence that the patentee had any idea that definite—i. e., regularly and uniformly recurring—wave groups, were a part of his invention when he filed application, nor until March, 1909.

But it is said that Fessenden used a synchronous rotary spark gap, which insured definiteness in the sense urged, and from this fact is built up the argument that he invented his method as early as 1905. Let the fact of use be assumed; but, if so, then there is no excuse for the omission in the specification of the only piece of apparatus, even now suggested, for accomplishing the patentee's method, for the reasons and by the system said to be wrapped up in the word "definite." We decline to believe that, when Fessenden wrote "*37* is a spark gap," he meant "*37* is a synchronous rotary spark gap producing uniformly recurring impulses, which I describe as definite group frequencies."

Unless this can be done, however, the conclusion is irresistible that, if "definite" means what appellants insist upon, the Fessenden method

[8] These points are fully elaborated in the opinion of Mayer, J. The evidence thereon, here first adduced, renders the result reached in 208 Fed. impossible, by the reasoning there used.

was never completed, nor applied for, until March, 1909, and was unlawfully patented. It follows with equal certainty that, if the patentee meant in 1907 what is now claimed, his patent never meant what these plaintiffs urged for it in 208 Fed. Men may justly admit error in matters of opinion, but when two histories of facts are successively put forward under the circumstances here shown, it can afford little cause of complaint if those charged with the duty of decision end in believing neither.

(b) Examination of prior patents and publications relating to radio communication shows that before this application was filed the word "definite," as applied to spark production, was by no means unknown. The main citation against Fessenden (Blondel, No. 824,682) uses it repeatedly, and always in its normal sense of fixed or predetermined; there are other instances of such use, but no case is called to our attention, in the whole prior history of the art, wherein the word was used with the meaning we are now asked to give it.

By overwhelming evidence it is proven that, before San Juan heard the Brant Rock signal, the United States Navy, using a fixed gap and a mercury turbine interrupter, accomplished high frequencies, resulting in a high pitched signal, which in the case of the U. S. S. Kentucky became quite literally famous in the service; nor do we consider the testimony on this point open to criticism, because much of it was given by the wireless operators of the Navy who attended court in uniform. We are aware of no reason why the dress of their profession should be avoided by witnesses.

Whether regularity in timing discharges was or could be attained by the Navy method is a point on which no decision is necessary. It is enough that in 1905 there was no novelty in the high note resulting from high frequencies.[4]

Summarizing the foregoing observations, we hold, from a consideration of the application resulting in this patent, that, when filed, regularity in point of timing sparks was not, and was not intended to be, any part or portion of the method applied for. That idea, now said to be the foundation stone of the patented system, appeared (if it ever did appear) in 1909, constituted "a radical change of base," and is now represented in unlawful claims. National, etc., Co. v. Telefunken, etc., Co. (D. C.) 209 Fed. 856.

Further, it is plain from the known Brant Rock practice and experiments, plus the paper history aforesaid, that what Mr. Fessenden had thought out in 1907 (not before), and the reason for filing application, is correctly described in the opinion of Buffington, J., and now that the theory of validity then successful is abandoned by those who urged it, no other meaning can be ascribed to the language of the patent consistently with the very facts that overturn the original contention.

It is therefore concluded that Fessenden never patented the method

[4] It is not thought necessary to prolong the matter by consideration of the De Forest methods, especially at Galilee, N. J., nor to consider whether infringement can result from use of the quenched gap, because (and only because) decision is not to be rested on these matters.

now ascribed to him, for in 1905 he had not the spark on which the method depended—his frequency was not high enough; if he had conceived such method in 1907, he filed an application which disclosed a wholly different one; and if he ever disclosed a method of which definite (i. e., regular) spark production was the essential or an essential thought, he did it in 1909, without complying with the law that authorized a patent to issue.

But we also conclude that he never intended to patent, or supposed he had patented, the method of appellants' argument; on the contrary, Fessenden's method depended for vitality on that physiological selectivity which has been abandoned in the face of facts put in evidence for the first time in this case.

The claims being invalid, the decree below is affirmed, with costs.

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## BARBER v. OTIS MOTOR SALES CO.

(Circuit Court of Appeals, Second Circuit. December 20, 1916. On Petition for Rehearing, February 7, 1917.)

No. 83.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—MOTOR ENGINE.
The Barber patent, No. 781,802, for an internal combustion engine the essential feature of which is a combination which permits the ready and easy removal of the valve units with the valves for inspection, repair, or replacement without requiring the disconnection of other parts, was not anticipated and discloses patentable invention; also, *held* infringed.

2. PATENTS ⟸26(2)—INVENTION—COMBINATION OF OLD ELEMENTS.
A patent is not to be defeated by showing that all the elements are old, where they are not shown in combination, and in the combination of the patent by their conjoined action they produce a new result.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 29.]

3. PATENTS ⟸243—INFRINGEMENT—UNITING OF PARTS.
Neither the joinder of two elements in one integral part, accomplishing the purpose of both and no more, nor the separation of an integral part into two, doing together substantially what was done by the single element, will avoid a charge of infringement.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 382–384.]

4. PATENTS ⟸51(1)—"ANTICIPATION"—ELEMENTS.
To find in the prior art each element in isolation is not to "anticipate" the work of a patentee who by inventive act first evolves a new combination of these elements, which by their conjoined functions produce a new result.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 66, 67, 69, 74.
For other definitions, see Words and Phrases, First and Second Series, Anticipation.]

On Petition for Rehearing.

5. PATENTS ⟸324(1)—SUITS FOR INFRINGEMENT—REVIEW ON APPEAL.
After the decree in an infringement suit has been affirmed, the appellate court cannot properly grant a rehearing to permit the defeated

party to exhibit before it structures not in evidence, which would result, not in review of the decision below, but in a new trial on new evidence.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600, 604, 605.]

Appeal from the District Court of the United States for the Northern District of New York.

Suit in equity by William Barber against the Otis Motor Sales Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 231 Fed. 755.

This cause comes here on an appeal from an interlocutory decree entered in the United States District Court for the Northern District of New York on April 8, 1916. The complainant is a citizen of the United States and a resident of the borough of Brooklyn in the state of New York. The defendant is a corporation organized and existing under the laws of the state of New York and doing business in the city of Utica in that state.

Coudert Brothers, of New York City (R. A. Parker, of New York City, of counsel), for appellant.

Fred Francis Weiss, of New York City (Samuel E. Darby, of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. [1] This action is brought by the plaintiff, who alleges the infringement of patent No. 781,802, which was issued to him by the United States Patent Office on February 7, 1905.

The complainant's structure and the defendant's structure represent internal combustion engines. Combustible material in the form of a gas or vapor mingled with air is drawn through a valve into the working cylinder which carries the piston and is there burned. The gases are thereby expanded by heat and press upon the piston to produce motion and power.

At the time complainant took out his patent, explosive engines were not new, and valves and valve gear were not new. The inlet and exhaust passages and their mode of operation were old. The patent concedes this and claims an improvement. In his specification the patentee declared that:

"The object of my invention is to provide a motor engine of the explosion-vapor type of a simple and cheap form of construction, so made that the inlet and exhaust valves thereof may be quickly and easily removed from the body of the motor without disturbance of the other parts, and quickly cleaned, adjusted, or renewed, as occasion may require, and returned to position, and also to provide motors of such type with a combined electric circuit making and breaking and speed-regulating device of improved form."

He described his invention as follows:

"To such ends my invention consists, in substance, of a cylinder, a piston reciprocating in the cylinder, a crank shaft in actuative connection with the cylinder by means of a connecting rod, an explosion chamber adjacent to the

cylinder in communication with inlet and exhaust passages, an exhaust-valve plug located in the exhaust passage, a normally spring-closed exhaust valve carried by the exhaust-valve plug, a gear wheel carried by the crank shaft, a combined gearing and a cam wheel rigidly mounted upon an idler shaft meshing with a wheel carried by the crank shaft, and a rod reciprocating in a slip journal actuated by the cam so as to open the exhaust valve, such rod being adapted by rotation upon its axis to be thrown out of engagement with the rod of the exhaust valve, a contact wheel rigidly secured upon the outer end of the idler shaft carrying combined spur gear and cam wheel, a plate of insulating material vibratorily mounted adjacent to the contact wheel, a spring contact carried by such insulating plate in electrical connection with one terminal of a sparking plug, the sparking point of which is located in the chamber of the motor, the other sparking point of which plug is in connection by way of the motor frame with the contact wheel carried by the idler shaft by way of a source of electric energy, means for vibrating the insulated disk or plate so as to change the point of contact as the idler shaft is rotated, an inlet valve bushing adapted to be secured in the casing of the explosion chamber, so as to be in communication therewith with the atmosphere and with the explosive vapor supply source, and an inlet-valve plug carrying a normally closed inlet-valve adapted to inclose the inlet bushing, although it is not to be understood that my invention is limited to a device comprising at once all of the devices and parts before mentioned as the same consists of the construction of certain devices and parts and the construction, combination and arrangement of certain devices and parts, all as hereinafter more particularly set forth in the description and pointed out in the claims."

That which constitutes his invention is the provision of a combination of elements in a valve structure for motor engines which permits the ready and easy removability of the valve units, with the valves, for inspection, cleaning, repair, or replacement, without requiring the disconnection of supply or exhaust pipes, or other parts, and without disconnecting or removing the cam actuated valve operating rod from its support, or interfering with or disturbing the timing mechanism or other parts or disassembling the valve unit.

There are 13 claims in the patent, but of these only claims 8 and 9 are involved in this suit.

Claim 8 reads as follows:

"In an explosion motor, the combination with an explosion chamber having a T-shaped gas passage the main central or stem portion of which forms the explosive vapor inlet, of a valve-seat ring provided with gas passages located in the end of the head portion of the T-passage adjacent to the explosion chamber, a puppet valve carried by the valve-seat ring opening toward the explosion chamber, a spring normally keeping the valve in the closed position, and a screw plug provided with a perforate peripheral wall and a closed outer and an open inner end closing the outer or air end of the head portion of the T-shaped passage and holding the valve-seat ring in position thereof, through the perforations in the wall of which the explosive vapor passes from the main or stem portion of the T to the valve at the open end of such plug, substantially as shown and described."

The above claim deals mainly with the inlet and inlet-valve construction.

Claim 9 reads as follows:

"In an explosion motor, the combination with an explosion chamber having a T-shaped gas passage the main central or stem portion of which forms the exhaust orifice of the explosion chamber of a screw plug closed at the outer

end, open at the inner end and having a perforated peripheral wall so as to give free communication between the central hollow thereof and the main stem or central passage and the explosion chamber located in the head portion of the T-shaped passage, a puppet valve the stem of which projects outward through the head of the plug seated upon the inner end of the plug so as to cut off communication between the main stem portion of the T-passage and the explosion chamber except when the same is forced away from the seat and toward the explosion chamber, a spring for normally keeping the valve in the closed position and means for forcing the valve stem inward so as to open the valve actuated by the motor and adapted to be removed from contact with the valve stem without removal from the support thereof so as to permit of removal of the plug and valve by the unscrewing of the plug, substantially as shown and described."

The above claim deals with the plug and valve and of their removal by the unscrewing of the plug.

The defendant in its answer denied the validity of the patent and that the patentee was the original and first inventor of the improvements for which the patent issued. It also alleged:

"That the various asserted combinations in claims thereof of said patent are not for valid combinations, for the reason that the various elements thereof are all old and but perform their own functions regardless of their association with other elements in said claims and that the resultant operation is but that of the sum total of the operation of the various elements only."

A large number of patents have been set up to defeat the complainant's claim. The court below examined them all carefully and reached the conclusion that the patent in suit was not anticipated but disclosed patentable invention in view of and in face of the prior art. In the course of his opinion, Judge Ray said:

"It is vain to search the prior art for a construction and combination like this. Each and every patent in evidence which shows a valve cage or a screw plug or a combination of both has one or more obstructions to a removal of these parts which interfere with the removal of the valves. Various of these patents show that efforts had been made in the direction of securing a quick removal of the valves, but no one had fully solved the problem until Barber came into the field. In a sense and to an extent at least he is a pioneer. In but one or two of the prior patents is any reference made to the problem which Barber sought to solve."

It will serve no good purpose for this court to traverse step by step the ground which the District Judge has very carefully gone over in his opinion. It must suffice to say that our examination of the patent and of the patents of the prior art fails to convince us that any mistake was made by the District Judge in sustaining the validity of this patent.

[2, 4] The validity of a patent is not to be defeated by simply showing that all the elements of a patent are old, where they do not show all of the elements of the claims in combination. And this the defendant has not shown. To find in the prior art each element in isolation is not to anticipate the work of a patentee who by inventive act first evolves a new combination of these elements, which by their conjoined functions produce a new result. Benthall Machine Co. v. National Ma-

chine Corporation (D. C.) 222 Fed. 918 (1915); Western Electric Co. v. Millheim Electric Tel. Co. (C. C.) 88 Fed. 505 (1898).

The validity of the patent being determined, there remains the question of infringement.

An analysis of claim 8 shows the following elements:

(1) An explosion chamber which has (a) a T-shaped gas passage, the main central or stem portion of which forms the explosive-vapor inlet.

(2) A valve seat ring (b) provided with gas passage and (c) located in the end of the head portion of the T-passage adjacent to the explosion chamber.

(3) A puppet valve (d) carried by the valve seat ring and (e) opening towards the explosion chamber.

(4) A spring (f) normally keeping the valve in the closed portion.

(5) A screw plug provided with (g) a perforate peripheral wall, (h) a closed outer end, and (i) an open inner end (j) closing the outer or air end of the head portion of the T-shaped passage and (k) holding the valve seat ring in position (l) through the perforations in the wall of which (screw plug) the explosive vapor passes from the main or stem portion of the T to the valve at the open end of such plug.

An analysis of claim 9 shows:

(1) An explosion chamber which has (a) a T-shaped gas passage the main central or stem portion of which forms the exhaust orifice of the explosion chamber.

(2) A screw plug having (b) a perforated peripheral wall so as to give free communication between the central hollow thereof and the main stem or central passage and the explosion chamber, and (c) located in the head portion of the T-shaped passage.

(3) A puppet valve (d) the stem of which projects outward through the head of the plug (e) seated upon the inner end of the plug so as to cut off communication between the main stem portion of the T-shaped passage and the explosion chamber except when the same is forced away from the seat and towards the explosion chamber.

(4) A spring (f) for normally keeping the valve in the closed position.

(5) Means for forcing the valve stem inward so as to open the valve, and (g) actuated by the motor (h) and adapted to be removed from contact with the valve stem without removal from support thereof so as to permit of removal of the plug and valve by the unscrewing of the plug.

It is the opinion of this court that every element of claims 8 and 9 of the plaintiff's patent finds full and complete response in purpose, function, relation, and mode of operation in corresponding features of defendant's structure. Plaintiff asserts, and the evidence sustains the assertion, that the defendant has produced a simple and cheap form of structure which permits the ready, easy, quick, and convenient removal of the inlet valve unit, including screw plug valve, cage, valve, and spring without requiring the disconnection of the supply

pipe or other parts without disconnecting or removing the cam actuated valve operating rod or mechanism from its support and without interfering with or disturbing the timing mechanism or other parts.

The defendant's structure has:

1. An explosion chamber comprising the space into which the explosive vapor mixture is introduced and within which such vapor is compressed, ignited, and exploded. There is in it a T-shaped passage which is the equivalent of complainant's T-shaped passage.

2. A valve seat ring.

3. A puppet valve which closes the inner end of the plug and opens towards the explosion chamber. The open inner end of the plug affords a passage for the explosive vapor to gain access from the central hollow of the plug to the explosion chamber when the valve is unseated.

4. A spring which normally keeps the valve in a closed position.

5. A screw plug, closed at its outer end and open at its inner end adjacent to the explosion chamber. The peripheral wall of the screw plug is formed with openings through which the explosive vapor gains access from the vapor supply pipe to the interior of the plug.

The valve unit, including the screw plug, valve, and spring is removable by unscrewing the plug from its seat in the cylinder casting.

[3] The defendant asserts that in defendant's structure the screw plug and valve seat ring are made in one integral piece and that in plaintiff's structure the inlet valve unit is made in two separate pieces, namely, the screw plug, and the valve seat ring. The argument is that this amounts to a substantial difference between the two structures, and is sufficient to enable the defendant to escape from the charge of infringement. When it comes to the question of infringement, it is not important that in the one structure the screw plug and the valve seat ring are made in two separate pieces, while in the other they are made in one integral piece. There is no substantial difference in means, purpose, structure, or mode of operation. The defendant cannot escape the consequences of its appropriation and use of all the benefits, advantages, and utility of the patent in suit on the plea that the valve cage is made in one piece integral with the valve seat ring in its structure, whereas in the plaintiff's structure these parts are made in two separate pieces. We agree with the Circuit Court of Appeals in the Sixth Circuit when it said, speaking through Judge Lurton in Nathan v. Howard, 143 Fed. 889, 893, 75 C. C. A. 97, 101 (1906), that:

> "Neither the joinder of two elements into one integral part accomplishing the purpose of both and no more, nor the separation of one integral part into two, together doing precisely or substantially what was done by the single element, will evade a charge of infringement."

And see Dowagiac Mfg. Co. v. Brennan, 127 Fed. 150, 62 C. C. A. 257; Bundy Mfg. Co. v. Detroit Time Register Co., 94 Fed. 524, 36 C. C. A. 375; Bonnette Arc Lawn Sprinkler Co. v. Koehler, 82 Fed. 428, 27 C. C. A. 200.

As the complainant and defendant have the same structures with substantially the same functions, the complainant's patent, as respects claims 8 and 9, is infringed.

Decree affirmed, with costs.

## On Petition for Rehearing.

Edmund Wetmore, Lawrence E. Sexton, and Robert D. Eggleston, all of New York City, for petitioner.

PER CURIAM. [5] Judge Ray found the claims in controversy valid and infringed. This court, after a careful and thorough examination of the issues involved, affirmed the opinion. Now the defendant has engaged three new counsel, not apparently in the case when it was argued in this court, and asks for a reargument on the ground that the court misapprehended the scope of the invention. The defendant also asks that as a part of this motion it be permitted to exhibit to the court one of the defendant's standard motor engines, a structure which we understand not to be in evidence. This seems to us to be an extraordinary request, which, if granted, will introduce a novel, and, we might add, revolutionary, practice in patent causes. The question here is always: Did the District Court commit error? If, in considering this question, the court may take into consideration structures not in evidence, the proceeding here will not be one of review, but a new trial on evidence produced here for the first time. Considering the question on the record now before the court, we find no error which would justify a rehearing.

Petition denied.

## IRVING-PITT MFG. CO. v. TRUSSELL MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 121.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—LOOSE LEAF BINDER.

The Pitt patent, No. 778,070, for a loose-leaf binder, claims 1–6, disclose patentable invention and novelty, and in view of the pioneer character of the device and its unquestioned utility and popularity, are entitled to a liberal construction. As so construed, *held* infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Irving-Pitt Manufacturing Company against the Trussell Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

This is an appeal from a decree holding that the first six claims of the Pitt patent No. 778, 070, for improvements in loose-leaf books, are valid and infringed. The patent has been carefully considered by Judge Rose in the so-called Twinlock Case, 220 Fed. 325. His decree was affirmed by this court upon his opinion in 225 Fed. 1022, 140 C. C. A. 603. The patent was also considered by the Circuit Court of Appeals for the Eighth Circuit in an opinion filed December 4, 1916, 238 Fed. 177, —— C. C. A. ——, in which it was held that the claims must be limited in scope and, as so limited, they were not infringed by the structure there in controversy.

The following is the opinion of Hough, District Judge, on final hearing:

This patent has been expounded and interpreted by Rose, D. J., in Irving-Pitt Co. v. Twinlock Co., 220 Fed. 325, and that exposition has been given binding authority by the affirmance of the decree there rendered on Judge Rose's opinion in 225 Fed. 1022, 140 C. C. A. 603. It is therefore incumbent upon me to follow absolutely the exegesis of the patent thus adopted. This is the more necessary because, in respect of all evidence tending to show the state of the art or relating to possible anticipation, the record of this case is in my opinion substantially identical with that in the Twinlock matter.

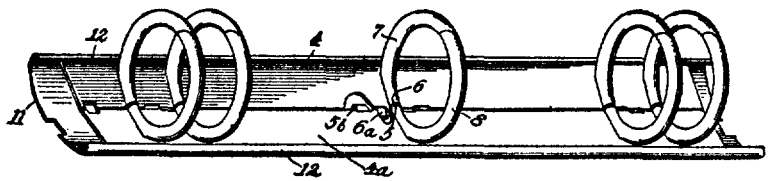
The claims in suit are the first six, and concerning them I entirely agree with the remark of the prior decision that, if the first claim is valid and infringed, the others must be similarly regarded; and I feel entitled to go further and say that, if the first claim is neither valid nor infringed, none of the other five in this suit can be. For the language of the first claim, see 220 Fed. 329, and for the details of construction, Figs. 2, 3, and 4 of the patent are so clear as to require no exposition at all. The thought which lies at the bottom of this patent, and without which there can never be any patentable invention, is in my judgment the idea of controlling or arresting the movement of two halves of a hinge by the operation of a piece of curved metal flanged upon the hinge-butts and always holding the hinge as a whole under tension.

I am wholly in accord with the finding of the ruling opinion that this was a neat and ingenious utilization of well-known properties of matter, but applied with great skill to a branch of art where neatness, compactness, and simplicity are greatly desired. One way of putting it is that the back or binder for loose leaves pictured in this patent is about as near "fool proof" as anything of the sort that I can imagine. It is further obviously true that the

first claim, and every other claim in suit, consists of three elements, as stated in 220 Fed. 327, 328.

Turning to a study of the alleged infringing apparatus, there is found in all the defendant's structures introduced in evidence the spring plate or spring back which is the first element, also two hook plates which conjointly make up the second element; but the third element, i. e., the retaining plate, is in the ordinary sense conspicuously absent, and herein rests the whole defense to this suit, which may be summed up in the proposition that the defendants are using two elements out of a combination of three, and no more, and this they have a right to do. No one denies this doctrine of law. When the patent is studied, it is to me wholly plain that the third element is described in each one of the claims in suit only in the following language: "Means for reliably holding the hook plates and the spring plate together;" and further is it evident that the only reliable means known to or suggested by the patentee for such holding together are all comprised in the third element of his invention, viz. the retaining plate. He says so in so many words in the eighth claim (not in suit); also in the specification, where he mentions the retaining plate "which holds the hook plates and spring plate together." And again he says that the movement of the hook plates upwardly "is limited by contact with the underside of a retaining plate." And finally he describes his apparatus in the following words, viz. that the "interlocking edges of the hook plates contact with the retaining plate * * * where they are reliably held."

The most casual observation of the patent figures above referred to, and of any device manufactured in accordance with the revelations of the patent, shows that the retaining plate is the only thing that keeps the entire apparatus from flying apart when the hinge formed by the tongue and groove construction of the two hook plates is moved upwardly. Obviously, therefore, since the defendant admits using two elements of the patentee's invention, it must substitute something for that reliable holding which the patentee affords by means of his retaining plate. Such substitute is plainly shown by the subjoined diagram:

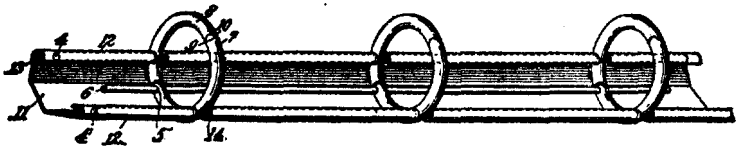



—which exhibits substantially the same contrivance as is shown in a subsequent patent to Trussell (whose name sufficiently indicates his connection with defendant), No. 1,141,157, and also in another subsequent patent to the suing patentee (with the same assignment), viz. Pitt, 806,913.

Very brief inspection of these diagrams shows that the function of the retaining plate of the patent in suit has been transferred to the hook plates, and that the method of "reliably holding the hook plates and the spring plate together" is no longer (as in the patent) by putting an external stopper on the action of the hinge, but by making a hinge that will jam when it is bent to a predetermined angle. The same thing can be done and the same result achieved by the tongue and groove construction of the plaintiff; but it is plainly not the intent of this patent to do anything of the kind, for, if it were, the unanswerable question suggests itself, Why put on any retaining plate? In short, if I were left to my own construction of this patent, as compared with the defendant's devices, I should be strongly of opinion that, while defendant arrived at the same result, and for the same purpose as that sought and achieved by the patentee, it did it by a different method, and is therefore within the law.

But I find myself unable to transform this opinion into a decree, because I can perceive no defense open to this defendant that was not more than suggested—indeed, most obvious in respect of the McMillan apparatus, which was the infringing article in the Twinlock Case. That binder has a hinge of a far

more usual and easily recognizable variety than are the tongue and groove or slot and lug constructions of the plaintiff and defendant here. Reduced to its lowest terms, the Twinlock or McMillan infringement is the skeletonized part of Fig. 1 of McMillan, 857,254, and it may be studied also in the subjoined diagram:



McMillan shows a covering plate which at first glance answers to the retaining plate of the patent in suit, but it has no function except to hold in place the C-springs, ringed upon the hinge pintle which runs through the two halves of the ring binders. That construction was held in the ruling case to be an infringement because the three wires were the mechanical equivalent of Pitt's hook plates, and so they obviously were, and the C-springs did not furnish all the power which made the device operative—a part of it came from the spring plate, or what McMillan called a back plate—and this also was obviously true. I cannot discover where or how the third element in Pitt's construction was or can be discovered in the McMillan construction. This is not because McMillan does not show a covering plate, which looks like a retaining plate, but because that plate in McMillan performs no function at all in relation to or coaction with the other two elements of Pitt's device which do exist in McMillan; whereas in Pitt there is that coaction and co-ordinate operation with a new result, which is the true test of a mechanical combination.

Yet the appellate court has held, for the reasons given by this court, that McMillan infringed. Take off McMillan's covering plate and throw it away, and the device will operate just as well without it. The C-springs are an unnecessary addition; the covering plate was only useful to disguise the rawness and cover the rough edges of the machinery. The defendant, with mechanical skill, has smoothed these rough edges and made a presentable and workable device, which looks well enough to dispense with a covering plate, and does not need any retaining plate because there is nothing to retain. McMillan needed a covering plate to cover his rough mechanical parts; he only wanted a retaining plate for his useless and superfluous springs.

In short, in my opinion, the identity in mechanical construction, operation, and result between McMillan and Trussell is absolute, and there is no reason discoverable by me why, if the first man infringed, the second does not also. If the plaintiff in the Twinlock Case was entitled to a decree, the same plaintiff is entitled to a like decree here. Yet to me it seems plain that neither McMillan nor Trussell has used more than two out of the three elements of Pitt's combination. Probably I am wrong about this, but I cannot arrive at any other result. Nevertheless I cannot feel it right to stop defendant's business, if reasonable security is given, until after an opportunity has been afforded to ask the Circuit Court of Appeals for what I think is practically a reargument of the Twinlock matter.

Plaintiff may take the usual decree on the six claims in suit, but the injunction will be lifted until the Circuit Court of Appeals has spoken, if an appeal is taken within 30 days and security given in the sum of $10,000. There will be no accounting, if this security is given, until after mandate comes down from the higher court.

Fraser, Turk & Myers, of New York City (Arthur C. Fraser and Henry M. Turk, both of New York City, of counsel), for appellant.

Pennie, Davis & Marvin, of New York City (John C. Pennie and Dean S. Edmonds, both of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The Pitt patent in issue has been so frequently before the court and has been so thoroughly examined by the judges who have passed upon its validity and scope that further discussion along these lines seems superfluous. We indorsed the opinion of Judge Rose in the Twinlock Case and see no reason to justify us in receding from the position there taken. Nothing has occurred to change our opinion that the exposition of the law as stated by Judges Rose and Hough follows as a necessary conclusion from the facts.

The claims in controversy are the first six. The District Court considered the first claim as typical of the others. This claim contains three elements; the first two are found in the defendant's structure and the controversy turns upon the question whether or not the third element—the retaining plate—is present. This element is described in the first claim as "means for reliably holding the book-plates and the spring plate together." This "means" is referred to in the testimony as the "retaining plate." The question, therefore, narrows itself down to this. Does the defendant have the retaining plate or an equivalent thereof? We think it does.

There is nothing in the patent itself or in the evidence requiring a restricted interpretation of the claims and, in view of the unquestioned popularity and utility of the Pitt device, we do not see why the claims should be so limited. Pitt was practically the originator of this art. It was in a crude and nebulous condition before he appeared. In short, we find nothing which requires us to reverse our former decision affirming Judge Rose. The complainant acting under the Pitt patents is practically the creator of this art and is entitled to a liberal construction of the claims in controversy. As so construed the defendant infringes.

The decree is affirmed with costs.

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## WISE SODA APPARATUS CO. v. BISHOP-BABCOCK-BECKER CO.

(Circuit Court of Appeals, Sixth Circuit. March 15, 1917.)

No. 2903.

1. PATENTS ⟸328—VALIDITY—INVENTION—SODA COUNTER FRAME.
The Wise patent, No. 1,002,950, for an improved metallic frame for soda fountain counters and other analogous structures, *held* void for want of invention.

2. PATENTS ⟸19—INVENTION—CHANGE IN DEGREE.
A change in the structure of an article previously patented, which is only a change in degree, is not invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 19.]

3. PATENTS ⟸21—INVENTION—CHANGE OF MATERIAL.
Invention cannot be predicated of a mere change from wood to metal as the substance used, unless some new and useful result is thereby accomplished; and increasing the durability of the article is not such a result, since that is due alone to the inherent quality of the metal, which is well known to every skilled mechanic.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 23.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Suit by the Wise Soda Apparatus Company against the Bishop-Babcock-Becker Company for infringement of a patent. From a decree adjudging the patent void and dismissing the bill of complaint, complainant appeals. Affirmed.

Obed C. Billman, of Cleveland, Ohio, for appellant.

Jesse B. Fay, of Cleveland, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This appeal is from a decree adjudging letters patent No. 1,002,950 null and void and dismissing the bill of complaint. The patent was granted September 12, 1911, to George W. Wise and Henry A. Wise, assignors of appellant. The pleadings present in the usual way the issues of validity and infringement, all the claims of the letters patent being involved. It is stated in the specification:

"Our invention relates to improvements in metallic frames for soda fountain counters and other analogous structures. The primary object of the invention is to entirely eliminate wood as a material in such structures, and to provide a generally improved metallic frame work for securing, supporting, and reinforcing the marble walls, whereby a generally improved structure of great strength and durability is provided. * * *"

This clearly implies—indeed, it is common knowledge—that prior to this patent the frames used to sustain the exterior or inclosing parts of structures, such as soda fountain counters and the like, were composed in whole or in part of wood; and the prime object here is to use metal in place of these wooden parts, and so to add strength and durability to the structure. What the patentees did was to design an angle-bar structure comprising: (1) An upper and lower rectangular frame joined by four corner posts and four intermediate posts, with adjustable legs secured to the lower frame; (2) an angle-bar extending the length of the upper frame, suitably disposed between the side members, and fastened to the end members of the frame; (3) a container counter frame, polygonal in form, extending the entire length of the main frame and seated within a recess formed between the angle-bar before mentioned and the front side member of the upper frame; and (4) interior compartments, suitably disposed in the main frame and the container counter frame, and intended as receptacles for supplies and for means to keep them cool.

The framework thus generally described will be better understood by reference, for example, to the first claim of the patent, shown in the margin.[1] These frames are designed to be inclosed by and to support

[1] "1. A metallic frame for soda fountains, comprising a main frame consisting of upper and lower rectangular frames provided with corner posts, said upper frame being provided with a container counter receiving opening, and a metallic container counter frame seated in said opening and resting on said upper rectangular frame."

suitable materials, such as marble, glass, or slate, of appropriate dimensions. The complete structure may be illustrated in perspective by Fig. 1 of the drawings:

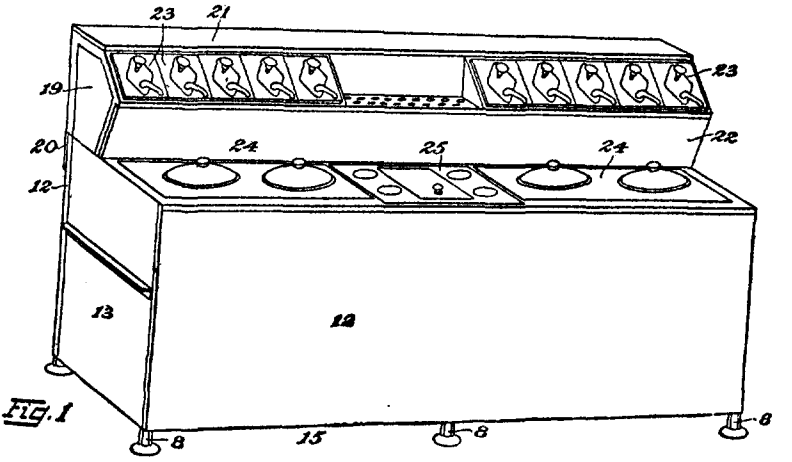


FIG. 1

The method of using the structure is sufficiently shown by four of its main features: *21* represents the usual counter slab; *23* the syrup container jars; *24* the storage cabinets; *25* an intermediate cooling chamber. So far as concerns the form of the structure and the materials composing it, save as to the metal, novelty cannot rightfully be claimed.

[1]The idea disclosed here of grouping sales articles into compartments and of cooling the articles from a common source contained in the same structure was developed by Helbling in 1884 in his "apparatus for cooling liquids," patent No. 302,131. Duhm and his associates added a counter to the same sort of a structure, calling it a "combined refrigerating counter and display case," in 1892, patent No. 469,010. Kade added to the latter ice-cream compartments, calling the structure a "soda-water dispensing apparatus" in 1900, patent No. 655,782. Butler's "cooling case for soda fountains" patented in 1905, No. 802,969, contains all the features of the other structures mentioned unless it be the counter and ice-cream compartments.

[2] Specific comparison of the foregoing patents of the prior art with the patent in suit, for purposes of tracing identity in parts, in mode of use, and in results, is not necessary, since our examination of the patents fails to convince us that the structure in issue works any substantial change in any of the respects stated, except possibly in matter of degree; and this is not invention. Keene v. New Idea Spreader Co., 231 Fed. 701, 710, 145 C. C. A. 587, and citations (C. C. A. 6).

Even as to the metal framework in question, the record contains pertinent references to patented structures designed for kindred purposes. We have seen that the specification states that the invention relates, not only to the specific structure of appellant, but also to "other analogous structures"; and it further states:

"While our invention is admirably adapted for use in the construction of soda fountain counters, it will of course be obvious that it may be readily adapted or embodied for use in connection with other, or similar structures where marble, glass, and similar material, are extensively used as a component part."

Fritch provided metal framework with glass panels for his refrigerator, patented in 1888, No. 377,246. Hogan in 1908 devised a metal frame and pointed out its advantages as to durability in his "workboard for bars," patent No. 892,831. Friedman in 1889 invented a "glass cigar box with metal or other frame," patent No. 400,840. Anderson in 1875 provided "metal corners" for the wooden framework of his improved show cases, patent No. 158,823, stating:

"This construction does not interfere with the glazing, and the corners are removed for cleaning or replacing, and then replaced, without interfering with the glass of the case."

Furthermore, the most that can be said of any advance or improvement involved in the structure in issue, when compared with structures of its particular class, is that the patentees substituted metal for wood in the framework.

[3] Invention cannot be predicated of a change in material, however, unless some new and useful result is thereby accomplished; and clearly, in a structure like the present one, the result achieved by the use of metal cannot differ in any conceivable respect from that accomplished through the use of wood, save only in point of duration. This difference does not call for the exercise of the inventive faculty; it is due alone to an inherent quality of the metal, and is well within the experience and adaptation of the skilled mechanic. Kilbourne v. W. Bingham Co., 50 Fed. 697, 703, 1 C. C. A. 617 (C. C. A. 6); Drake Castle Pressed Steel Lug Co. v. Brownell & Co., 123 Fed. 86, 87, 88, 59 C. C. A. 216 (C. C. A. 6); Sheffield Car Co. v. D'Arcy, 194 Fed. 686, 692, 116 C. C. A. 322 (C. C. A. 6); Ventilated Cushion & Spring Co. v. D'Arcy, 229 Fed. 398, 402, 143 C. C. A. 518.

The decree is affirmed.

## KAWNEER MFG. CO. v. DETROIT SHOWCASE CO.

(District Court, E. D. Michigan, S. D. February 28, 1917.)

No. 128.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—STORE FRONT CONSTRUCTION.
The Plym patent, No. 852,450, for a structure for holding heavy plate glass in position for store windows, *held* infringed.

2. PATENTS ⟸234—INFRINGEMENT—IMPAIRMENT OF FUNCTIONS OF DEVICE.
Infringement is not avoided by impairment of the functions of an element of a patented device in degree, if the distinguishing feature is retained.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370, 381.]

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—STORE FRONT CONSTRUCTION.
The Plym patent, No. 860,150, for store front construction, *held* infringed.

4. PATENTS ⟸236—INFRINGEMENT—UNITING TWO PARTS IN ONE.
Infringement is not avoided by forming in one part two elements of a patented device, if the part thus formed secures the same results in substantially the same way as the two elements.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 372, 373.]

5. TRADE-MARKS AND TRADE-NAMES ⟸70(1)—"UNFAIR COMPETITION."
It is "unfair competition" to manufacture an article and sell it for resale to ordinary people, if it is so similar to the article made by a patentee or original manufacturer that the ordinary man who buys and uses it cannot tell it from the genuine, even though the actual sale to the jobber, wholesaler, or middleman is without misrepresentation.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81.
For other definitions, see Words and Phrases, First and Second Series, Unfair Competition.]

6. TRADE-MARKS AND TRADE-NAMES ⟸70(1)—UNFAIR COMPETITION.
A defendant *held* chargeable with unfair competition in constructing store fronts which were not only an infringement of complainant's patents, but were so like complainant's structures in appearance that the ordinary observer could not tell one from the other.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81.]

In Equity. Suit by the Kawneer Manufacturing Company against the Detroit Showcase Company. On final hearing. Decree for complainant.

Wallace R. Lane and Clarence J. Loftus, both of Chicago, Ill., for plaintiff.

Edward N. Pagelsen, of Detroit, Mich., for defendant.

TUTTLE, District Judge. In this suit the plaintiff charges three things against the defendant: Infringement of patent No. 852,450, to Plym, of May 7, 1907; infringement of patent No. 860,150, to Plym, of July 16, 1907; and unfair competition.

The defendant admits the validity of the two patents and denies infringement. Defendant also admits that the structures manufactured and sold by it are of such similarity in appearance to plaintiff's structure that those not technically familiar with the articles would be confused as between the two, and would be likely to take one for the other. Defendant denies, however, that people skilled in the trade and in the art, and those engaged in dealing in and handling the articles would be deceived, and denies that the defendant has ever sold its articles for the articles of the plaintiff, or that it has ever deceived any one with whom they have dealt. I will take these matters up in the order that I have mentioned.

[1] As already stated, the validity of the patent to Plym, No. 852,450, of May 7, 1907, is admitted; but proof has been offered by the defendant as to the state of the art and prior inventions for the purpose of limiting the scope of the patent, and as bearing upon the question of noninfringement. After hearing all of this proof, and considering all of these matters, the case, on that branch, narrows itself down to the single question as to whether the defendant's inner gutter is resilient, within the meaning of the patent—whether or not the defendant's inner gutter actually assists and serves, because of resiliency, in holding the glass. Does it press the glass yieldingly outward, so that, on pressure from the outside, it yields with sufficient resiliency, so that the glass is saved from breaking, and then, when the pressure is withdrawn, the glass is returned to its normal position, and the inner gutter assumes its normal position, because of resiliency?

Defendant denies that it possesses resiliency, contending that, while on heavy pressure, it will yield, and when the heavy pressure is withdrawn it will resume its normal position, yet denies that the possible forces applied to the glass before the breaking point is reached are such that resiliency of the inner member is brought into play. Results of an experiment were brought to my attention and offered in evidence by the defendant, for the purpose of showing that this inner member is not resilient. This experimental test is not persuasive, as it does not correctly represent the conditions existing in practical use.

In determining this question, of course, the court ought to have in mind the weight of the glass, the amount of pressure that is likely to be exerted against it, the bending qualities of the glass, and all of its different characteristics. Glass, while it can be bent, at the same time possesses great strength, and these large panes of glass are heavy, and must, if they are serviceable and durable, resist heavy strains. The resiliency which the patent intends for the inner member is not that kind of resiliency which is very easily yielding, or it would not serve its purpose. The value of the resilient inner member is to hold the glass in its normal position so much of the time as possible, and to only permit it to leave that normal position on heavy pressure, for the purpose of saving it from being broken.

I have studied by actual experiment of my own the question of whether or not it was resilient. It yields perceptibly upon pressure. In addition to my own judgment upon that subject, I have had in mind the previous case from this court (Kawneer Manufacturing Company v. Toledo Plate & Window Glass Company [D. C.] 232 Fed. 362),

in which the Circuit Court of Appeals of this Circuit (Toledo Plate & Window Glass Co. v. Kawneer Manufacturing Co., 237 Fed. 364) has held a similar inner gutter to be a resilient member. I have not changed my own opinion with reference to the inner gutter of the Toledo Plate Glass Company, which I then thought was resilient. Every thought and every reason which would lead me to think that member resilient would lead me to believe that this one is. Within the proper construction and meaning of the language of the claims of the patent, the inner gutter is resilient.

[2] Defendant's inner gutter has no turned-down edge or lip which presses flatly against the glass on its inner surface. On the pressure from the outside I fail to discover any difference in the actual function of defendant's inner gutter and the same gutter with the flange extending downward and pressing flatly against the glass. I take it any such flange would only offer resistance and add to resiliency on pressure from the inside. On pressure from the inside it would press against this down-turned edge of the gutter, and the tendency would be to return the glass to its normal position. On pressure from the outside, as soon as the lower or extreme edge of the glass leaves the perpendicular, it would leave such a flange; and I fail to discover any force or any function that would be performed by the flange on the pressure from the outside. While the glass is to be protected and guarded against pressure from both sides, there is a greater occasion or reason for guarding against heavy pressure from the outside; therefore, if there is any difference, it is one of impairment of functions without changing the operation. "Infringement is not avoided by impairment of the functions of an element of a patented device in degree, if the distinguishing feature is retained." Penfield v. Chambers Bros. Co. (C. C. A. Sixth Circuit) 92 Fed. 630, 653, 34 C. C. A. 579; Murray v. Detroit Wire Spring Co. (C. C. A. Sixth Circuit) 206 Fed. 465, 124 C. C. A. 371, and cases there cited. Defendant's inner gutter is, in my opinion, resilient, and I hold it to be resilient. I hold claims 5, 6, and 7 of patent No. 852,450 infringed.

[3] Claims 1 and 2 of patent No. 860,150 are the ones in suit and read as follows:

"1. The combination of a channeled front plate, a back plate, a channeled filling strip occupying the channel of the front plate and headed fastening devices extending through the channeled plate and the back plate and having their heads within the channeled filling strip to be covered by the same.

"2. The combination of a channeled front plate provided with lateral flanges, a plate back of the same and provided with resilient wings, a stiffening part engaging the back plate, bolts extending through the channeled front plate, the back plate, and the stiffening part, and a channeled filling strip occupying and closing the channel of the front plate and clamped in position by said bolts."

Defendant, while admitting the validity of this patent, introduced a number of prior patents. The British patent to Shelley, No. 12,036 of 1887, is admitted by defendant's expert to be the nearest to both plaintiff's and defendant's constructions. This does not show a practical construction for store front purposes. This is admitted by defendant's expert. None of these prior patents show anything which limits either of these claims.

The defendant's structure has a front plate consisting of two glass engaging lateral flanges with inwardly extending members, with a channel between them to receive a channel filling strip. This filling strip is formed as a part of the inwardly extending members of the front plate. There is a back plate with lateral flanges for engaging the inner sides of the adjacent edges of the glass. Bolts, with heads fitted within and covered by the channel filling strip, are supported by the sides of the channels of the filling strip and front plate and pass through the back plate for adjusting the front plate and back plate relative to each other for properly holding the glass with a resilient friction grip.

The first claim contains four elements, three of which are admittedly old, and one, the channel filling strip occupying the channel of the front plate, is new. The second contains five elements, four of which are old, and the new one being the same new element as that in claim 1. Defendant contends that this new element, viz., the channel filling strip, is not found in its constructions, and that therefore neither of these claims was infringed by it.

The completed structures, as they are finally in service in the building, holding the two adjacent edges of adjacent panes of glass at the corner of a building, or in front of a building, after they are assembled and in place, are identical, except that the bottom part of the channel front plate of the plaintiff's structure is absent from the defendant's structure. Aside from this, in the finished form they are identical in shape, and where you find one thickness of the metal in one you will find one thickness of the metal in the other; and where you find two thicknesses of the metal in one you will find two thicknesses of the metal in the other. At the point where the head of the bolt exerts its pressure, it is identically the same part of the structure, and at that particular part there are two thicknesses of the metal immediately opposite, between the head and the glass in each structure.

Considering the finished structure, and forgetting for the instant the manner of assembling, it would seem to me that the two structures were identical in every particular, except that the defendant, by removing the bottom part of what the plaintiff calls the channeled front plate, has impaired to that extent the function which that plate is to perform. I am led somewhat to that conclusion (which seems to me apparent by looking at the structures and considering the results which they are intended to accomplish) by the fact that the defendant itself, in one of its structures, has arranged a tie across the bottom of this channel at the point where the head of the bolt comes in contact with the sides of the channel in order to prevent spreading of this channel. I would expect it to spread, and in actual use it evidently has on some occasions spread, or the defendant would not have found it necessary or desirable to use the tie or stay across the bottom. If that tie was extended along the entire length, then we would have the identical structures when they were in place and performing service, and then the only possible difference would be one of assembling. So it seems to me that either of the defendant's structures, when assembled and in service in the building, is in fact the plaintiff's structure, except for the impairment that I have mentioned. An infringer

cannot escape liability for his infringement by diminishing or impairing the advantages and functions of the patented device, if he retains the substantial form, function, and manner of operation. See cases supra.

Now, is there enough of the assembling feature in the plaintiff's patent, and is there enough difference in the defendant's method of assembling, to avoid infringement? I have already reached the conclusion, as stated, that in the finished product I find them the same. If I read either claim 1 or claim 2 of the plaintiff's patent upon the structure when it is assembled and together, I read it as readily on the defendant's structure as I do on the plaintiff's structure. And in my interpretation of it I am not at all bothered to do that by the fact that the bottom of the so-called channel or front strip of plaintiff's structure has been removed in the defendant's structure.

The plaintiff describes his method of assembling—talking about claim 1—by first putting together the three old elements, and then slipping the channel filling strip into its place under the heads of the bolts; the back plate and the so-called channeled front plate having first been bolted together. In other words, the plaintiff assembles those old parts first, and then slips his new part into position under the head of the bolt. In the actual structures made under the patent by plaintiff, the bolts are slid into the filling strip and then inserted directly through the channeled front plate, instead of sliding the filling strip over the bolt heads, and as thus assembled are delivered to the user.

The defendant, in assembling its structure, first makes into one piece that which corresponds to the channeled front plate and the channel filling strip of the plaintiff's structure, then slips the head of the bolt into the channel, and then fastens these three elements to the back plate. In other words, as I view it in the combination, it is simply a difference in the order of assembling, and a difference in the part where the last step in the assembling takes place. In the plaintiff's structure the last step is to put in the channel filling strip, and that completes the last step in the combination of the four elements; while in the defendant's structure the last step is to add to the other three elements the back plate.

[4] I find nothing in the patent in suit or in the prior art relied upon by the defendant, which so limits the plaintiff's claims that this difference in the method of assembling ought to avoid infringement, when the finished completed article, when assembled, is, as I find it to be, the same as plaintiff's structure, and possesses each and every one of the elements and functions of the plaintiff's structure and accomplishes the same result in precisely the same way. Infringement is not avoided by the forming in one part two elements of a patented device, if the part thus formed secures the same results in substantially the same way as the two elements. Bundy Mfg. Co. v. Detroit Time-Register Co. (C. C. A. 6th Cir.) 94 Fed. 524, 538, 36 C. C. A. 375; Nathan v. Howard (C. C. A. 6th Cir.) 143 Fed. 889, 893, 75 C. C. A. 97; Clipper Belt Lacer Co. v. E-W Co. et al. (C. C. A. 6th Cir.) 237 Fed. 602, — C. C. A. —; Pedersen v. Dundon (C. C. A. 9th Cir.) 220 Fed. 309, 311, 136 C. C. A. 143, and cases there

cited. I have discussed this particularly with reference to claim 1, but everything that I have said with reference to claim 1, so far as really affecting or controlling this lawsuit, could be said with reference to claim 2, because claim 2 differs simply by having an added element, and that element is an old element, making a combination of four old elements, with one new element, viz., the channeled filling strip. The added old element in claim 2 is made by defendant and does not change the reasoning nor change the conclusion; so I hold that this patent, which is admittedly good, is broad enough, and that the defendant's structure is close enough, so that the defendant's structure infringes both claims of patent No. 860,150.

This leads me to the other and only remaining branch of the case —that of unfair competition. As I stated at the outset, it is proven beyond dispute, and in fact is admitted in the case, that the structure of defendant is so similar in appearance to that of the plaintiff that the unskilled, average, ordinary consumer, the man who ultimately gets the product, finally pays for it, and finally uses it and owns it, would not know the one from the other.

The record shows that the plaintiff had built up a large business in this country in these products. The structures covered by the two patents in suit are closely related to each other in a commercial way. The articles built under the one, and those built under the other, fit into the same structure, they adjoin each other in the structure, and they ought to be and are built in harmony with each other, and they are so sold and used. It is true, as has been urged by counsel, that the officers of the defendant company are men of high standing in this community, and I ought not to do, unnecessarily, any harm to their business, or to them as individuals, by any decision that I might make in this court. It is not for me to pass upon their individual intent in this matter, and I am glad that I am not called upon to do that, because, knowing some of them as I do, I know they would not intend to violate the law, or intentionally do what was wrong in any particular. Yet I find, according to my best judgment, that they have infringed both of these patents, and, as I say, it must be admitted on this record that the product which I find was an infringement of these patents is so like to that of the plaintiff's product made under these patents, and upon which plaintiff had built up a business and established a reputation, that it did in fact—whether the officers of defendant company as individuals intended that it should so result or not—deceive the public. It must be admitted that the ordinary layman, who owns a store and needs a new show window, might specify "Kawneer," receive defendant's structure, and think he was getting "Kawneer," and he never would know, unless some one told him, but that he had "Kawneer."

[5] When patents are infringed, and articles made that are so similar to the genuine article, the result to the plaintiff in truth and in fact must be held to be unfair competition. I find, as a matter of fact, that the defendant has not deceived any one that purchased direct from it. Every one who has bought from it has known what he was buying, and has known that he was buying defendant's

product, and not Kawneer product. I am satisfied that the defendant would not do so, and there is no proof that it has done so. On the other hand, there is proof that it has not; but I do not think that is the test. It would be unfair competition to do that. It is also unfair competition to manufacture a patented or unpatented article and sell it for resale to the ordinary purchaser, if it is so similar in all its details, functional and nonfunctional, essential and nonessential, to the article made by the patentee or original manufacturer, that the ordinary man who buys it and uses it cannot tell it from the genuine, even though the actual sale to the jobber, the wholesaler, or the middleman is without misrepresentation. Coca Cola Co. v. Gay-Ola Co. (C. C. A. 6th Cir.) 200 Fed. 720, 119 C. C. A. 164; Gaines v. Turner-Looker Co., 204 Fed. 553, 556, 123 C. C. A. 79; Enterprise Mfg. Co. v. Landers et al. (C. C. A. 2d Cir.) 131 Fed. 240, 241, 65 C. C. A. 587; Yale & Towne Mfg. Co. v. Adler (C. C. A. 2d Cir.) 154 Fed. 37, 83 C. C. A. 149; Rushmore v. Badger Brass Mfg. Co. (C. C. A. 2d Cir.) 198 Fed. 379, 380, 117 C. C. A. 255; Ludwigs v. Payson Mfg. Co. (C. C. A. 7th Cir.) 206 Fed. 60, 124 C. C. A. 194; Farmers' Handy Wagon Co. v. Beaver Silo & Box Mfg. Co. (C. C. A. 7th Cir.) 236 Fed. 731.

[6] It is urged that the things in which these structures resemble each other are all of them necessary elements in the performing of functions in the practical work which the structure does, and that they are not for the purpose of appearance. There is some force in that argument, but we ought to have in mind that this is a structure for showcase windows, and not for back cellar windows, or for places where no beauty is desired. They are intended for places where beauty is one of the controlling elements to be considered. A show window is for the purpose of attracting people and getting them to stop and look and be pleased. One of the things desired is to make it beautiful. It is true that these lines are simple, but probably they are more pleasing to the eye than they would be if they were less simple. The exact form is not necessary.

If one sees a practical and useful article on the market, and then later tries to design and devise something to serve the same purpose for their own manufacture, it is difficult even for them to tell to what extent they have been influenced by the article they have previously seen. So in this case it does not matter whether it is done consciously or unconsciously; but it is apparent to me that, not only in the elements and the combination of elements, which I hold to infringe, but also as to the dress and appearance of the product, the plaintiff's structure has influenced the dress and appearance of the defendant's structure. They are so similar in every particular that, even though it was not intentional, I feel that the plaintiff's structure must have influenced the form, shape, dimensions, and appearance of the defendant's structure, as well as the construction of elements which I hold infringe.

It is true the defendant placed its name upon each piece that it manufactured. These pieces are of considerable size, and that would not of necessity mean that each piece, when resold, would have the defendant's name upon it. The name is something that one would not wish to have

in too conspicuous a place; one would probably not want to buy these articles if the name was placed in such a conspicuous way that the ordinary observer would see it. More than that, by placing the name once upon a strip, it is not likely, in every case, to get in such a position that the owner of the building would see it and observe it. What I have said about placing the defendant's name upon these pieces applies to the corner strips and the dividing strips, but does not apply to the sash strips. No name was stamped on the sash strips. Along with the defendant's name appeared the word "Almetal," with the word "Trade-mark" under it. And these words have also been conspicuously displayed in the defendant's advertising matter. While this is not a large element in the matter, and not a thing that I have given great weight to, I think it is an item to be considered, along with all the other things, upon this question of unfair competition. It seems that the plaintiff was the first to actually make an all-metal strip of this kind for store fronts. The old ones that have been shown me as having been made before plaintiff's two patents in suit, and before plaintiff began to build up its business in these articles, are not commercial articles. They were mere material used by mechanics, along with other material, in building store fronts. They were not sold as standard construction, but sold as so much material, and mechanics bought it as they would buy lumber to build and use in constructing store fronts.

The use of this word "Almetal" as a claimed trade-mark, by the defendant, when in fact, it did not have a trade-mark, and would not be able to get a legal valid trade-mark in this name, was in reality a misrepresentation. It is substantially the word which had been prominently displayed by the plaintiff long prior to its use by the defendant—not the exact word. The word that the plaintiff displayed was "All-Metal," spelling the words correctly, and connecting them with a hyphen; but they are pronounced the same, they meant the same to every one, they are descriptive, they are not fanciful words, and therefore not subject to registration as a lawful trade-mark; so I am not entertaining the thought that defendant infringed any trade-mark of the plaintiff, but simply considering that along with all of the elements in this case, as one of the "straws" directing the conclusion which I feel forced to reach, that defendant has been guilty of unfair competition. This is a term that the plaintiff was using in connection with its business. It was long ago engaged in the business of manufacturing an all-metal construction of this kind. This defendant, before or about the time that it engaged in the operation of the business which I am now about to restrain, must have known of the decree of this court (Kawneer Mfg. Co. v. Toledo Plate & Window Glass Co. [D. C.] 232 Fed. 362) holding the first-mentioned patent in suit valid.

It is not a pleasant thing to restrain reputable business men from engaging in a business which they have built up, and which is undoubtedly profitable to them, and in a way helpful to the community and to the public. However, there is no question but that, if I am right in my findings of fact and conclusions of law as to these other matters, it is a just law that would restrain, because that business has been built up, as I view it, at the expense of the plaintiff, using things that plaintiff's

genius had devised and really given to the world, and under our patent law, and the law as to unfair competition, defendant ought not to have built up the business which it has built up in these particular articles.

A decree will therefore be entered in favor of the plaintiff for such profits and damages as plaintiff is entitled to under the findings which I have made, and reference will be made to William S. Sayres, Jr., the standing master of this court, to take an accounting as to the damages and profits, and a permanent injunction will issue restraining the defendant from infringing these patents, and from continuing the unfair competition.

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## SEARCHLIGHT HORN CO. v. AMERICAN GRAPHOPHONE CO.

(District Court, D. Connecticut. November 27, 1916.)

No. 1451.

1. JUDGMENT ⊜675(1)—PERSONS CONCLUDED—PERSONS CONDUCTING DEFENSE.

A corporation, which, although not a party to the record, assumes full control and conduct of litigation on behalf of a defendant, is as fully bound by the decree therein as though a formal defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1190, 1194.]

2. CORPORATIONS ⊜1—CORPORATE LIABILITIES—SEPARATE ENTITY OF CORPORATION AND STOCKHOLDERS.

When a corporation is owned and controlled by a single person, either a natural or artificial person, the doctrine of separate legal entity of the corporation, as distinguished from its shareholders, cannot be invoked in a court of equity for the purpose of covering up transactions or of evading liability, but the court will look beyond the corporate form to the purpose of it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1, 3–6.]

3. INJUNCTION ⊜33—SUIT FOR INFRINGEMENT—RESTRAINING OTHER PROCEEDINGS BY COMPLAINANT.

An infringement suit in a federal court in California resulted in an interlocutory decree against the defendant corporation. Such defendant was the selling agent for the manufacturing corporation, which owned all of its stock, controlled its acts, and conducted the defense to the suit, to the knowledge of all parties. Some years later the complainant brought suit for infringement against the manufacturing company in a federal court in Connecticut. *Held*, that the latter court, the suit in which involved an accounting for a different period of time, would not restrain the complainant from proceeding by supplemental bill in the California court to have the manufacturing company made a party to the record in the cause before it, so as to permit the final decree to include a judgment for damages against it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 70, 71.]

In Equity. Suit by the Searchlight Horn Company against the American Graphophone Company. On rule by defendant for injunction. Rule discharged.

Frederick S. Duncan, of New York City, for plaintiff.
C. A. L. Massie, of New York City, for defendant.

THOMAS, District Judge. This is a suit in equity for infringement of letters patent of the United States granted October 4, 1904, to Peter C. Nielsen for phonograph horns, No. 771,441, owned by the plaintiff.

The case now arises on a rule to show cause why the plaintiff should not be enjoined from impleading or attempting to implead the defendant in this action as a joint defendant in an equity suit charging infringement of said letters patent now pending in the District Court of the United States for the Northern District of California in which the plaintiff here is the plaintiff there and the Columbia Graphophone Company is the defendant, or from in any wise attempting to bring the defendant, the American Graphophone Company into said California suit or within the jurisdiction of the California court, or from in any wise interfering with the orderly conduct of this cause now pending in this court. The facts upon which this rule arises are as follows:

The plaintiff is a New York corporation. Some time in 1911 the plaintiff commenced litigation in the northern district of California against infringers of said patent. There were several of these suits, some of which were taken to the Circuit Court of Appeals for the Ninth Circuit, and in all of the cases the validity of the patent was sustained, and the respective defendants adjudged to be infringers. In 1913 the plaintiff filed a bill in equity in the Northern district of California on the patent in suit against the Columbia Graphophone Company, a West Virginia corporation formerly known as the Columbia Phonograph Company General, praying for an injunction against the further manufacture, use, and sale by said Columbia Graphophone Company of phonograph horns embodying the invention of the Nielsen patent, and an accounting of profits and damages, and for costs. A preliminary injunction was granted, and after final hearing on pleadings and proofs an interlocutory decree was entered in favor of the plaintiff, deciding all the issues in favor of the plaintiff, and adjudging said patent to be valid and infringed by the phonograph horns made, used, and sold by the defendant therein, and a permanent injunction was granted against the further manufacture, use, and sale of such horns by the defendant. An accounting was also directed, together with the customary reference to a master. A motion by the plaintiff is now pending in the California case for leave to file a supplementary bill of complaint making the American Graphophone Company, a party defendant, and for a decree to the effect that the American Graphophone Company committed the acts of infringement therein complained of and proved, and for a judgment for profits and damages against the American Graphophone Company for the six years prior to the commencement of the California action. The purpose of the present motion and rule is to restrain the plaintiff from prosecuting this motion in California.

All of the infringing articles had been supplied by the American Graphophone Company to the Columbia Graphophone Company for the purposes of sale, the latter corporation being the sales agent of the American Graphophone Company. All of the capital stock of the Columbia Graphophone Company is under the full and complete control and management of the American Graphophone Company, and

the Columbia Graphophone Company has been and is, as a matter of fact, a mere name under which the defendant herein has conducted its business. Its stores have been rented for it by the American Graphophone Company, and all of its goods belong to the American Graphophone Company, as do all the proceeds of the sales, and the Columbia Graphophone Company has made no profits and received no compensation whatever for its handling of the American Graphophone Company's goods, and all of the acts and doings of the Columbia Graphophone Company have, as a matter of fact, been the acts and doings of the defendant herein, doing business under the name of the Columbia Graphophone Company. Moreover, the action in the California suit against the Columbia Graphophone Company was openly defended by counsel employed by the defendant herein, who had the conduct and management of the litigation, and with full knowledge of opposing counsel.

[1] Clearly this court has no power to take any action which will take from the final decree to be entered in the California case the force and effect to which it is clearly entitled. Although the American Graphophone Company was not a party of record to the California litigation, its conduct in taking part in and managing the litigation makes it bound by any judgment therein as fully and to the same extent as though it were a party to the record. Souffront v. Compagnie des Sucreries, 217 U. S. 475, 30 Sup. Ct. 608, 54 L. Ed. 846; Washington Gas Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712; Robbins v. Chicago City, 4 Wall. 657, 18 L. Ed. 427; Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129.

[2] Moreover, the authorities put beyond all question that when a corporation is owned and controlled by a single person (either a natural or an artificial person) the rule that the corporation and the shareholders have a separate entity and existence can never be made use of for purposes of evading responsibility, or as a means of distorting or hiding the truth, or of covering up transactions. In such cases, the presumption that knowledge of facts and circumstances affecting the interests of the stockholders of a corporation cannot be imputed to the corporation itself has no application, unless the interests of the stockholders and the corporation are adverse; but, on the contrary, the presumption is otherwise where such interests are not adverse. The courts in all such cases look beyond the formal corporate differences into the real and substantial rights, rather than mere matters of organization. There are numerous adjudged cases bearing out this proposition.

An instructive case on this point is National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co. (C. C.) 73 Fed. 491, arising in the Circuit Court for this district and decided by Judge Townsend, in which it was held that the estoppel as against the assignor of a patent operates against a corporation subsequently formed by him, and which is entirely owned and controlled by him, and that the corporation will be estopped, even if another company has a substantial interest therein, if it appears that at the time of acquiring his interest he had knowledge of the patent, its assignment, and had been associated with the assignor in the line of business to which the patent relates.

Another case directly in point is Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267, decided by the Circuit Court of Appeals for the Ninth Circuit, and affirmed by the United States Supreme Court, 236 U. S. 574, 35 Sup. Ct. 440, 59 L. Ed. 725, where it was held that the doctrine of separate legal entity of a corporation, as distinguished from its members, cannot be invoked in a court of equity as a cover for a transaction, but in such cases the court will look beyond the corporate form to the purpose of it, and whatever would be binding upon the persons composing it will be binding on the corporation.

In Simmons Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063, it was held that where each and all of the individuals who organize a corporation under a state law had knowledge or actual notice of a defect in the title to lands acquired by the corporation through them, their knowledge or actual notice was knowledge or actual notice to the company.

The rule is nowhere more clearly or forcibly stated than by Mr. Justice McKenna in delivering the judgment of the Supreme Court in McCaskill Co. v. United States, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590, as follows:

"Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that in transactions with it, when their interest is adverse, their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it and to the officers who are identified with that purpose. Illustrations are given of this in Cook on Corporations, §§ 663, 664, and 727. The principle was enforced in this court in Simmons Creek Coal Co. v. Doran, 142 U. S. 417 [12 Sup. Ct. 239, 35 L. Ed. 1063]. In that case a corporation claimed title to land through a deed of its corporators, one of whom became its president. Of the effect of this the court said: 'Associated together to carry forward a common enterprise, the knowledge or actual notice of all these corporators, and the president, was the knowledge or notice of the company, and if constructive notice bound them it bound the company.' The case at bar is within the principle. The bill alleges that J. J. McCaskill and Robert E. L. McCaskill were copartners and engaged in the manufacture of lumber at Freeport, Fla. They incorporated this business, it is alleged, under the laws of Florida, 'by the corporate name of J. J. McCaskill Company, with the said J. J. McCaskill as president and the said Robert E. L. McCaskill as secretary, owning a large majority of the stock of said corporation, with the entire management and control of the business and affairs of said corporation.' There is no denial of this allegation. The interest of the corporators and the corporation thus shown to be identical, not adverse, we think the ruling in Simmons Creek Coal Company v. Doran is applicable.".

Other cases directly in point are Riverdale Mills Co. v. Mfg. Co., 198 U. S. 188, 25 Sup. Ct. 629, 49 L. Ed. 1008; United States v. Lehigh Valley R. R. Co., 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458; Anthony v. American Glucose Co., 146 N. Y. 407, 41 N. E. 23; In re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530; In re Rieger, Kapner & Altmark (D. C.) 157 Fed. 609.

[3] Whether the California court has the right to allow the filing of the supplemental bill of complaint in the action there pending, making the American Graphophone Company a party to the record in that cause, so as to permit the final decree to be drawn, so as to include a judgment for damages against said corporation, is a question that is not before me, and one which I am not called upon to decide. Such a question belongs to the California court, and it is the appropriate forum in which to litigate that question.

Moreover, the present suit was commenced in June, 1916, and can include the recovery of profits and damages only from June, 1910. The California suit was commenced in 1913, and if the American Graphophone Company can be deemed a party to that suit, so that a judgment for damages may be rendered against it, a recovery can be had against it in that suit for all profits and damages for six years prior to the commencement of that suit, viz., from July, 1907. In other words, the two suits involve different periods of time and different recoveries of profits and damages, and in view of the claim of fact which is strongly urged, and which is not controverted, that the Columbia Graphophone Company has no assets, a question is presented which should not be adjudicated upon this rule and motion.

Should any accounting be ordered at any time in the California suit against the American Graphophone Company, the plaintiff agrees that such accounting may be had here, where the books of the American Graphophone Company are kept. This agreement disposes of the claim made by the defendant that the attempt of the plaintiff to implead the American Graphophone Company in the California suit, if successful, would work a severe hardship and expense, necessitating, as is urged, the removal of all books and records as well as some of the employés of the American Graphophone Company to California, to be detained there as long as the accounting lasts.

Under the circumstances I fail to see how the prosecution of the motion in the California case in any way interferes with the orderly conduct of this case. For the reasons above indicated, the rule should be discharged and the motion denied. Let an order to that effect be entered.

So ordered.

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## STANDARD ASPHALT & RUBBER CO. v. BARBER ASPHALT PAVING CO.

(District Court, S. D. Illinois, S. D. January 17, 1917.)

No. 25.

1. PATENTS ⊜202(1)—ASSIGNMENT—PASSING OF TITLE.

An assignment of patents for a temporary purpose, which had been fulfilled, and expressly providing that it was not the intention to interfere with the right of disposition of the patents by the assignors, *held* to leave the legal as well as the equitable title in them.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281–288.]

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⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PAVING MATERIAL.
The Culmer patents, Nos. 635,429 and 635,430, the former for a process of making an asphaltic paving material and the latter for the product, *held* not anticipated, valid, and infringed.

In Equity. Suit by the Standard Asphalt & Rubber Company against the Barber Asphalt Paving Company. On final hearing. Decree for complainant.

A. F. Reichmann and F. L. Belknap, both of Chicago, Ill., and Walter M. Allen, of Springfield, Ill., for complainant.

Henry N. Paul, Jr., and Joseph C. Fraley, both of Philadelphia, Pa., Edward Rector, of Chicago, Ill., and Logan Hay, of Springfield, Ill., for defendant.

HUMPHREY, District Judge. The bill charges infringement of two patents, No. 635,429 and No. 635,430, known as the Culmer patents. The one describes a process; the other, the product derived therefrom. The process consists in violently agitating with air petroleum residuum, while the latter is heated to a relatively low temperature, resulting in an asphaltic product more or less solid and practically without loss; that is to say, the volume and specific gravity of the liquid being substantially the same as the volume and specific gravity of the resulting product.

It is admitted by defendant that its process is identical with that of complainant, so that the real controversy here is as to the validity of the Culmer patents. The defenses are: (1) That complainant has not shown a clear title to the Culmer patents. (2) Anticipation by the Byerly patent and prior invention by Byerly.

[1] The attack upon complainant's title is collateral only, the defendant not seeking to connect itself in any way with the title to the Culmer patents. On July 14, 1899, the Culmers had made an agreement with parties called the Byrd syndicate for the repayment of $50,000, furnished by the syndicate in connection with the Culmer patents. Later, on December 14, 1899, the Culmers assigned the patents to the Guardian Trust Company. The assignment was not to secure a debt, but for a temporary purpose, and specifically states that it was "subject in all respects to the terms of the agreement of July 14, 1899." The assignment also provides:

"It not being the intention of this agreement to interfere with the right of disposition of said patented process on the part of the parties of the first part" (the Culmers).

The two agreements must be considered together, for the second specifically includes the first, and without the first the second is meaningless. I am of opinion that, notwithstanding the assignment, the legal and equitable title to the patents remained in the Culmers.

The record of proceedings in Guardian Trust Co., Trustee, v. Culmer (no opinion filed), begun in the United States court in Chicago, January, 1901, is significant. The pleadings and the result of the suit convince me that the assignment was a temporary pledge and that it

had been discharged. It is therefore held that the legal and equitable title to the Culmer patents is in the complainant company.

[2] The case was mainly fought on the joint defense of anticipation and prior invention by Byerly. The language of both Byerly and Culmer patents is clear and unmistakable. Byerly describes a process of distillation; Culmer, a process of oxidation at relatively low temperature and without distillation. Byerly's process involves a heavy loss of material, and Culmer's process involves practically no loss of material. Byerly's process takes away the lighter oils. Culmer's process retains those oils. In the Patent Office the Byerly patent was cited against Culmer's application, and the distinction made at that time was satisfactory to the department. The proof here verifies that distinction.

The further defense is that, regardless of his patent, what Byerly actually did constituted prior invention and use. So far as the proof of such prior invention by the elder Byerly rests in the memory of his two sons, Francis and Josiah Byerly, it is not sufficient to sustain the defense, and the record of certain still books of the father, produced in evidence by the son Francis, is against rather than in favor of the contention that the elder Byerly was the original inventor of the process described in Culmer's patent. Indeed, the most convincing proof on the subject of prior invention is that contained in the still books, which are now for the first time known in the litigation.

Much time and consideration have been given to the various cases cited by counsel for defendant in which the Byerly or Culmer patents, or both, have been involved. Harmony of decision is highly desirable, and all courts seek to preserve such harmony; but those decrees were all based upon different records, and the decree here must be based upon the record made here.

The equities are found to be with the complainant. Counsel for complainant may submit form of decree.

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## FORDHAM v. HICKS.

(District Court, S. D. Georgia, W. D. March 20, 1917.)

1. SPECIFIC PERFORMANCE ⟸121(5)—RIGHT TO—EVIDENCE—SUFFICIENCY.
On a bill for specific performance of a parol contract for the sale of land, evidence *held* to show that complainant had made partial payments and had been admitted into possession, and also improved the land, and hence was entitled to specific performance under Park's Ann. Civ. Code Ga. § 4634, declaring that specific performance of parol contract to convey land may be decreed, where there has been a full payment alone, or a partial payment accompanied by possession, or possession alone with valuable improvements.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 388.]

2. JUDGMENT ⟸739—CONCLUSIVENESS—MATTERS CONCLUDED.
A judgment of the city court on a distress warrant for rent, rendered against complainant, who under a parol contract for the purchase of land was admitted into possession and paid most of the purchase price, does not, the proceeding being collusive, estop complainant from obtaining spe-

cific performance of the contract; the city court having no jurisdiction, under Park's Ann. Civ. Code Ga. § 6510, to pass on title to land, for a judgment of a court of law or decree in chancery is an estoppel only as to matters directly decided, and not as to those incidentally considered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1105, 1267.]

In Equity. Bill by J. H. Fordham against T. B. Hicks. Decree for complainant.

See, also, 224 Fed. 810.

Robert L. Berner, of Macon, Ga., for complainant.

Akerman & Akerman, of Macon, Ga., for respondent.

SPEER, District Judge. This is a bill for specific performance of a parol contract for the sale of land. It is brought by a colored man, J. H. Fordham, who was formerly a citizen of Laurens county, in this state, but who has since become a citizen of Arkansas. The land involved consists of 100 acres, in close proximity to the city of Dublin. The purchase price agreed upon at the date of the sale was $1,000, but, owing to the rapid increase in the value of such lands and the improvements thereon made by the plaintiff, he and several disinterested witnesses testify in effect that its value is $3,500 or $4,000. The defendant, T. B. Hicks, is a citizen of Laurens county, in this district.

[1] The law of Georgia, which will control this controversy, is found in section 4634 of Park's Annotated Code:

"The specific performance of a parol contract as to land will be decreed," where there has been "full payment alone, accepted by the vendor, or partial payment accompanied with possession, or possession alone with valuable improvements, if clearly proved in each case to be done with reference to the parol contract."

It is not in fair dispute that the plaintiff went into possession of the land in 1892, but the contract of sale under which he claims was made in 1897. It was for $1,000, to be paid in annual installments of $120. The plaintiff insists that he has paid the purchase price, and, on demand of the defendant, has tendered him $104 in excess thereof. This Hicks refused, and has also refused to execute the deed. It is also not in dispute that since 1892 the plaintiff has paid all taxes on the land. The proof is equally satisfactory that the plaintiff, prior to 1897, erected upon the land two dwelling houses, a corncrib, and a smokehouse, and cleared about 50 acres, and since that time has erected a wire fence around about one-half of the place. When he first took possession of the place, only 8 or 12 acres were suitable for cultivation. Since 1897 he has cleared up the remainder of the land, except 5 acres. It is true that the defendant claims that some of these improvements were paid for by the sale of cross-ties cut from the land. It is, however, difficult for the court to accept this defensive explanation. It is scarcely credible that the plaintiff would have performed the amount of labor made necessary by these improvements on the land of another, and for the benefit of that other. Nor does Hicks, the defendant, who claims that the plaintiff was his tenant, state anywhere that he either authorized or directed the improvements and the work necessary to their completion. The fact that they were made, considered in connection with

the payment of the purchase price, is deemed by the court, as clearly shown to be, a compliance with the Georgia statute quoted above, and done with reference to the parol contract. This, too, is borne out by certain receipts in evidence given to the plaintiff by the defendant, or by his authority. They are as follows:

"$10.00. Dublin, Georgia, 3/26/1904.
"Received of J. H. Fordham ten dollars, part of purchase money for land sold him, for which bonds, etc., are to be executed. [Signed] T. B. Hicks.
"Witness: T. H. Rowe."

"Dublin, Georgia, Oct. 29, 1904.
"Received of J. H. Fordham $80.00 rent for this year, and also received of him $20.00 (twenty dollars), to be applied to the purchase price, when bond in compliance with trade is consummated. [Signed] T. B. Hicks."

"$60.00. Dublin, Georgia, Nov. 16, 1905.
"Received of J. H. Fordham sixty dollars, to be applied on purchase price.
"[Signed] T. B. Hicks.
"M. J. H."

It is true that the defendant Hicks contends that the plaintiff held the land simply as his tenant. The evidence, however, preponderates to show that this is not true. The testimony of Fordham, the plaintiff, seems consistent and truthful. T. J. Perry, a witness for the plaintiff, was entirely disinterested. He is a white citizen of Laurens county. He testified that in 1903 or 1904 Mr. Hicks told him that Fordham owed him something like $275 or $300, as a balance on the land. J. B. Veal, equally disinterested, testified that in 1908 Hicks told him that he had sold the land to Fordham. The third witness was E. P. Rentz. He was a railroad man, seeking to purchase a right of way through the land. He made inquiry of Hicks, with the view of ascertaining where the title was, and Hicks told him he had sold the land to Fordham, and that Fordham still owed him a small balance. There is no doubt from the evidence that the parol contract of sale was made as insisted upon by the plaintiff in his bill. It is true that the issue presented by this bill was tried on another proceeding in Laurens county, and that there was a verdict for the defendant; but so inimical was the verdict to the principles of law and equity involved that the court there granted a new trial. While this was pending, the plaintiff dismissed his bill and brought it anew in this court. A motion to dismiss here has been overruled, for reasons stated in the opinion of the court filed on the 10th day of August, 1915, to which reference is here especially made.

[2] It is also claimed that the plaintiff is estopped by the judgment of the city court in Dublin on a distress warrant for rent in 1908. It seems, however, that this proceeding was collusive. Even if this be not true, it does not appear that the distress warrant was defended, or that any issue was made as to the title. Indeed, the city court, from which it issued, would have no jurisdiction to pass upon title to land. Park's Annotated Code, § 6510. And said the Supreme Court of Georgia, in Bonds v. Brown, 133 Ga. 454, 66 S. E. 157, which was the case of a judgment on a distress warrant pleaded as an estoppel:

"A judgment, therefore, of a court of law, or a decree in chancery, is an estoppel to the parties thereto, and to those who are in privity with them.

This is the rule. It is, however, carefully and strongly fenced. The judgment must relate to the same question, and must clearly decide it. If it came collaterally under consideration, or was only incidentally considered, there is no estoppel."

On the whole, the court is convinced that the preponderance of the evidence so clearly entitles the plaintiff to the relief in equity sought by this bill that it must be granted. While the evidence also preponderates to show that the plaintiff has paid the entire sum of the purchase price due under the parol contract, yet, because he has tendered to the defendant a final payment of $104, he will be held liable therefor, and the decree will so provide.

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## POSTAL TELEGRAPH CABLE CO. OF MONTANA v. NOLAN et al.

(District Court, D. Montana. March 29, 1917.)

No. 50.

1. COURTS ⟸299—JURISDICTION—FEDERAL QUESTION.
A case does not arise under the laws of the United States, so as to give the District Court jurisdiction, unless it is apparent from the complaint that it involves a substantial dispute respecting the validity, construction, or effect of some federal law, upon the determination of which the result depends.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841.]

2. COURTS ⟸284—JURISDICTION—FEDERAL QUESTION—PREVIOUS CONSTRUCTION.
When the federal law involved in a suit has been settled by the United States Supreme Court, it no longer furnishes a basis for a claim that the case arises under the laws of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820–826, 831.]

3. COURTS ⟸285—JURISDICTION—FEDERAL QUESTION—USE OF POST ROADS BY TELEGRAPH.
A suit by interstate telegraph company to restrain a railroad's cotenants in the fee of the right of way from removing plaintiff's telegraph lines, erected on the right of way with the railroad's permission, is not controversy arising under Comp. St. 1916, § 10072, providing that any telegraph company shall have the right to construct telegraph lines along any military or post roads of the United States, which section has been construed by the United States Supreme Court as not applying to the conduct of individuals, who interfere with the telegraph lines, and as not conferring the right to use post roads without consent of the owner thereof, and therefore such suit is not within the jurisdiction of the federal court, when all the parties are citizens of the same state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 827, 828.]

4. COURTS ⟸289—JURISDICTION—FEDERAL QUESTION—INTERSTATE TELEGRAPH LINES.
The fact that the destruction of a telegraph line, along a right of way in which defendants were cotenants, would interfere with interstate commerce, does not give the federal court jurisdiction of a suit between citizens of the same state to restrain such destruction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830.]

In Equity. Suit by the Postal Telegraph Cable Company of Montana against Joseph P. Nolan and others to enjoin defendants from destroying plaintiff's telegraph lines on a railroad right of way. On defendants' motion to dismiss. Motion granted.

William Meyer, of Butte, Mont., for plaintiff.
Nolan & Donovan, of Butte, Mont., for defendants.

BOURQUIN, District Judge. This case by complaint and proof on an order to show cause is one wherein plaintiff seeks to enjoin defendants from continued destruction of the former's interstate telegraph lines upon a railroad's right of way (an easement acquired by condemnation) wherein the railroad company and defendants appear to be cotenants in the fee, plaintiff having the railroad company's permit to place the former's wires on the latter's poles on said right of way. All parties hereto are citizens of Montana.

Plaintiff has complied with the federal Telegraphs on Post Roads Act (10 West's Comp. Stats. p. 12335), and claims the case is one arising under the Constitution and laws of the United States. Defendants' only claim is that the railroad company's permit gives plaintiff no right to occupy said right of way that they, cotenants in the fee, are bound to respect, that the issue involves only the local law of cotenancy and is not a case arising under the laws of the United States, and so move to dismiss the suit for want of jurisdiction.

[1] This court has not jurisdiction unless the case arises "under the laws of the United States." A case does not so arise unless it is apparent from the complaint that it involves a substantial dispute respecting the validity, construction, or effect of some federal law, upon the determination of which the result depends. Hull v. Burr, 234 U. S. 720, 34 Sup. Ct. 892, 58 L. Ed. 1557.

[2] When the law involved has been settled by the Supreme Court, it no longer furnishes a basis for a claim that the case arises under the laws of the United States. Telegraph Co. v. Railway Co., 178 U. S. 244, 20 Sup. Ct. 867, 44 L. Ed. 1052.

[3] By reason of both these rules, it is believed the instant case does not arise "under the laws of the United States"; hence, no jurisdiction.

The federal act involved, so far as here material, is for the purpose of preventing states and their instrumentalities, as cities, from prohibiting telegraph companies doing business therein. It has nothing to do with the conduct of individuals, whether wrongdoers or otherwise, who hinder the companies' operations. The act confers no right upon such companies to occupy post roads in invitum.

The companies must secure leave from the owners of such roads, and their rights therein are not dependent upon nor measured by the said act, but by the terms of the leave secured. Essex v. Telegraph Co., 239 U. S. 317, 36 Sup. Ct. 102, 60 L. Ed. 301; Telegraph Co. v. Richmond, 224 U. S. 169, 32 Sup. Ct. 449, 56 L. Ed. 710; Telegraph Co. v. Railway Co., supra. And see Pomona v. Telephone Co., 224 U. S. 345, 32 Sup. Ct. 477, 56 L. Ed. 788.

If the companies secure leave to occupy state or city post roads, any subsequent interference by state or city may make a case arising under the Constitution of the United States—the contract or due process clauses—and so within the jurisdiction of the federal courts. Illustrations are the first and last of the four cases last cited.

The instant case in principle is like Telegraph Co. v. Railway Co., supra, which determines that, not the construction or effect of said act, but that of the leave to occupy, controls the result.

[4] That interstate commerce is involved, adds nothing to plaintiff's rights. See Water Co. v. McCarter, 209 U. S. 357, 28 Sup. Ct. 529, 52 L. Ed. 824, 14 Ann. Cas. 560.

It may be that plaintiff, by the railroad company licensed to use the right of way as the latter uses it, involving no exclusion of defendants as cotenants, has rights entitled to protection. But not the federal law, but the local law alone, determines the result. So is it, if defendants are not cotenants but only wrongdoers. Any remedy must be sought in the state courts.

The motion to dismiss is granted.

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## UNITED STATES v. SMITH et al.

(District Court, M. D. Tennessee, N. E. D. January 29, 1917.)

No. 51

COSTS ⊜316—CRIMINAL PROSECUTIONS—JUDGMENT—"COSTS OF THE CAUSE."

Though the term "costs of the prosecution" in Rev. St. § 974 (Comp. St. 1913, § 1615), providing that, when judgment is rendered against a defendant in a prosecution for any fine or forfeiture, he shall be subject to the payment of costs, and that, on every conviction of any other offense not capital, the court may in its discretion award that the defendant shall pay the costs of the prosecution, may be broad enough to include costs not incurred in the trial at which defendant was convicted, an awarding of such costs is discretionary with the court, and a judgment requiring defendant to pay the "costs of the cause" does not require the payment of the costs of the preliminary examination.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1143, 1144.

For other definitions, see Words and Phrases, First and Second Series, Costs.]

W. W. Smith and others were convicted of illicit distilling, and sentenced to be imprisoned and to pay a fine and one-third of the costs of the cause. On motion by the United States to retax the costs. Motion denied.

Lee Douglas, U. S. Atty., of Nashville, Tenn., for the motion.

SANFORD, District Judge. The three defendants were, under Rev. Stat. § 1014 (Comp. St. 1913, § 1674), arrested and brought before a United States Commissioner, on a complaint charging them with illicit distilling, an offense punishable under Rev. Stat. § 3281, as amended by the Act of Feb. 8, 1875, c. 36, § 16, 18 Stat. 307, 310

(Comp. St. 1913, § 6021), by both fine and imprisonment, and were bound over by the Commissioner to the court. And, having been subsequently indicted, tried and found guilty, judgment was rendered, at a former term of this court, that each be imprisoned in a county jail, and pay a fine and one-third of "the costs of the cause." An execution having issued against the defendant Pitcock, upon a præcipe from the United States Attorney, and the costs against him taxed by the clerk, the United States has moved to retax these costs so as to include one-third of the costs of the preliminary proceeding before the Commissioner.

Section 974, Rev. Stat. (Comp. St. 1913, § 1615), provides that when judgment is rendered against a defendant "in a prosecution for any fine or forfeiture" incurred under a federal statute, "he shall be subject to the payment of costs," and that "on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution." Under this section the word "costs" as used in reference to prosecutions for fines or forfeitures, means the "taxable costs of the trial before the court and petit jury in which defendants have been convicted." United States v. Wilson (C. C.) 193 Fed. 1007. That is, in effect, in such cases the word "costs" means merely the taxable costs of the court cause. It is earnestly insisted, however, in behalf of the Government, that "the costs of the prosecution," which under this section may be awarded against a defendant upon conviction for any other offense, not capital, that is, offenses punishable by imprisonment, is a broader term than the word "costs" as used in reference to prosecutions for fines or forfeitures merely, and hence includes other costs of the entire prosecution, such as those incurred in the preliminary proceedings before a Commissioner and grand jury, which may be taxed against a convicted defendant under this section, although not, strictly speaking, costs of the cause. While it may perhaps be that the term "costs of the prosecution" is broader than the word "costs," and may include costs of the prosecution which are not costs of the cause itself, such as the fees of witnesses examined before the grand jury prior to the return of an indictment, this would not strengthen the Government's position in the instant case, since the awarding of the entire "costs of the prosecution" is, under the statute, discretionary with the court, and in the instant case, under the judgment, which was rendered at a former term and has now passed beyond the control of the court, it was not awarded that the defendants pay "the costs of the prosecution," but merely "the costs of the cause." Obviously the costs of the preliminary proceeding before the Commissioner are not part of the costs of the cause, within the definition of "costs" given in United States v. Wilson (C. C.) supra. The preliminary proceedings before the Commissioner are, it is settled, not a part of the cause in the court itself. There is no "cause" in the court until an indictment or information is filed; the filing therein of the Commissioner's transcript not being the institution of a suit, but having as its object the giving of information to the District Attorney that the defendant has been held to bail or committed to await the action of the grand jury. United States v. Van Duzee, 140 U. S. 169, 174, 11

Sup. Ct. 758, 35 L. Ed. 399; and see, by analogy, Virginia v. Paul, 148 U. S. 107, 119, 13 Sup. Ct. 536, 37 L. Ed. 386, and Katz v. Manufacturing Co. (C. C.) 150 Fed. 684, 685. And the papers sent up by the Commissioner constitute no part of the record in the court. United States v. King, 147 U. S. 676, 685, 13 Sup. Ct. 439, 37 L. Ed. 328. It is entirely clear, therefore, that as the proceedings before the Commissioner are no part of the "cause" in court, the costs incurred therein cannot properly be included in taxing costs under a judgment rendered against the defendants for "the costs of the cause" merely.

It is therefore unnecessary to determine whether, if the judgment in this cause had been rendered against the defendants for "the costs of the prosecution" instead of "the costs of the cause," the costs of the preliminary proceedings before the Commissioner would have been taxable against them under such judgment; that is to say, whether the term "costs of the prosecution" as used in section 974 includes anything more than the costs of the cause; whether, if so, the proceeding before the Commissioner is to be regarded, in the light of the decisions in the Van Duzee and King Cases, supra, as part of the prosecution, though not part of the court cause; and, finally, whether, in any event, the costs of such preliminary proceeding could be taxed against the defendants as part of the costs of the prosecution in view of the specific provision in section 1014 of the Revised Statutes that the preliminary proceedings before a Commissioner are to be "at the expense of the United States."

Being, however, clearly of the opinion, for the reasons above stated, that the costs of the proceeding before the Commissioner are in no event taxable under the present judgment for the "costs of the cause" merely, the Government's motion to retax must be denied; and an order will be entered accordingly.

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## Ex parte BELL.

(District Court, N. D. California, First Division. March 10, 1917.)

No. 16168.

COURTS ⇐489(1)—FEDERAL COURTS—JURISDICTION—HABEAS CORPUS.

A resident of Nevada petitioned in the District Court of California for a writ of habeas corpus to secure the custody of a minor child, alleged to have been kidnapped by defendants, residents of California, and brought into that state. Under the adoption proceedings had in Nevada, petitioner was entitled to the custody of the infant. *Held*, that the federal court was without jurisdiction to entertain the habeas corpus proceeding, notwithstanding the diversity of citizenship and the Nevada adoption proceedings.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1324.]

In the matter of Loletta Bell, minor. Petition by Mrs. Sadie E. Bell for a writ of habeas corpus. On demurrer to the writ. Demurrer sustained.

Howard K. James, of Oakland, Cal., for petitioner.

Robinson, Gillis & Sizer, of Oakland, Cal., for respondent.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

DOOLING, District Judge. Sadie E. Bell has petitioned this court for a writ of habeas corpus on behalf of Loletta Bell, a child of about six years of age. The petition shows that the petitioner and her husband duly and regularly adopted the child in Nevada in July, 1911, in accordance with the laws of that state and with the consent of the mother; that the child was then but 18 days old; that petitioner and her husband had the care and custody of the child by virtue of the adoption proceedings until December 18, 1915, when the mother kidnapped her, and removed her from that state; that the adoptive parents were unable to find her until quite recently, when they found her in this district in the custody of the mother; that petitioner is a resident and citizen of the state of Nevada, and the mother a resident and citizen of this state. The petitioner seeks by this proceeding to have the custody of the child taken from the mother and transferred to her in accordance with the Nevada decree.

An order to show cause was issued and served upon the mother, who has filed a demurrer to the petition, by which the jurisdiction of the court is sharply questioned. Petitioner contends that the court has jurisdiction, both because of the diverse citizenship of the parties and because it is the duty of the court to "give full faith and credit to the Nevada decree." Upon neither ground can the jurisdiction of the court be upheld. Petitioner cites no authority in support of her contention, and the principles supporting the contention of respondent are fully set out in Re Burrus, 136 U. S. 586, 10 Sup. Ct. 850, 34 L. Ed. 1500, Clifford v. Williams (C. C.) 131 Fed. 100, and Hoadly v. Chase (C. C.) 126 Fed. 818.

The court being without jurisdiction, the demurrer to the petition will be sustained, and the proceeding dismissed.

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## STEPHENS et al. v. OHIO STATE TELEPHONE CO.

(District Court, N. D. Ohio. W. D. February 14, 1917.)

No. 166.

1. COURTS ⇐316—JURISDICTION—COLLUSION.

Judicial Code (Act March 3, 1911, c. 231) § 37, 36 Stat. 1098 (Comp. St. 1913, § 1019), authorizing the dismissal of a suit in the federal court if it should appear that it does not properly involve a dispute within the jurisdiction of the court, or that parties have been collusively made or joined for the purpose of giving the court jurisdiction, does not deprive the federal court of jurisdiction over a suit by the subscribers of an interstate telephone company whose employés were on a strike, to compel the company to furnish the service it had contracted to furnish, though the parties thereto were friendly antagonists, and the telephone company was willing to have the controversy submitted to the federal court, since the collusion which deprives the court of jurisdiction is not an agreement between the parties that an existing dispute cognizable in the federal courts shall be brought there, but an agreement so to adjust the situation as to clothe the court with an apparent jurisdiction which it otherwise would not have.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 862.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. EQUITY ⊜48—ADEQUATE REMEDY AT LAW.

Under Judicial Code, § 267 (Comp. St. 1913, § 1244), providing that suits in equity shall not be maintained in the federal courts where a plain, adequate, and complete remedy may be had at law, the fact that each one of a large number of subscribers of an interstate telephone company might have an adequate remedy at law for the interruption of the service which he contracted for does not prevent a suit by several subscribers, on behalf of all, to compel a restoration of the service, since, while the several actions at law were being tried, the suspension of service would continue, and might reach the proportions of a public calamity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 156, 158.]

3. EQUITY ⊜48—ADEQUATE REMEDY AT LAW—MANDAMUS—STRIKE.

Where a telephone company's service was being interrupted during a strike by acts of unknown individuals, the remedy of subscribers by mandamus to compel a restoration of the service is not sufficiently speedy, and is inadequate, since it cannot reach the wrongdoers whose acts caused the interruption of the service, and therefore such remedy does not prevent a suit in equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 156, 158.]

4. COURTS ⊜289—JURISDICTION—INTERSTATE TELEPHONE COMPANY.

Under Act June 18, 1910, c. 309, § 7, 36 Stat. 544 (Comp. St. 1913, § 8563), amending Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, so as to make it apply to telephone, telegraph, and cable companies engaged in sending messages from one state, territory, or district to another or to a foreign country, which companies shall be common carriers within the act, the federal courts have the same jurisdiction relating to a telephone company's duties as an interstate agency that they have relating to railroads and other interstate carriers.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830.]

5. COURTS ⊜289—JURISDICTION—CONTROVERSY UNDER LAWS OF UNITED STATES—INTERSTATE TELEPHONE SERVICE.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, as amended in 1889 (Act March 2, 1889, c. 382, 25 Stat. 855) and 1910 (Act June 18, 1910, c. 309, 36 Stat. 544), interstate telephone companies are required to furnish reasonable facilities for the transaction of their business, and that duty may be enforced by a proceeding in equity in the United States courts as a controversy arising under the laws of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830.]

6. CONSTITUTIONAL LAW ⊜70(1), 72—COURTS—JURISDICTION—LEGISLATIVE OR ADMINISTRATIVE ACTS.

A suit by the subscribers of an interstate telephone company, to require it to repair its appliances and thereafter to keep them in a good state of repair and in condition for operation, is not beyond the jurisdiction of the court, as asking the court to undertake administrative or legislative functions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 132, 133, 137.]

7. INJUNCTION ⊜101(3)—STRIKE—UNLAWFUL ACTS—"LAWFUL."

Within Clayton Act Oct. 15, 1914, c. 323, § 20, 38 Stat. 738, providing that no injunction in any case between employer and employés shall prohibit any persons from terminating the relation of employment, or from recommending or persuading others by peaceful means so to do, or from attending at any place where they may lawfully be for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or abstain from work, or from ceasing to patronize or employ any party, the test whether the act is lawful is the question whether it would be lawful if no strike existed, and no action having in it the element of intimidation, coercion, or abuse, physical or

verbal, or of invasion of rights of privacy, nor any act or speech which a fair-minded man may reasonably judge to be intended to convey insult, threat, or annoyance to another, or to work abuse upon him, is lawful.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175.

For other definitions, see Words and Phrases, First and Second Series, Lawful.]

8. INJUNCTION ⟸101(2)—STRIKE—INTERFERENCE WITH PUBLIC UTILITIES.
Striking employés of a telephone company, which is a public utility whose first duty is to serve the public, cannot lawfully interfere, under the Clayton Act, with the business of the company, if it can find people willing to work for it, since, if it can find laborers, it must employ them and fulfill its public duties.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 175.]

9. CONSTITUTIONAL LAW ⟸82—PERSONAL RIGHTS—EXTENT.
Individual rights are and must be subordinated to the public good.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 149.]

10. INJUNCTION ⟸204—CERTAINTY—PICKETING BY STRIKERS.
An injunction issued in a suit by the subscribers of a telephone company whose employés were on a strike, to compel the company to perform its contracts, which restrained all persons from doing any act which may interfere in any respect with the performance of those duties, is, in view of the fact that the interests of the public are paramount to the interests of the strikers or the employers, as definite as it could be made and be effective, and complies with Clayton Act, § 19, providing that, in any case between employers and employés, an injunction should specify in reasonable detail the things enjoined, conceding that that section applied to such a suit.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 422, 423.]

In Equity. Separate suits by A. C. Stephens and others and by the Home Telephone Company against the Ohio State Telephone Company, in which Bert Hoffman was allowed to intervene on behalf of Local 245, International Brotherhood of Electrical Workers, and its members. On motion by the intervener and other members of the union, attacking informations charging violation of the injunction issued by the court. Motions denied.

Marshall & Fraser, of Toledo, Ohio, for complainants.
L. T. Williams, of Toledo, Ohio, for defendant.
J. A. Cline, of Cleveland, Ohio, for Local 245, International Brotherhood of Electrical Workers.
H. W. Fraser, Sp. Atty., of Toledo, Ohio, for the United States.

KILLITS, District Judge. December 12, 1916, A. C. Stephens and others, each claiming a cause of action similar in character and occasion to that offered by every other, and alleging that they were suing in a representative capacity in behalf of numerous other persons similarly situated, filed a complaint in this court against the Ohio State Telephone Company, a corporation organized under the laws of Ohio, and doing business in Toledo, of which city each of the complainants is a resident.

The complaint asserts that the defendant is engaged in the business of transmission of messages to points within and without the state of

Ohio over telephone lines and cables of its own extending into neighboring states, and through its connections with other companies, and that each of the complainants, and each of the numerous persons in whose behalf also the complainants profess to act, are patrons of said telephone company, with an interest as such in the maintenance of its facilities for interstate communication by virtue of their several contracts with defendant, whereby complainants, severally, are entitled to enjoy local and long-distance telephone facilities to points within and without the state of Ohio.

It is further alleged that the defendant is obligated, by the terms of its charter and franchise for the use of the streets of Toledo, to furnish adequate facilities for telephonic communication to points in the city and within and without the state of Ohio to all persons willing to pay the fixed charges prescribed for such services by the company; that it has over 20,000 telephones connected in the city of Toledo with central exchanges by the usual and necessary wires and other constructions, and maintains a so-called "long-distance" exchange physically connected by wires and other instrumentalities to similar long-distance exchanges and central exchanges located in many cities, villages, and towns in the state of Ohio and in adjoining states, and that thereby the defendant company serves the community as an instrumentality of interstate commerce; that the defendant company has suffered and permitted its lines, cables, and other facilities to become so greatly out of repair that it is impossible for complainants to obtain and to have service for which they pay, and which defendant is obligated to furnish, and that it has become impossible for the patrons of the telephone company to have reasonably full use of the company's lines; that at 25 or more places in the city, designated in the complaint, defendant's lines and cables have become cut and are permitted to remain out of repair, to the end that over 2,500 patrons of the defendant company have been entirely deprived of telephone service, including many of the prominent manufacturing and business establishments of the city, in some of which the complainants are severally interested; that the working force of the defendant company, of operators, linemen, and repairmen, has been permitted by the company to become so depleted that it is unable to and fails to keep its lines and facilities in reasonable repair, and that the situation presents a matter of grave concern to the prosperity and well-being of the city of Toledo and its inhabitants, including the several complainants, in that the legitimate business and commerce of the city to points within and without the state of Ohio are seriously and very largely interfered with, to the very great damage of community interests; that the complainants have no adequate remedy at law, and that the defendant indicates neither ability nor disposition to comply with the requirements of the several contracts alluded to, and with the obligation to maintain adequate facilities for intra and inter state communication.

It is asked, therefore, that the company be cited to answer the bill; that a preliminary order be issued to the defendant, requiring the defendant to immediately repair and put its plants, lines, wires, and facil-

ities in reasonable order and condition for operation, and to observe its duties and obligations as an interstate carrier and as a public utility under the several acts of Congress and its contracts; and that it be determined and decreed that the rights and interests of the public and of the complainants, representing the public, are paramount in all respects to the private interests of the defendant, its officers, and employés, and all other persons whomsoever.

A few days after the filing of this complaint, a Michigan corporation, known as the Home Telephone Company of Grass Lake, filed a complaint against the Ohio State Telephone Company, alleging substantially the same condition of affairs as in the former complaint, with additional circumstances, setting forth the Michigan corporation's particular interest in the maintenance of the facilities and obligations of the local company, because the latter is the medium by which the former company maintains its interstate long-distance communication with points in the state of Ohio, and that its business in Ohio was interrupted by the failure of defendant to maintain its lines in proper repair.

Before any action was taken by the court these cases were consolidated, and thereupon the court, after notice, found that "within the past three weeks the cables of defendant company have been cut, damaged, or destroyed" at the several points set forth in the complaint, and that this situation was the result of depredations by divers persons unknown to the telephone company; that thereby followed large, but unascertainable, losses of money and business to the complainants and others and the community, and an interruption of the free flow of interstate commerce; that the defendant company should immediately proceed to the repairing of the several cables located at or about the places mentioned in the order, and should thereafter maintain and keep all other cables, lines, wires, and appliances in good state of repair and in condition for operation. Then followed this provision:

"It is further ordered, adjudged, and decreed that the defendant company, its officers, agents, servants, and employés, those in concert or participating with them, and all persons whatsoever, and particularly all persons having notice of this order, be and are hereby enjoined and restrained from interfering in any way, or in any manner, with the cables hereinbefore enumerated, or with the repair of said cables, or with workmen engaged in repairing said cables, or with employés of defendant company when in the company's service; and all said persons and parties are enjoined and restrained from doing any acts or things which may interfere in any respect with the performance of the duties and obligations of the defendant company as a common carrier."

The answer of the defendant company, filed some time after the entering of the preliminary order, admitted many of the allegations of the complaint, but, putting the complainants upon proof as to many others of important character, which need not be discussed here, set up the fact by way of excuse that it was suffering a strike on the part of its operators and linemen, and that it was having great difficulty in maintaining its working force, because its striking employés and their sympathizers were conspiring and combining to prevent the defendant from continuing in the operation of its telephone system and from employing operators, linemen, cablemen, and other electrical

workers to repair the lines upon which depredation had taken place, and from maintaining the facilities of the company in operation; that their loyal employés were subjected to intimidation, abuse, and violence; and that its cables and lines were being destroyed and cut, as charged in the complaints, by the striking employés and their sympathizers.

Prior to the coming in of this answer, however, one Bert Hoffman, representing himself as a resident of the city of Toledo, applied for leave to intervene by answer and intervening petition in behalf of himself and the several members of Local 245 of the International Brotherhood of Electrical Workers, of which he was a member, and in behalf of said union. After a finding that he did in fact sue in behalf of the said union and its members, permission was granted, and his answer and intervening petition allowed to be filed. In these admissions were made of substantially the facts set forth in the complaints, except that Hoffman denied that either he or any of the parties for whom he attempted to speak were guilty of the depredations of the lines and facilities of the defendant company. An attempt was made also in Hoffman's pleadings to raise the merits of the labor controversy between the striking employés and the company, an issue which the court has not yet considered. Hoffman's pleadings in behalf of himself and his fellows assert their intention:

"To do and perform, singly and in concert with others, by peaceful and lawful means, all acts which he is able to perform by peaceful and lawful means, to compel said company to re-employ its striking employés, and to establish fair wages and decent working conditions; that until said company shall comply with said demands of its employés this petitioner will, in every peaceable and lawful manner possible, interfere with the business of said telephone company."

The order permitting Hoffman to file his intervening petition and his answer in behalf of himself and his fellow members of the union, and of the union, contains a stipulation of his counsel, with the counsel of all the other parties to the cause:

"That the order heretofore entered in this suit upon December 14, 1916 (the temporary order above referred to), shall be and remain in full force and effect as a preliminary injunction until the further order of this court, and that said order be observed and respected in all things until the further order of this court."

After the temporary restraining order had become a temporary mandatory injunction in the language above quoted, to which all the parties consented, including the union men, as above stated, testimony was had before the court in several instances, pursuant to the last provision of section 22 of the act of October 15, 1914, commonly known as the "Clayton Act," which testimony tended to suggest violations of the provisions thereof by various parties, including Hoffman, the representative defendant himself. Attachments were issued, based upon this testimony, and subsequently informations were filed by direction of the court. The parties arrested thereon were admitted to bail in amounts of from $100 to $400, and the court has now before it the return of the several respondents to the respective informations. As the

returns raise practically the same questions in each instance, for the purpose of this opinion we will consider only that of Gustav M. Bugniazet, one of the vice presidents of the International Order of Electrical Workers, who had been in charge of the alleged strike among the employés of the defendant telephone company. The points raised by this return, which we deem worthy of special consideration at this time are:

First, the jurisdiction of the court to entertain an action attempted to be brought by patrons holding contract relations with the Ohio State Telephone Company under circumstances such as obtain here is questioned.

Second, that the terms of the injunction are too broad and indefinite to be valid under the provisions of sections 19 and 20 of the so-called "Clayton Act," which, it is insisted, exclusively control the court in this case.

Respecting the first contention, it is urged that jurisdiction is lacking because the suits are collusive, and because there is a lack of jurisdiction, on the theory that legal remedies are present, and because the court is asked to undertake administrative and legislative functions.

Respecting the second position taken by respondent, it is urged that the order attempted to restrain employés of the telephone company and persons seeking employment therewith from attending in places where they may lawfully be for the purpose of peacefully obtaining and communicating information, peacefully persuading persons to abstain and cease working for the telephone company, and from doing acts which might lawfully be done in the absence of such dispute concerning terms and conditions of employment, contrary to the provisions of section 20 of the Clayton Act, and that the order did not describe in such reasonable detail the act or the acts of the parties to be restrained, as provided by section 19 of the so-called "Clayton Act."

[1] In argument it is urged with considerable insistence that the court has before it a case squarely within the provisions of sections 19 and 20, and particularly the latter, of the act of October 15, 1914. There is no evidence of collusion between the parties in this case; that the original parties may be friendly antagonists is not, however, improbable. Counsel's surmise may be correct, but something more than this is necessary to make their "collusion" reprehensible. The court will not concern itself with the fact, if it exists, that the parties to the cause have agreed to submit their alleged controversy to this court; if there is nothing in substance to support the theory of collusion, other than that, the fact is of no consequence. Provided a real controversy between the parties exists, and the same elements of jurisdiction obtain as if the action were forced upon the defendant by the plaintiff, the court will not inquire into the reason why the parties to the cause entered into an agreement, if they did, to bring their action in this court in any form. Ashley v. Board of Sup'rs of Presque Isle County, 83 Fed. 534, 27 C. C. A. 585; Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444; In re Metropolitan Railway Receivership, 208 U. S. 90, 110, 111, 28 Sup. Ct. 219, 52 L. Ed. 403. It is when the collusive agreement extends to an

adjustment of the situation, so as to apparently clothe the court with jurisdiction which it otherwise would not have, that it becomes obnoxious, so that the real inquiry here is the inquiry as to jurisdiction upon the facts alleged, and if it is found that the court is asked to consider a cause of action which exists as one within its jurisdiction, no matter what the parties thereto determine to do with it, we are not interested to ask why they presented it to this court. Section 37 of the Judicial Code is addressed to that form of collusion which is entered into "for the purpose of *creating* a case cognizable" under the Code. The statute is not new; it was the law under consideration in the cases cited, and it is not understood to refer to an agreement to submit a real controversy over facts not of the making of the alleged colluding parties, but to the collusive establishment, for the purposes of a suit, of facts in controversy which otherwise would have had no existence.

[2] Counsel first insist that the complaints present no cause of equitable cognizance, because the complainants have a complete and adequate remedy at law; wherefore, under favor of section 267 of the Judicial Code, this suit is not sustainable. It is suggested that each of the complainants might find relief through appeal to the Interstate Commerce Commission, or through appeal to the Ohio State Utilities Board, or in an action for damages, or by an action in mandamus. Assuming, for the sake of arguing counsel's position, that any individual complainant might have a remedy at law through one of the methods suggested, still that mere fact does not suffice to make the situation here unrecognizable in equity. It is a *complete and adequate remedy at law*, only, which will oust equitable jurisdiction. The Supreme Court, in Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, announced the rule as follows:

"This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity. * * * Where irreparable injury is threatened, or the damage be of such a nature that it cannot be adequately compensated by an action at law, or is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction."

The condition which complainants picture is one which affects not only each one of them individually, but which affects the entire public. It is obvious, assuming that the complaints state the truth, that an extension of the damage done to the properties of the defendant company in any material degree beyond what is stated in the complaints would approximate a public calamity, if that state of affairs does not already exist. While each individual complainant was carrying his complaint through the slow processes of any legal remedy, whichever one of those enumerated by counsel for respondent should be chosen, an intolerable public situation would remain and doubtless be enhanced in its calamitous features.

[3] Assuming that any one of the complainants might be compensated for his damages in an action at law, while he was having those damages ascertained, following legal procedure, they would be continuing and increasing, not only as to him up to the day of trial, but as to

every contract holder of the company, for his contract would entitle him to service with every other contract holder. While the alternative rule in mandamus was running, if one should be granted, which would be, of course, only against the defendant company, there would be no restraint upon the continuing action of irresponsible people who were placing the company at the mercy of an order in mandamus. No remedy at law would be possible, either, against probable, but then unknown, wrongdoers. Some of the remedies suggested involve of necessity a multiplicity of suits, which, when brought, would be effective only touching the particular actions, and would not reach recurring conditions, involving new causes of action. Even if there were remedies at law available to complainants, individually or collectively, or to the public, it is very plain that none was adequate to meet this situation, for no remedy had in it that celerity and comprehensiveness of operation which mark an injunction order, and which such a situation as this required in order that there may be any adequacy at all in the remedy. While the public, represented by complainants, was awaiting the necessarily slow processes of law, where would the public service have been? The futility of a resort to any suggested legal remedy to meet the situation alleged in the complaints is too plain to need any further argument.

[4] In 1910 (Act June 18, 1910, § 7) the Interstate Commerce Act of 1887, and subsequently amended, was further amended to the effect that:

"The provisions of this act shall apply to * * * telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States to any other state, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act."

It seems to be clear that the purpose of Congress in this enactment was to classify such corporations as the defendant here, for all purposes so far as the administration of the laws of the United States is concerned, with railroads and other transportation common carriers, for the laws pertaining to interstate commerce, while generally providing for matters of administration of the duties of instrumentalities of interstate commerce towards the public, yet comprehensively bring them within the jurisdiction of the federal courts for all purposes relating especially to their duties as interstate agencies. We cite this act, therefore, to the point that all decisions touching the jurisdiction of the federal courts under the laws relating to interstate commerce are applicable to situations arising with reference to telephone and telegraph companies, and that we may assimilate controversies respecting interstate traffic by telephone and telegraph with those which deal with transportation of goods and persons.

[5] It probably would not be disputed, at least it is not subject to dispute, that the acts of Congress regulating interstate traffic are intended to, and do, so far as it is possible for mere enactments to accomplish anything, secure to the public the effective performance of the duties imposed upon public utilities by virtue of their contracts and

those public engagements which result from their franchises. It was long ago held by the declaration of the Supreme Court that telegraph lines, when extending from state to state, were instruments of commerce under the protection of section 8 of article 1 of the Constitution—the commerce provision—and that messages transmitted over such lines from one state to another constitute interstate commerce. Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 24 L. Ed. 708; Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187. It has also become the settled law by adjudication, as well as in many states by statutory enactment, that for all purposes respecting the rights of the public a telephone company must be treated in the same manner as a telegraph company. The federal act of 1910, cited above, is effective also to that end.

The several sections of the Interstate Commerce Act, as enacted in 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379), and amended in 1889 (Act March 2, 1889, c. 382, 25 Stat. 855) and 1910 (Act June 18, 1910, c. 309, 36 Stat. 544), require telephone companies to afford all reasonable facilities for the transaction of business for which they are chartered and which they engage to carry on through their contracts, and subject them, as in case of other instrumentalities of interstate traffic, to heavy penalties for failure to comply with these obligations. As we read the statutes, the same law and procedure are applicable to them which safeguard public and private interests in the operation of any other business engaging in interstate commerce, and we find the jurisdiction of the federal courts over analogous controversies upheld by a long line of decisions touching so great a variety of phases of dereliction that we may safely say we have here one belonging to the same category. We cite: Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co. et al. (C. C.) 34 Fed. 481; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. et al. (C. C.) 54 Fed. 730, 19 L. R. A. 387; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. et al. (C. C.) 54 Fed. 746, 19 L. R. A. 395; Wabash R. Co. v. Hannahan et al. (C. C.) 121 Fed. 563; Sunderland Bros. et al. v. Chicago, R. I. & P. Ry. Co. et al. (C. C.) 158 Fed. 877; Northern Pac. Ry. Co. et al. v. Pacific Coast Lumber Mfrs.' Ass'n et al., 165 Fed. 1, 91 C. C. A. 39; Cleveland, C., C. & St. L. Ry. Co. v. Hirsch, 204 Fed. 849, 123 C. C. A. 145; Alaska S. S. Co. v. International Longshoremen's Ass'n of Puget Sound et al. (D. C.) 236 Fed. 964; In re Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; Western Union Telegraph Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; Southern Railway Co. v. Tift, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124, 11 Ann. Cas. 846; Macon Grocery Co. v. Atlantic Coast Line Railroad Co., 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300; Louisville & Nashville Railroad Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355; United States v. Pennsylvania Railroad Co., decided December 11, 1916, 37 Sup. Ct. 95.

Extended comment upon these cases is unnecessary. We may note, however, that in the Tift Case, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124, 11 Ann. Cas. 846, the court held that, although an action

at law for damages to recover unreasonable rates existed, the federal court could entertain a bill in equity to restrain the enforcement of an unreasonable schedule of rates; and in the case last cited (United States v. Pennsylvania Company) it was held that the Interstate Commerce Act does not give the Interstate Commerce Commission power to direct a railroad company to provide reasonable facilities for service, that is, that the act does not give the Commission the power to enforce the provision that "it shall be the duty of every carrier * * * to provide and furnish such transportation upon reasonable requests therefor," but that such power is lodged only in the courts. See Pa. R. Co. v. U. S. (D. C.) 227 Fed. 911. So, also, in the Beer Case, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355, it was held that the refusal of a common carrier to accept a certain class of freight did not give rise to an administrative controversy within the jurisdiction of the Interstate Commerce Commission, but created a question to be determined only by a court. The criterion is the presence of a controversy arising under the laws of the United States. We feel that we are entirely justified upon this current of authority in holding that we have such a controversy here.

[6] As the court is not asked to perform an administrative act, so we are unable to see with counsel that it is asked "to legislate and fix the quality of service required to be given by the defendant company, not only that the present service is inadequate, but as fixing the standard of service which will be required of the company." We see no application to the instant situation of any of counsel's authorities on this subject. It seems to us that this is plain from a consideration of the order issued, which follows the prayer of the complaint, and which reads in its material parts as follows:

"The court finds that within the past three weeks the cables of defendant company have been cut, damaged, or destroyed at the points hereinafter set forth, and that by reason thereof telephones of defendant company, which are instrumentalities used and useful in interstate commerce, have been rendered inoperative and that complainants, being directly interested in certain of said cables and telephones, and appearing herein on behalf of all persons interested, are entitled to have said cables immediately repaired and to have service thereon immediately re-established. * * * It is therefore ordered, adjudged, and decreed that the defendant company shall immediately repair all its cables located at or near the following places: [Here follows a description of points where repairs are imperatively needed as alleged in the complaint.] * * * It is further ordered, adjudged, and decreed that the defendant company shall immediately repair all other cables, lines, wires, appliances, and facilities of the defendant, and that it shall keep and maintain all said property in a good state of repair and in condition for operation."

Other parts of the order are either injunctional or findings of facts. The order itself is sufficient answer to all of counsel's argument. Such an order would be clearly within the power of a court in mandamus proceedings, and if it could be issued at law, in a case of this kind where mandamus, by reason of procedure and because of continuing conditions, is a cumbersome and inadequate remedy, it could be granted by a court of chancery.

It is contended that, although this suit was instituted by patrons of the company against the company only, it is squarely within section 20 of

the Clayton Act, which enacts certain limitations upon the power of federal courts "in any case between an employer and employés, or between employers and employés, * * * or between persons employed and persons seeking employment," involving a labor controversy. This contention will occupy here none of the court's time. It is at present of no consequence to consider whether this section 20 should be construed to govern cases not within the exact terms of its limitations. If this portion of the act presents the novel features claimed for it, it may well be argued that it is therefore class legislation, which, if valid all, must be construed narrowly; but respondent's motion to the information against him may be disposed of to a better purpose if we assume, with his counsel, that the Clayton Act applies in every section to this controversy, it being understood, of course, that the court is not deciding the point, but joins with counsel in the assumption, because, if section 20 of the act does not apply, respondent's case is hopeless.

The fact that Local 245 of the International Brotherhood of Electrical Workers was permitted to intervene through the representations of Hoffman must not be taken as indicative that the court finds the case to be under section 20. The question still remains whether the issue that now appears between the complainants and the union is under the Clayton Act. Without extended comment, we hold that an "irreparable injury * * * to a property right, of the party making the application, for which * * * there is no adequate remedy at law," is involved in this case, to prevent and abate which the action is brought. As clearly we must hold, also, that that is described "with particularity in the application." Argument to the contrary seems to us to be mere effusive verbality.

[7] The second paragraph of section 20 we quote in full as the important one. It has sometimes been called "Labor's Bill of Rights." We may as well call it an "Employer's Bill of Rights," and also, when there is a labor controversy involving a public utility as here, the "Public's Bill of Rights." The "rights" guaranteed by it to the employés, "in any case between employer and employés," are to be set up against and limited by the certain "rights" of the employer therein written. He has just as much right, under this section, that his employés shall not exceed the limits of their rights under it as they have to enjoy them. The rights of the employer begin where those of the employés stop. The granting of a "right" by statute always involves an obligation upon the favored one not to exceed its limitations. The act says:

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by *peaceful* means so to do; or from attending at any place where any such person or persons may *lawfully* be, for the purpose of *peacefully* obtaining or communicating information, or from *peacefully* persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by *peaceful* and *lawful* means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a *lawful* man-

ner, and for *lawful* purposes: or from doing any act or thing which might *lawfully* be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

It is well to note, and not to lose sight of, the fact that the words "lawfully," "peacefully," "lawful," "peaceful," dominate the thought of the second paragraph of the section in question; they control its meaning, as they control both the court and the parties to a labor controversy. The statute but enacts the position which courts have universally taken; there is nothing new in it, for we hold that no case exists where a court has attempted jurisdiction to control lawful and peaceable action by injunction, although it may seem that sometimes judgment may have been faulty as to what particular action was "unlawful" or provocative of a disturbed peace. The challenge to the court is to define "peaceful picketing" within the limits of this section. This does not seem to be an occasion for an attempt at an academic formula, which, in any detail, would meet all exigencies possible in labor controversies, if one could be drawn up.

Each case presents its own peculiar questions. An act may be lawful and peaceful, or just the opposite, according to its setting. It is easier, and far more practicable, therefore, to deal in prohibitions than in affirmations. Broad generalizations, however, are easily framed, because, if we just keep in mind the prevalence in the statute of the qualifying idea of "peaceful" and "lawful" action, we cannot be misled. The best we have seen is one lately appearing in a newspaper devoted to labor interests. It is:

*"What constitutes peaceful picketing may be answered by any fair-minded man, if this question is asked, 'Would this be lawful if no strike existed?'"*

We accept this as a very good test, and apply it to the concrete questions of fact arising in this case, as propounded in the several informations, with conclusions certain to come to every "fair-minded man." Suppose no strike were in progress—

Would it be lawful for one or more men to use offensive, abusive, insulting, or threatening language to another or others—for one to call another a "rat," a "scab," a "thief," an "outcast," or by any other name commonly accepted as offensive, or degrading, or calculated to provoke the other to break the peace in resentment?

Would it be lawful for one man, or more, to take station adjacent to the place of rest, lodging, or work of another, or others, and there, by gesture, language, or otherwise, convey to the other insult or threat?

Would it be lawful for one or more men to force his or their talk upon the unwilling ear of another—to compel him to listen against his will?

Would it be lawful for one man or more to persistently follow another to and from his work, to his home or lodging, and about the city, forcing upon him unwillingly their presence, without occasion other than to unmistakably suggest to him their hostility unless he meets their views?

Would it be lawful for one to photograph another against his will, especially under circumstances which indicate unfriendliness to be the spirit, and a hostile use of the photograph to be the object?

Would it be lawful to slink upon an unsuspecting man, inoffensively gazing into a shop window, and deal him a blow—to step from the hiding of an alley to trip a lady, and then to strike her escort as he stoops to her assistance?

These questions are formulated upon the testimony produced in open court, because of which attachments were issued under the law, resulting in the filing of informations against which counsel for respondents has presented the motions we are considering. This court has heard other testimony upon which as yet no writs have issued. Upon the facts therein alleged, and upon alleged occurrences which have been the subject of comment in the public press since the middle of November as part of local contemporaneous history, we may ask certain other questions, and thus touch upon all the phases of disorder which have marked the city of Toledo in the time mentioned, and which there is apparent justification in assuming were incidents of the strike. If no strike were in progress—

Would it be lawful to intercept a young girl on her way to work, and beat and scratch her and tear her clothing; to destroy the telephone connections with public hospitals, so as to leave them without means of communication; to destroy fire department lines, hazarding the safety of property; to so menace, threaten, and frighten the employés of another as to make it necessary to convey them to and from their work in armored or protected cars; to so act as to gather large crowds of bystanders and curiosity seekers about places of business, to the interruption thereof; for a crowd of a dozen or more men to surround a vehicle, follow it through the business streets of a city, shouting offensive names, stopping or interfering with traffic; to cut automobile tires; to strew tacks in streets for the purpose of destroying tires; to throw bricks and stones at automobiles; to assault and beat a boy engaged in delivering water to a place of business; to assault persons entering one of the prominent hotels of the city, or to follow such persons from their place of employment to said hotel, calling them offensive names and causing crowds to gather?

Of course, the court is not assuming that these things are established facts, or that the commission of any of them should be charged to any parties now before the court, although the public prints, without any denial, ascribed some of these transactions to the activity of strikers on picket duty, who are parties to this cause. We are calling attention to them only because they are incidents not uncommon in labor controversies, and as such occurrences were not noticeable incidents of the city's history prior to November, 1916, except in cases of other strikes, and as it is not understood that the defendant company was having such experiences before that date, it is not unnatural to assume that they were induced, those that really occurred, in some manner by the labor controversy which caused this suit. Because such occurrences are liable to be the result of passions inflamed by such con-

troversies, there is an insistent and undeniable demand that all persons having part in a strike, who are trying to exercise their rights under the law to maintain a strike, should be persistent in their efforts to keep the controversy within lawful bounds and to guard that these inexcusable results do not follow; otherwise, in the estimate of the public generally, they will be held to some considerable measure of responsibility.

"Any fair-minded man" will answer each of these questions above stated in the negative. It must be borne in mind that not every act is lawful against which no positive provision of law exists. Many acts are unlawful for which no affirmative penalty is enacted, or against which no redress at law is possible; and some, while within the prohibitions of positive law may not offer a practicable occasion for redress at law, yet a court of equity may be asked to protect the intended sufferer from the annoyance and damage they may create, and such a court may enforce its prohibitions. No legislation yet exists to the contrary, if legislation depriving courts of such power is possible. Some acts, lawful when but once performed, may become unlawful when repeated for the purpose of annoyance or damage, and may be restrained when that purpose becomes plain.

The right of free speech does not give any one the privilege to force his views upon others, to compel others to listen. The right of the others to listen or to decline to listen is as sacred as that of free speech. It is clear that, if one does not desire speech of another, he may as surely have his privacy therefrom as the privacy of his home. It is undeniable that the so-called right of peaceful persuasion may be lawfully exercised only upon those who are willing to listen to the persuasive arguments.

Again, every man has the right to the pursuit of his lawful business or employment undisturbed, and any act performed with intent to disturb the full and unrestrained exercise of his faculties and wishes in such employment is plainly unlawful.

Again, he has the right of privacy and freedom from molestation of private persons, hostile or otherwise, at his home, at his lodging, at his place of work; he has the right to walk the streets without annoyance from the unwelcome attentions of others, so long as he is conducting himself in a lawful manner.

Again, the right of one to the privacy of his own features, to the end that he may not be photographed without his consent, is manifest. It has been sustained by the courts in actions for damages.

Again, the right of one man to work is as much entitled to respect as the right of another to cease work or to strike.

Again, the right of an employer to engage whomsoever he chooses is as strong as the right of an employé to refuse to work.

Again, the right of an employer to have access to and from his place of business, and his right to have the streets and public highways in front of his place of business kept clear of crowds, bystanders, and curiosity seekers, is as strong as the right to picket, and no picketing which is conducted in a manner to attract and retain the presence of crowds can be said to be peaceful or within the law.

It is a safe and proper generalization that any action having in it the element of intimidation or coercion, or abuse, physical or verbal, or of invasion of rights of privacy, when not performed under sanctions of law by those lawfully empowered to enforce the law, is unlawful; every act, of speech, of gesture, or of conduct, which "any fair-minded man" may reasonably judge to be intended to convey insult, threat, or annoyance to another, or to work assault or abuse upon him, is unlawful. Not a syllable of the Clayton Act, or of any other law, whether of legislation of Congress or of the common law, sanctions any of the incidents we have referred to. They are to be condemned as legally inexcusable—such must be the verdict of "any fair-minded man"—nothing can be said in justification.

These propositions are so elemental that, but for the confusion which exists in many minds that a labor controversy affects the commonest rules of life, it would seem a waste of time to state them. The existence of a strike does not make that lawful which would otherwise be unlawful. These personal rights to which we have alluded are, in each instance, precisely those which the striker himself would insist upon were conditions reversed. They are also so plain, and the answers to the questions involving them so certain, that one called upon to enforce the law, if he has but ordinary intelligence, will plainly fail to do his duty when in his presence a fellow citizen suffers an invasion of his rights of this character.

The things we have mentioned are so clearly unlawful that the failure or refusal of public officials to prevent their occurrence or to punish their commission presents a plain and reprehensible evasion of official duty. Any officer of the law, a policeman, for example, ought to know that such acts are in violation of law, and of individual rights, subjecting their perpetrators to restraint and to punishment; he must know that a sworn duty devolves upon him to arrest the guilty party, and that such an arrest would be, in no respect, an invasion of any right arising from a strike or the right of peaceful picketing. Having a mind capable of understanding the question, "Would this be lawful if no strike existed?" he could have no difficulty in seeing his duty to prevent such occurrences. If the court may accept as reasonably accurate the testimony it has heard, and if we may accept as fairly reliable the history of Toledo as it was detailed in the newspapers in the months of November and December, wherever the responsibility therefor may be placed, no "fair-minded man," in our judgment, can say that the plain rights of individuals and the right of the public to order were in all possible cases observed and preserved to the degree which law and official obligation demanded.

The labor organization, party to this case through the representation of Hoffman, came here voluntarily and was admitted upon its application and the statement of its counsel, in the presence of the officers of the organization, that the injunction then in force would be observed and respected until it should be modified or vacated by this court. Indeed, we have, as we have observed, exactly the injunction which the labor defendants in this court agreed should be issued. Yet it pleads that it intends to "interfere" by all "lawful means" with the business

of the defendant company. It should know, and act upon the knowledge, that the only "interference" which the law permits is that incidental to a strict observance of the terms of section 20 of the Clayton Act. If it goes beyond the privileges of action therein provided, it comes within the court's restraining and punitive processes. Its only safe course, in pursuing its "interference" methods, is to place intelligently and carefully, in word and conduct, the same emphasis which Congress employed on the expressions "lawful" and "lawfully," "peaceful" and "peacefully," as used in the act.

[8] The Ohio State Telephone Company is a public utility. Its first duty is to serve the public. Its work meets a vital public necessity. The right of its striking employés to "interfere by lawful means" with its business does not mean a right to cripple performance by it of its duties to the public, if it can find people willing to work for it. If labor can be had, the company must employ, and the strikers must permit it to employ and use, labor to perform its public duties, and any one willing to work for it must be allowed by everybody entire freedom to do so. The public, having a great need for services of the character offered by this public utility, has an enforceable right to demand these conditions of both the company and of those associated in controversy with it. This court is empowered to say to the company that it must meet its public obligations. Coupled with that power of the court is the power and duty of laying its prohibitive and punishing hand upon any one whose willfully unlawful conduct tends to render abortive the exercise of that power. We can no more say to the company that it must yield to the demands of its striking employés than we can say to them that they must meet the company's exactions. The controversy must be carried on, on both sides, without substantial detriment to the company's public service.

"Peaceful picketing" is exercisable only within these limitations; no "interference" with the company's business is lawful which exceeds them. Whatever may be the effect of this provision of the Clayton Act now under consideration upon controversies engaging corporations not public utilities and their employés, we cannot believe that Congress enacted against the public welfare to sanction more than we have above indicated.

[9] Two maxims, which have much the same meaning, are universally treated as controlling all legislation and as limiting all personal rights. They are "Salus populi est suprema lex," and "Salus reipublicæ suprema lex." Liberally translated, they mean that the public welfare is the first and supreme consideration. They are the law of all courts and all countries. Individual rights universally are, and plainly must be, subordinated to the public good, and of this principle we have many applications, of which the superior quality of the public's interest in the service of a public utility vitally conserving the public welfare is one. Congress must be considered to have legislated in the light of this principle, which must be resorted to as one essential criterion of interpretation of the acts of all legislatures.

[10] Holding, as we must, that the public interest in the company's public service is the first consideration, that it is paramount to that in-

terest in the company's affairs held by the very small fraction of the public which would work for the company, and to that enjoyed by that other very small fraction whose members hope for a return from their investments, we are unable to agree with respondent's counsel that the order is deficient, because it does not conform to the provision of section 19 of the Clayton Act that an injunction order should specify in "reasonable detail" the things enjoyed. That portion most vigorously attacked as too broad and indefinite is the provision restraining the doing of—

"any acts or things which may interfere in any respect with the performance of the duties and obligations of the defendant company as a common carrier."

This provision is as definite as it is possible to make it. It is this paramount interest in the public which may not suffer interference as the result of the controversy, and it is impossible to set out every act or line of conduct which might work interference. Labor controversies are not unexpected or unusual; courts recognize that they are possible; courts also notice that the existence of one produces some embarrassment to the employer affected in the management of his business. Whether that embarrassment arises to a state of "interference," as that term means in cases of this sort, depends upon how the controversy is conducted on either or both sides. A total cessation of the employer's business, even of that of a public utility, might not indicate an illegal interference under some circumstances. A strike *lawfully* conducted is not an illegal interference, although it might effect even a total paralysis of a public utility's activities, resulting in great public suffering and loss. The right to abandon employment, by individuals singly or in association, is unquestioned, and the law maintains the right of such late employés, commonly known as strikers, to "peacefully" persuade others to abandon the same employment, or to refrain from engaging in employment, and to that end "peaceful picketing" is permitted for purposes of observation and information and "peaceful persuasion." But no single act, to which we have alluded above, can be possibly considered to be a necessary, and hence an excusable, accompaniment of peaceful picketing. Such acts tend inevitably to that "interference" which the law condemns.

In a recent decision, Tri-City Central Trades Council v. American Steel Foundries, 238 Fed. 738, —— C. C. A. —— (October Session, 1916, 7th Circuit Court of Appeals), which the public prints treated as one favorable to organized labor, this language occurs:

"Plaintiff's contention that a court may restrain lawful acts of striking employés when committing and carrying out the purpose of an unlawful conspiracy to destroy the employer's business is supported by many authorities (citing [Sailors Union of Pac. v. Hammond Lumber Co.] 156 Fed. 450 [85 C. C. A. 16]; [In re Debs] 158 U. S. 564 [15 Sup. Ct. 900, 39 L. Ed. 1092]; [Barnes & Co. v. Chicago Typographical Union No. 16] 232 Ill. 424 [83 N. E. 940, 14 L. R. A. (N. S.) 1018, 13 Ann. Cas. 54]; [Karges Fur. Co. v. Amalgamated Woodworkers Local Union No. 131] 165 Ind. 421 [75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829]). * * * If the purposes of the undertaking complained of were purely and simply, or even primarily, interference with the plaintiff in the conduct of his business as alleged, no act, however innocent in itself, directed to that end, can be said to have a lawful purpose for its doing."

We cite and quote this case, not because it presents a novel doctrine, but simply because it is the latest on the subject. It is a legal proposition, too firmly settled to be disregarded, that two or more persons may not combine to employ activities, in which singly they might lawfully engage, with an intent that the effect of their joint action should be the injury of another, and there is absolutely nothing in any provision of the Clayton Act, and we have in mind particularly sections 6 and 20, that weakens the force of this principle. The case we cite is decided with reference to the Clayton Act. In this view, we suggest that the bald statement in the pleading of the labor organization referred to that its purpose is to "interfere" by lawful means with the business of this public utility comes perilously near a confession that an unlawful conspiracy is in progress, and the only way that such a conclusion can be avoided is a line of conduct during the further continuance of this strike which will secure the public against that interference with the business of this public utility which is the direct result of the unlawful acts of the character of those to which we have alluded. Accompanying the strike have been occasions of undoubtedly unlawful interference. If convictions should follow the charges now before the court, involving members of Local 245 when on "picket" duty, the attitude of the union as a law-abiding organization would be prejudiced very unfortunately, especially when it is considered that it formally urges to this court its purpose to "interfere" with the company's business. If its members will confine their strike activities within the limits of the Clayton Act, then whatever embarrassment ensues to the company will be no illegal interference.

The court's views as to what is and what is not peaceful picketing in the instant case are sustained by an unbroken current of authority. The early authorities are summed up in Labatt on Master and Servant, vol. 7, p. 8364. Our position is consistent with Judge Tayler's opinion in a local case. Pope Motor Car Co. v. Keegan (C. C.) 150 Fed. 148. We cite but two additional cases, already referred to in this opinion, because they are the latest cases and deal with conditions since the Clayton Act was passed, namely, Tri-City Central Trades Council v. American Steel Foundries, supra, and Alaska S. S. Co. v. International Longshoremen's Ass'n of Puget Sound et al., supra. The concluding paragraph of Judge Neterer's able opinion in the last case cited we regard as specially worthy of the attention of the labor defendants in this case. We quote 236 Fed. 972:

"While there is no testimony that any of these acts were expressly authorized, there is no evidence that the acts were disapproved, or members disciplined or expelled. The testimony does show that the defendants did have control of the situation, and did not exercise their influence or power to correct the irregularities or disavow the acts until the issuance of the temporary restraining order and service upon the defendants, when all overt acts ceased, which, considered with what defendants did do, confirms the conclusion that the acts were under the authority and within the control of defendants. When persons or parties set in motion machinery for the purpose of shaping sentiment, they cannot take the benefits, without also being burdened with responsibilities. Such parties thereby assume the burden of controlling such agency, if within their power; and if, perchance, some persons unauthorized, acting with defendants, commit unauthorized acts, it is incumbent upon the defendants to

show such fact, and, if committed by members under the control of the association, to disavow such acts by causing such offending members to be disciplined or expelled."

A history of this controversy shows that, immediately after the issuing of the court's temporary restraining order, the most flagrant public manifestations of unlawful conduct ceased; that thereafter those things were done which could be done surreptitiously or with a smaller chance of detection, although one or more of the informations follow attachments after testimony involving several members of the union, and consequently parties to the injunction, in what appears to have been an indecent public disorder, which was permitted by a local peace officer, who was present, to proceed with no attempt at repression.

The informations in question are all lodged against members of the union. If the charges are sustained on trial, it would appear that they have violated the beneficent provisions of the act which their counsel claims gives them special consideration. It would seem, therefore, that more time for the honor of the defendant local union might be profitably spent in getting at the facts, the truth of the charges, and less to technical objections which have nothing to do with the merits.

If the court finds the several charges sustained by the testimony, if the acts, willfully performed, bear with reasonable certainty the construction that they were performed with coercive, intimidating, insulting, or annoying intent, that thereby the lawful business of the company may suffer interference, the court's duty is plain to say that the acts are not privileged by any law and are violative of the order in this case to which Hoffman and his fellow members consented. In such case, some more tangible and distinct proof is indicated to be necessary that the union honors the law its counsel invokes than mere disclaimer of responsibility. In such an event the unfortunate assertion in the pleadings that Hoffman and his associates intend to "interfere" by means of what they call "peaceful" and "lawful" measures would create a demand for action more definite than even words of condemnation by Local 245 of its guilty men. Judge Neterer, in the opinion quoted, points out the way. The law that is called upon to protect Hoffman and his fellow members should be honored by it. The local and defendant union "set in motion machinery for the purpose of shaping sentiment"; its responsibility is clear to control such agency within lawful bounds.

We make these observations, not to convey an impression that any one under charge is guilty—no one has been tried, and we may have no opinion yet—but moved by a profound conviction that, because of the undeniable lawlessness which has accompanied the telephone strike, and because of the condition of the record made so far in this case, an imperative demand exists now, for its own good, for affirmative action by Local 245 to range itself definitely on the side of law and order, if it would have that efficiency for social good of which organized labor is capable, and which alone justifies its existence, and if it would have and retain public respect. The local should protect its members against unjust charges; its duty to itself and its membership is just as plain to

set itself sternly against disorder. There is no legal excuse for disorder in a strike; somebody is always responsible in some degree to the law for disorder.

The motions to the several informations should be denied.

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## In re WEBSTER LOOSE LEAF FILING CO.

(District Court, D. New Jersey. December 29, 1916.)

1. CHATTEL MORTGAGES ⟸192 — RECORDING — NECESSITY — STATUTE—"IMMEDIATE."

Under Comp. St. N. J. 1910, p. 463, providing that every chattel mortgage not accompanied by an immediate delivery and followed by an actual and continued change of possession shall be void as against the creditors of the mortgagor unless it be recorded as directed in the succeeding section of the act, the word "immediate" extends throughout the provision and applies to recording as well as to delivery, and requires possession and recording as soon as may be by reasonable dispatch under the circumstances of the case.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 434–437.

For other definitions, see Words and Phrases, First and Second Series, Immediate.]

2. CHATTEL MORTGAGES ⟸192—RECORDING—DELAY—EXCUSE.

The requirement of 1 Comp. St. N. J. 1910, p. 463, that a chattel mortgage be recorded immediately, is absolute, and delay reasonably explained and satisfactory to the parties is not a compliance therewith.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 434–437.]

3. CHATTEL MORTGAGES ⟸192—RECORDING—PAYMENT OF FEES.

Where the attorney of a chattel mortgagee transmitted it by mail to the register for recording accompanied by a statement that he would promptly remit on learning the amount of the fee, and the mortgage was not recorded until the fee was remitted four days after its execution, the mortgage was not immediately recorded as required by 1 Comp. St. N. J. 1910, p. 463, in view of 4 Comp. St. 1910, p. 4642, authorizing the register to withhold recording until the fees were prepaid.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 434–437.]

4. CORPORATIONS ⟸313—DIRECTORS—ADVERSE INTEREST—ATTORNEY FOR MORTGAGEE.

An attorney for a director of a corporation who was also a director, having received shares necessary to qualify him from his client without paying any consideration therefor, and who, at a directors' meeting presented a proposal on behalf of his client to loan money to the corporation on security of a chattel mortgage and thereafter voted as director to accept the proposition, was acting throughout in the interests of his client, which were adverse to the interests of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1387.]

5. CORPORATIONS ⟸298(5)—DIRECTORS' MEETINGS—"QUORUM."

Where the by-laws of a corporation did not fix the number required for a quorum, a majority of the directors constitute a "quorum."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1302–1312.

For other definitions, see Words and Phrases, First and Second Series, Quorum.]

6. CORPORATIONS ⟸298(5)—DIRECTORS—QUORUM—ADVERSE INTEREST.
Where one of the directors of a corporation whose presence is necessary to constitute a quorum or whose vote is necessary to constitute a majority of a quorum is disqualified by adverse personal interest, any action of the directors is invalid, and the fairness or unfairness of the transaction will not be considered.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1302–1312.]

7. CORPORATIONS ⟸545(3)—RIGHTS OF TRUSTEE—INVALID MORTGAGE—RETURN OF CONSIDERATION.
The directors of a corporation, who hold a chattel mortgage on the corporate property which was invalid because executed under authority voted by a director who represented the mortgagee as well as the corporation, cannot thereby acquire property over innocent creditors represented by the trustee in bankruptcy of the corporation, though the corporation itself could not disavow the mortgage without returning the consideration.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2170.]

8. CORPORATIONS ⟸298(1)—CHATTEL MORTGAGE—AUTHORITY TO EXECUTE—DIRECTORS' MEETING.
Two of the three directors of a corporation cannot authorize the execution of a chattel mortgage by an informal agreement between themselves without a directors' meeting having been called or a resolution adopted.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292, 1293, 1314, 1317.]

In Bankruptcy. In the matter of the Webster Loose Leaf Filing Company, bankrupt. On review of an order of the referee sustaining in part the validity of a chattel mortgage executed by the bankrupt corporation to one of its directors. Order reversed, and mortgage held invalid.

Raymond, Mountain, Van Blarcom & Marsh, of Newark, N. J., for trustee.

Randolph Perkins, of Jersey City, N. J., for Anita L. Pearson.

DAVIS, District Judge. This cause is before this court on review of an order made by the referee in bankruptcy sustaining in part the validity of a chattel mortgage for $10,000 executed by the Webster Loose Leaf Filing Company, a corporation, on March 15, 1915, to Anita L. Pearson, one of the directors of said company.

I find it unnecessary to consider all of the errors assigned and exceptions taken to the order.

[1] The referee found that the mortgage was not recorded immediately, in accordance with the requirements of the New Jersey statute which provides:

"That every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder of said mortgage, his agent, or attorney, stating the consideration of said mortgage and as nearly as possible the amount due and to grow due thereon, be recorded as directed in the succeeding section of this act." Compiled Stat. of N. J. vol. 1, p. 463.

The force of the word "immediate" extends throughout the sentence in the statute and applies to the word "recorded" as well as to "delivery." Immediate possession and immediate recording mean as soon as may be by reasonable dispatch under the circumstances of the case. Roe v. Meding, 53 N. J. Eq. 350, 368, 30 Atl. 587, 33 Atl. 394; Dunham v. Cramer, 63 N. J. Eq. 151, 51 Atl. 1011; Hardcastle v. Stiles et al., 69 N. J. Law, 551, 55 Atl. 104; Brockhurst v. Cox, 71 N. J. Eq. 703, 64 Atl. 182; Gulden v. Lucas, 81 N. J. Eq. 106, 85 Atl. 902; Bollschweiler v. Packer House Hotel Co., 83 N. J. Eq. 459, 91 Atl. 1027.

[2] The requirements of the statute are absolute, and delay reasonably explained and satisfactory to the parties is not a compliance with the statute. Bollschweiler v. Packer House Hotel Co., supra.

[3] The mortgage in question was executed on March 15, 1915, by the bankrupt corporation to Anita L. Pearson, who was at that time confined to her home in New York by illness. The mortgage was delivered to her by Gerard Roberts, her attorney, between 4 and 5 o'clock in the afternoon of the same day, at which time Mrs. Pearson took the statutory affidavit to the mortgage. The following morning, Roberts secured a certificate from the county clerk of New York county, N. Y., of authority of the commissioner before whom Mrs. Pearson took the affidavit. This certificate was attached to the mortgage, which was sent by mail the morning of the 16th to the register of Hudson county, N. J., with a letter of which the following is a copy:

"I send you herewith for record, chattel mortgage from Webster Loose Leaf Filing Company to Anita L. Pearson. If you will let me know what your fees are, I will promptly remit."

Roberts received a postal on March 18th telling him that the recording fee was $2.75. He at once mailed check for that amount to the register, and the mortgage was recorded on the following morning, March 19, 1915, at 9:33 o'clock. This was not an immediate recording as soon as might have been by reasonable dispatch under the circumstances of the case. A messenger might have reached the office of the register on the morning of March 16, 1915, after securing the said certificate, or the mortgage would probably have reached the office by mail in the afternoon of that day, or at the latest the morning of the following day, and would have been immediately thereafter recorded, if it had been accompanied by a check to pay the recording fees. Mr. Roberts knew by his past experience with this same office a month before, the testimony shows, that the register would not record the morgage until the fees for so doing were paid. The statute provides that registers may demand payment of fees for recording before the work is actually done.

"The said surrogates and county clerks, and the said registers of deeds and mortgages, shall be personally liable to their respective counties for the payment of all such fees and costs as are mentioned in the first section of this act, and for their own protection it shall be lawful for them to exact the payment of such fees and costs before filing any paper, entering and docketing any writ, order or judgment, recording any paper, making a copy or search, or performing any other services in their said offices for which costs, fees or compensation is allowed." Comp. Stat. vol. 4, p. 4642.

Deeds and mortgages sent to the county clerks or registers not accompanied with the fees for recording are not properly lodged with them for that purpose. In the case of Dickerson v. Bowers, 42 N. J. Eq. 295, 296, 11 Atl. 142, the court said:

"I am not satisfied that the deeds were 'lodged' with the clerk for record within the true meaning of the act. * * * I do not discover by the act that the clerk can refuse to record until the fees are paid."

This case was decided before the passage of the act enabling the clerk to demand payment for his fees before deeds and mortgages are recorded. Since the passage of the act, it is all the more true that deeds and mortgages are not properly lodged with registers for recording until the fees for so doing are paid. The mortgage therefore was not immediately recorded as required by the chattel mortgage act and is void as against the trustee, in so far as the creditors of the bankrupt company on March 19, 1915, are concerned.

[4] But a more serious question arises regarding the validity of this mortgage: Did a quorum of the directors qualified to act accept on January 12, 1915, the proposition submitted on behalf of Anita L. Pearson, mortgagee, and pass the resolution authorizing the execution of the mortgage for $10,000 to her? Some time prior to January 12, 1915, Anita L. Pearson transferred, without consideration, sufficient stock in the bankrupt company to Gerard Roberts to make him eligible for director in said company. At the annual meeting of the stockholders, January 12, 1915, Anita L. Pearson, Gerard Roberts, and Bradford Webster were elected directors of the bankrupt company, by the stockholders. Immediately after the close of the meeting of the stockholders on said day, a directors' meeting was held at which only Gerard Roberts and Bradford Webster, two of the three directors, were present. At that meeting, a proposition was submitted on behalf of Anita L. Pearson, by Gerard Roberts, one of the three directors of the company, by the terms of which she agreed to loan the company $10,000 on a chattel mortgage on certain property of the corporation. This proposition was accepted by Roberts and Webster, and the following resolution passed by them:

"Resolved that the proper officers of this company be and they are hereby authorized and directed to execute and deliver to Mrs. Pearson a chattel mortgage covering the property of the company now in existence or hereafter to be acquired by the company of the sort named above, upon the execution by Mrs. Pearson jointly with said company of notes to the amount of $10,000."

While according to the minutes of the meeting Anita L. Pearson appears to have been present, yet as a matter of fact it is admitted that she was not present.

It is alleged that at this time and in all matters pertaining to the mortgage, so far as Anita L. Pearson is concerned, she was represented by Gerard Roberts as attorney. In order to determine the question of whether or not a quorum of directors qualified to act in accepting the proposition submitted on behalf of Mrs. Pearson and in passing the resolution authorizing the execution of the mortgage for $10,000 was present, it is necessary to determine whether or not Gerard Roberts was acting as attorney for Mrs. Pearson and for and in be-

half of her interest. If he was, the legal effect of such action is the same as if Mrs. Pearson herself had voted instead of Roberts.

It is admitted that Gerard Roberts was the attorney of Mrs. Pearson at this time. Mrs. Pearson was the administratrix of the estate of her husband, who had died some time in the year 1914. Mr. Roberts was the attorney of the husband of Mrs. Pearson during his lifetime, and also represented Mrs. Pearson as administratrix of the estate of her husband, which was in process of settlement.

The corporation was financially embarrassed at this time, and Mrs. Pearson was interested in the corporation to the extent of about $20,000, and, as I understand it, was the largest stockholder. In order to protect her interest in the corporation, she doubtless wanted the ability and advice of her attorney in directing its affairs. He was not a stockholder, which was necessary in order to become a member of the board of directors. She, accordingly, transferred to him certain shares of stock, without consideration, and at the annual meeting of the stockholders, on the second Tuesday of January, 1915, Gerard Roberts was elected a director. At this meeting, Roberts held a proxy for Mrs. Pearson. At the meeting of the board of directors, immediately following that of the stockholders, a proposition was submitted by Gerard Roberts, for and on behalf of Anita L. Pearson, by the terms of which she agreed to loan the company $10,000 upon a chattel mortgage upon its property named in the resolution subsequently passed. Roberts and Webster voted on the proposition, which had been submitted by Roberts, and passed the said resolution. The mortgage was prepared by Roberts. Mrs. Pearson accepted his judgment as to the legality of the transaction and validity of the mortgage. She employed no other attorney to examine the mortgage, or to investigate the transaction for her. After the mortgage had been executed by the bankrupt company, it was delivered to Roberts for Mrs. Pearson. He took the same to her, and, after the affidavit as to the consideration for the mortgage had been taken by her, she delivered it to him to have recorded for her. In fact, Roberts had possession of the mortgage from the time it was drawn until he delivered it to be recorded. After it was recorded, he delivered the mortgage to Mrs. Pearson. During the bankruptcy proceedings, when its validity was questioned, he got it again from her. In fact, Roberts negotiated the whole proposition, so far as Mrs. Pearson is concerned, of the mortgage transaction and attended to every detail of it so far as it concerned her. When it was discovered that the affairs of the company were involved, Mrs. Pearson asked Roberts to have an appraisal of the plant and the raw material made. When proceedings were instituted in the name of Mrs. Pearson against the bankrupt company by Randolph Perkins, it was Mr. Roberts who authorized the institution of proceedings and furnished the data therefor. Mr. Perkins at the time suit was begun had never seen Mrs. Pearson. On November 24, 1915, Mr. Roberts testified before the referee as follows:

"Q. Did you represent Mrs. Pearson at the time the chattel mortgage was given to her on the property of the Webster Loose Leaf Filing Company? A. Yes.

"Q. At what time was that? A. That was in March, 1915.

"Q. And you were present at the negotiations concerning that? A. Yes.
"Q. And familiar with the entire transaction? A. Yes." Page 2 of the testimony.

On page 10 of the testimony, of the same date, Mr. Roberts further testified as follows:

"Q. The loan of $10,000 is represented by any other instrument than the chattel mortgage? A. A note—chattel mortgage given as collateral security for the note.
"Q. Know the date of the note? A. Same date as the mortgage.
"Q. Who is it signed by? A. Both Mr. Webster and myself, as I remember it.
"Q. At that time, you were acting in the dual capacity of treasurer of the corporation and attorney for Mrs. Anita L. Pearson? A. Yes, that is right."

It seems to me that the conclusion is irresistible that at this time Gerard Roberts was acting as the attorney for Mrs. Pearson; that he was made a stockholder and director at her suggestion and through her influence; that he had no financial interest in the corporation aside from the salary which he drew as secretary and treasurer; that his principal interest in the corporation was the interest of Mrs. Pearson; and that, as her attorney, he had been made a stockholder and director for the sole purpose of protecting her interest. His acts, therefore, so far as this mortgage was concerned, were her acts, and the legal effect of his vote in passing the resolution, which authorized the execution of the mortgage, is the same as if she herself had voted.

[5] It required the vote of Roberts to pass the resolution in the directors' meeting of January 12, 1915. The by-laws contained no resolution fixing the number required for a quorum. In the absence of such regulation, a majority of the directors constitute a "quorum," and, when regularly assembled, may transact any business which the corporation has a right to transact under the provisions of its charter. Wells v. Rahway White Rubber Co., 19 N. J. Eq. 402; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 132, 82 Atl. 618; Cook on Corporations (7th Ed.) 712; 10 Cyc. 776.

The court in the case of the Metropolitan Telephone Co. v. Domestic Telegraph Co., 44 N. J. Eq. 568, 573, 14 Atl. 907, 910, said:

"When power is given to be exercised by several, in the absence of a rule requiring the concurrence of a definite number, a majority of a quorum duly convened may act."

The committee in the last-cited case, which held a meeting, was composed of four members, only three of which were present. One of the members, Mr. Harrison, was a director or trustee in both companies. The court said:

"He occupied a similar fiduciary relation to each of the two companies. In performing his duty as a member of the committee of the Bell Company, he was required to use his judgment in fixing the terms of the contract with the Domestic Company, in which he was interested. To sustain his capacity to do this would be like permitting one to be judge in his own case. * * * But the point now under discussion relates solely to the power of Harrison to take part in settling the terms of a contract in which he was adversely interested. In my judgment he was incapacitated so to do, and so no quorum of the committee was present capable of acting."

[6] All of the directors constituting a quorum must be qualified to act. If one of the directors whose presence is necessary to constitute a quorum, or whose vote is necessary to constitute a majority of a quorum, is disqualified by reason of his personal interest, any act done by the body is invalid. 10 Cyc. p. 777; Cook on Corporations (7th Ed.) 713a; Van Hook v. Somerville Mfg. Co., 5 N. J. Eq. 159. The rule rests upon the broad principle that it is the duty of each director in acting for the corporation to do so in the best interest of the corporation. His duty to the corporation is first. It is a duty he cannot perform if his own interest is adverse to that of the corporation. So insidious are the promptings of self-interest, and so great is the danger that it will override duty, when brought into conflict with it, that sound policy requires that such contract should not be enforced or regarded. He occupies the position of a judge passing upon his own case. The proposition in behalf of Mrs. Pearson was presented at the meeting on January 12, 1915, by Gerard Roberts, her attorney, who in turn voted upon the proposition submitted by himself. The court said in the case of Van Hook v. Somerville Mfg. Co., that an interested director in such a transaction, voting a mortgage to himself, must be regarded as a stranger. 10 Cyc. 777, 781; Cook on Corporations (7th Ed.) 713a; Van Hook v. Somerville Mfg. Co., 5 N. J. Eq. 159; Coryell v. President and Managers of the New Hope Del. Bridge Co., 9 N. J. Eq. 459; Stewart v. Lehigh Valley R. Co., 38 N. J. Law 505, 522; Metropolitan Telephone Co. v. Domestic Telegraph Co., 44 N. J. Eq. 568, 14 Atl. 907; Wall v. Utah Copper Co. et al., 70 N. J. Eq. 17, 25, 26, 62 Atl. 533; Curtin v. Salmon River, etc., Co., 130 Cal. 345, 349, 350, 62 Pac. 552, 80 Am. St. Rep. 132; Federal Life Ins. Co. v. Griffin, 173 Ill. App. 5; Burton v. Lithic Mfg. Co., 73 Or. 605, 144 Pac. 1149.

So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into. In such cases, the court will not pause to inquire whether a director or trustee has acted fairly or unfairly; being interested in the subject-matter, he may not as a trustee or director deal with himself, and thus be subjected to the temptation to advance his own interests. Stewart v. Lehigh Valley R. Co., supra; Shakespear v. Smith, 77 Cal. 640, 20 Pac. 294, 11 Am. St. Rep. 327; Curtin v. Salmon River, etc., Co., 130 Cal. 345, 349, 350, 62 Pac. 552, 80 Am. St. Rep. 132.

Mrs. Pearson was directly interested in the mortgage. Gerard Roberts testified on November 24, 1915, as follows:

"It became apparent in the fall of 1914 that something would have to be done if the company was going to continue in business. * * * It became apparent that, if anything was going to be done, a substantial sum would have to be raised in some way. Mrs. Pearson had a heavy interest at that time, about $20,000. Mr. Webster didn't seem to be a person to take interest in the matter, and it became evident that if Mrs. Pearson wanted to save her money she would have to put some more in."

The mortgagee had about $20,000 in the corporation, and, in order to save that and to advance her own interest, she entered into the agreement which resulted in the execution of the mortgage to her. Mrs. Pearson concluded that if she "wanted to save her money she

would have to put some more in." This explains the $10,000 loan. Her attorney made the proposition for her. Her attorney voted on the resolution, and his vote was necessary to pass it. It was the interest of Mrs. Pearson that both he and she were trying to preserve.

[7] The contest here is not between the mortgagee and a corporation over a contract which is ultra vires. If such were the case, before the corporation could disavow the contract, it would have to replace the money. This is a contest between the trustee in bankruptcy, who represents innocent creditors, some of whom had given credit to the corporation before the execution of the mortgage and some of them afterward, and a director who with her attorney dominated the corporation. It is, in fact, a contest between innocent third parties who were not acquainted with the financial condition of the corporation, and a director who knew the facts. It is a contest between persons who innocently gave credit to the corporation, and a director who loaned the corporation $10,000 for the purpose of saving $20,000, which was in danger of being lost. It would be inequitable to allow her, through her own vote or the vote of her attorney and representative in the board of directors, to acquire priority over innocent third parties.

[8] There is a question as to whether or not the $10,000 mortgage, under consideration, was ever authorized or was executed in pursuance of the resolution of January 12, 1915. A $7,500 mortgage was executed, which, however, was paid by part of the loan of $10,000 for which the mortgage was subsequently given. The mortgage under consideration does not correspond, as to the property it covers, with the terms of the resolution, and, if the mortgage were valid and based upon a legal resolution, it would have to be reformed so as to correspond with the resolution, provided it was executed in pursuance thereof. The resolution of January 12, 1915, states what specific property the mortgage is to cover, "the sort named above." The $10,000 mortgage executed on March 15, 1915, and now under consideration, covers, not only the property mentioned in the resolution, but also all other property of the corporation; and it is stated by Mr. Roberts that this mortgage was the result of conferences and discussions which he and Mr. Webster, another director, had. He testified on February 28, 1916, as follows:

"Mr. Perkins:

"Q. Was there a meeting in February at which action was taken by the board of directors on this mortgage (the mortgage in question)? A. Just prior to the making of the appraisal.

"Q. What was the action? A. Simply to the effect, to make up for the deficiency in the accounts receivable and having anticipated a deficiency in the machinery, that Mrs. Pearson could have a mortgage on all the property of the corporation—everything they had.

"Q. How much was the mortgage to be? A. $10,000. You understand the mortgage as it was executed on the 10th of February was only for $7,500, but it covered all the property of the corporation.

"Q. What was the action of the board of directors, if any, with respect to the after-acquired property of the corporation? A. That was included in the mortgage.

"Q. What was the action of the board of directors? A. The proposition as it was discussed in fact was—as it was discussed on the 1st of February.

"Q. What was the action of the board of directors with reference to after-acquired property? A. It was agreed that Mrs. Pearson should have a mortgage on all the property of the corporation, which should be in fact a running mortgage; that is to say, that any time she saw fit to foreclose the mortgage, it should cover everything the company then had, whether it was in possession of the company then or became in possession of the company afterwards.

"Referee:

"Q. By what formal method, if any, did the board of directors agree to that? A. There was not anything formal.

"Q. By resolution? A. Discussions between Mr. Webster and myself at the time.

"Q. Not put in the form of a resolution? A. Either Mr. Webster proposed something—we had the discussions at that time about this proposed appraisal, and undoubtedly an appraisal would show that it was less.

"Q. And this was an informal agreement on the part of you and Mr. Webster, is that right? A. I didn't consider it an informal agreement. There was not any motion. We didn't say, 'I move,' and, 'I second.' There was only two of us there, and we both agreed that that should be done.

"Q. And that is the only action that had been taken at a directors' meeting up to the time of the making of the mortgage? A. Some action taken at the meeting of January 12th, at that meeting."

There is no record whatever of any meeting between January 12, 1915, and the following August. Mr. Roberts said it was discussed on February 1st by him and Mr. Webster, "that Mrs. Pearson could have a mortgage on all the property of the corporation—everything they had." Mr. Webster, on the other hand, says that no meeting was held at that time, and their discussion was not different from many others which they had from time to time as they met in the office of the corporation, or at Mr. Roberts' office. It appears therefore that this mortgage for $10,000 covering all the property of the corporation was authorized, not at any meeting regularly and legally called of the directors, but was the result of a private agreement which Roberts and Webster made after discussing the matter from time to time as they met in the regular course of their business at the office of the corporation, or at the office of Roberts in New York, and Webster says this is exactly what happened. If this be true, the mortgage in question therefore was never legally authorized, and is therefore invalid for that reason.

If, however, that were not the case, and the mortgage was executed in pursuance of the authority contained in the resolution of January 12, 1915, it is void as a mortgage. Mrs. Pearson herself could not vote upon a proposition in which she was interested, if her vote was necessary to pass the resolution. If she could not vote, neither could her attorney, who represented her in the board. I am constrained therefore to hold that the mortgage in question is void and of no effect. Mrs. Pearson will have to stand with general creditors. An order will be entered in accordance with the conclusions herein reached.

## In re WILLIAMS.

(District Court, N. D. Ohio, W. D. February 14, 1917.)

No. 2577.

1. BANKRUPTCY ⊜144—RECEIVERS APPOINTED BY STATE COURT—DUTY AS TO ASSETS—RETENTION OF COMPENSATION.

A receiver appointed by the state court to take possession of the property of one subsequently and within four months adjudicated a bankrupt, no allowance of fees having been made before bankruptcy, must, the bankruptcy having superseded the proceedings in the state court, pay over all sums in his possession without deduction of his fees; his claims standing on the same basis as those of an agent in possession of the bankrupt's property, who may be required to make payments by summary order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 237.]

2. BANKRUPTCY ⊜484—PROCEEDINGS—ALLOWANCES—ATTORNEY'S FEES.

While one reasonable attorney's fee for professional services actually rendered to petitioning creditors in case of involuntary bankruptcy is allowed as of right, attorneys who render services to a receiver appointed by the state court subsequent to bankruptcy have no legal claim for fees, though such services were a benefit to the estate; the fees not being allowed and paid before bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896.]

3. BANKRUPTCY ⊜482(3)—FEES—ATTORNEY'S FEE.

The amount of the fee to which the attorney for the petitioning creditors in involuntary cases is entitled rests, in the absence of direct evidence as to the value of the services in the legal discretion of the court, but not in unrestrained discretion.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897.]

4. BANKRUPTCY ⊜20(2)—PROCEEDINGS—STATE COURT.

Where, more than four months before the filing of the bankruptcy petition, the state court acquires jurisdiction in receivership of the bankrupt's estate, its jurisdiction cannot be interfered with by the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23.]

In Bankruptcy. In the matter of the bankruptcy of Norman Williams. On question certified by referee. Question answered, and trustee in bankruptcy held entitled to receive all funds in possession of the receiver in the state court at the time of the filing of the petition in bankruptcy.

A. B. Johnson, of Kenton, Ohio, for trustee.
Eugene T. Lippincott, of Lima, Ohio, for bankrupt.

KILLITS, District Judge. This case is certified by H. D. Grindle, referee, for the decision of the court on the following question:

"May the receiver appointed by a state court, and his attorney, be paid fees allowed them for their services by the state court, out of the funds in the possession of said receiver; said allowance having been made after an adjudication in bankruptcy and upon the filing of a report by said receiver in the state court?"

The facts are as follows: On October 27, 1915, a receiver appointed by the common pleas court of Hardin county, Ohio, took possession of the property of Norman Williams and conducted the business until

January 28, 1916, when petitions and schedules were filed in this court, at which time the receiver had in his possession, as the proceeds of sales of certain assets of the bankrupt, the sum of $4,049.11. February 5, 1916, *after adjudication of bankruptcy,* the state court allowed and ordered said receiver to pay certain expenses of said receivership, including an attorney's fee in the sum of $500, compensation to said receiver in the sum of $600, and other expenses and costs in the sum of $650. February 21, 1916, the receiver filed his final report in the common pleas court and paid to the clerk of courts of Hardin county, Ohio, further costs in the sum of $36.63. A trustee in bankruptcy was appointed February 12, 1916, and forthwith demanded of the receiver all moneys and property which had come into his hands belonging to the estate. February 21st the receiver tendered $2,261.55, balance after paying costs and state court allowances, in full settlement, which the trustee refused to accept, claiming the entire amount on hand ($4,049.11) at the time the petition in bankruptcy was filed.

[1-3] In Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, it is held that, where the property of a bankrupt has come into the hands of a third party, before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no personal adverse claim, summary proceedings lie to compel the surrender of the property to the trustee in bankruptcy, and a mere refusal by the third party to deliver the property does not oblige the trustee to resort to a plenary suit, because such refusal does not indicate that the holding was adverse when the petition in bankruptcy was filed. In Louisville Trust Company v. Comingor, 184 U. S. 19, 22 Sup. Ct. 293, 46 L. Ed. 413, being contemporaneous with that of the Mueller Case, it is held that, when the assignee for creditors has had his expenditures, fees, and commissions determined before bankruptcy of his assignor in the usual way by the state court appointing him, his claim for expenses thereupon paid, and his right to retain fees and commissions so allowed, are adverse, wherefore he is subject only to a plenary action, which the bankruptcy court entertains only by consent; the court citing Bardes in Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

The important difference in facts between the instant case and the case just referred to arises because here Williams' assignee had his fees and expenses allowed him by the state court *after* bankruptcy had intervened. If, then, an assignee by operation of state insolvency laws occupies but the status of an agent of the insolvent, when administration in bankruptcy begins, the Comingor Case does not control. This question has been decided for us by our own Circuit Court of Appeals, saying (Matter of Hays, 24 Am. Bankr. R. 691, 697, 698):

"In our opinion, upon the case presented on this review, the District Court had jurisdiction to make the order complained of. The assignment by Hays to Stewart did not constitute the latter an assignee for value, but simply made him the agent of Hays for the distribution of the proceeds of the property among the latter's creditors. Being such agent, his possession was that of the principal, and he therefore did not hold adversely to the bankrupt, or to the latter's trustee, by the mere fact that he held in his hands funds received by him under the assignment."

The opinion cites the Mueller Case and Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, and distinguishes the case from the Comingor Case, which the same court decided, to be affirmed by the Supreme Court. The question has been decided also in Matter of Standard Fuller's Earth Company (D. C. Ala.) 186 Fed. 578, 26 Am. Bankr. R. 562, in language as follows:

"* * * On August 18, 1910, the receiver was appointed. On the 26th of November, 1910, the Standard Fuller's Earth Company was adjudicated bankrupt by this court on the petition of creditors of the company. * * * It appears that the chancery court at Mobile, on January 23, 1911, made an order allowing said McMillan & Grayson, solicitors for complainant in the cause in that court, a fee of $1,500, declaring it to be a reasonable and proper allowance to them, and authorizing and instructing the receiver in the cause to pay the same and the costs of the cause remaining unpaid after applying the funds in the hands of the register of the court deposited as security for the costs, the payment to be made out of any funds available for that purpose. It was further ordered by that court that the receiver and his bondsman, after the payment of these fees and the costs of the cause, be and are relieved and dismissed from all further accounting of his administration as such receiver. And the cause was ordered to be dropped from the trial docket of that court. * * * I cannot agree with the contention of petitioners that the fee allowed them by the chancery court was a priority claim, constituting a lien on the assets of said bankrupt company. And I do not find that said court specifically ordered the same to be paid out of the assets of the company. The order directed that such payment be made out of any funds available for that purpose. *This order was made on the 23d of January, 1911, about two months after the said corporation had been adjudicated a bankrupt, and when all of its assets had by operation of law passed under the exclusive jurisdiction and administration of the bankruptcy court.* The state court proceedings had been superseded by the proceeding in bankruptcy, and its action in the premises, if its purpose was to fix a lien on said assets, was coram non judice."

The law unquestionably permits the allowance of one reasonable attorney's fee for professional services actually rendered to the petitioning creditors in involuntary cases. The attorney is entitled to this reasonable fee as a matter of right. The amount, of course, must be reasonable, and be determined upon the evidence of the service performed and of its value. And if there is an absence of direct evidence of its value, the court determines it as a matter of discretion; that is, the amount to be allowed rests in legal judgment and judicial discretion, but not in unrestrained discretion. See In re Curtis et al. (C. C. A. 7th Cir.) 4 Am. Bankr. R. 17, 100 Fed. 784, 41 C. C. A. 59; Smith v. Cooper (C. C. A. 5th Cir.) 9 Am. Bankr. R. 755, 120 Fed. 230, 56 C. C. A. 578; In re Zier & Co. (C. C. A. 7th Cir.) 15 Am. Bankr. R. 646, 142 Fed. 102, 73 C. C. A. 326. In Re Standard Fuller's Earth Company, supra, the court states that such fee is provable and entitled to priority:

"(1) When the services were rendered the petitioning creditors in involuntary cases; (2) to the bankrupt in involuntary cases while performing the duties prescribed by the act; and (3) when the services of an attorney are really necessary and required by a receiver or trustee in the performance of their duties in the care and administration of the bankrupt estate. Such fees to be allowed as part of the expense of the care and preservation of the estate."

In the Matter of Zier & Co., supra, the court held that the fact that attorneys were employed by a receiver appointed in a state court pro-

ceeding against a corporation and rendered useful professional services therein *established no legal claim for allowance of fees out of the estate in bankruptcy of the defendant in the state court proceeding, by way of lien upon the assets or otherwise,* as they are not performed on behalf of the bankrupt nor in the bankrupt administration. The court further says:

"The bankruptcy jurisdiction, when properly invoked, supersedes the prior proceedings in the state court for winding up the corporation, 'as to which the jurisdiction is not concurrent' (In re Watts and Sachs, 190 U. S. 1, 27 [23 Sup. Ct. 718, 47 L. Ed. 933] 10 Am. B. R. 113), so that the rule upheld in Randolph v. Scruggs, supra, in reference to a voluntary assignment for the benefit of creditors, is equally applicable to this claim. Such claim is allowable only upon equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were beneficial in fact."

In the Matter of Rogers (D. C. Ga.) 8 Am. Bankr. R. 723, 116 Fed. 435, the court observed that the federal court will decline to recognize the authority of the state court to incumber assets of a bankrupt for the fees and expenses of its officers entered *after* the proceedings therein were suspended by the bankruptcy proceedings. The court said:

"If the assets are delivered to the trustee by the receiver of the state court, this court will consider any application for compensation which may be made by officers of the state court, and, if allowable, will grant suitable compensation."

In Wilbur v. Watson (D. C. R. I.) 7 Am. Bankr. R. 54, 111 Fed. 493, it was held that assignees under a general assignment, which was of itself an act of bankruptcy, and constructively fraudulent and in violation of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544), are not entitled to compensation from the estate for their services rendered prior to the filing of the petition in bankruptcy against the assignor, and they cannot retain any sum as such compensation from the proceeds of property in their hands. Such proceedings in state courts have no more validity than have proceedings in a state court when once a cause has been properly removed therefrom into a federal court. In re Curtis, 1 Am. Bankr. R. 440, 100 Fed. 784, 41 C. C. A. 59; Steamship Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87.

In Randolph v. Scruggs, 190 U. S. 533, 536, 540, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. R. 1, a case taken to the Supreme Court on a certificate from the United States Circuit Court of Appeals for the Sixth Circuit, the material facts are as follows: An assignee was appointed under the general assignment law of Tennessee on the 13th day of August, 1900. The assignee accepted the trust and entered into possession of the estate. The deed of assignment provided that the assignee should pay reasonable counsel and attorneys' fees for preparing the deed and for advice and services to be furnished and rendered the assignee in the course of the administration of the trust. Within four months after this deed of assignment, the assignor, upon a petition of his creditors, was adjudicated a bankrupt, and the

deed was set aside as in contravention of the Bankruptcy Act. A trustee was chosen and took possession of the assets of the bankrupt. A claim was filed against the bankrupt estate for professional services rendered the bankrupt in preparing the deed of general assignment and for services in advising and counseling the assignee, for legal services in defense of a suit in the state court wherein it was sought to have the corporation wound up as an insolvent corporation, and for services rendered in resisting the adjudication in bankruptcy. The referee found upon evidence, and certified, that the services had been rendered as claimed, and were reasonable and worth the amount claimed, but that they did not constitute expenses allowable as a preference, and were not otherwise a lien. He allowed fees for services rendered the corporation in preparing the general assignment, but disallowed the fees for the other services claimed. The District Judge sustained the referee so far as he held the claim to be nonpreferential, and adjudged that none of the items constituted a debt provable for any purpose against the bankrupt estate:

"Upon this state of facts this court [C. C. A. 6th Cir.] desires the instruction of the Supreme Court, that it may properly decide the questions of law thus arising:

"(1) Is a claim for professional services rendered to a bankrupt corporation in the preparation of a general assignment, valid under the law of Tennessee, entitled to be paid as a preferential claim out of the estate of the corporation in the hands of a trustee in bankruptcy, when the corporation was adjudicated an involuntary bankrupt within four months after the making of the assignment, and the assignment set aside as in contravention of the bankrupt law?

"(2) Is a claim for professional advice and legal services rendered such an assignee, prior to an adjudication of bankruptcy against the assignor, the assignment providing that the costs and expenses of administering the trust should be first paid, entitled to be proven as a preferential claim against the bankrupt estate?

"(3) Is a claim against such an assignee for legal services rendered at his employment in resisting an adjudication of involuntary bankruptcy against the assignor allowable as a preferential claim when the necessary effect of the adjudication would be to set aside the assignment under which the assignee was acting?

"(4) If not entitled to be allowed as preferential claims, may either of the items described in the foregoing questions be proven as unsecured debts of the bankrupt corporation?"

Answering, the Supreme Court said that the assignment was not illegal. It was permitted by the law of the state, and cannot be taken to have been prohibited by the Bankruptcy Act absolutely in any event, whether proceedings were instituted or not. It had no general fraudulent intent. It was voidable only in case bankruptcy proceedings should be begun. The court in the opinion says:

"The more difficult question is how to deal with the services rendered to the voluntary assignee. The claim for them must be worked out through the assignee, and cannot be put higher than his claim for allowances, supposing that they had been paid. We may assume that there is no question of form before us, and that whatever the appellants properly might have been paid by the assignee they may prove for now. * * * But it has been held that the assignee, even of a corporation, cannot be allowed anything for his services before the filing of the petition in bankruptcy. See, e. g., In re Peter Paul Book Co. [D. C.] 104 Fed. 786. So far as this opinion rests on constructive

fraud we have indicated above that it does not command our assent. The case would be different if the assignee were party to an actual fraud. * * * But the assignee is acting lawfully in what he does before proceedings in bankruptcy are begun, and although it may be assumed that the avoidance of the assignment relates back to the date of the deed, still so far as his services, or services procured by him, tend to the preservation or benefit of the estate the mere fiction of relation is not enough to forbid an allowance for them. * * * This is the doctrine of the state courts with reference to the operation of insolvent laws upon voluntary assignments and of the better considered decisions under the bankrupt laws [citing a number of cases]. If beneficial services are allowed for, they are to be regarded as deductions from the property which the assignee is required to surrender, and in that way they gain a preference." Platt v. Archer, 13 Blatchf. 351, Fed. Cas. No. 11,214; In re Scholtz (D. C.) 106 Fed. 834, 5 Am. Bankr. R. 782; White v. Hill, 148 Mass. 396, 19 N. E. 407; Clark v. Sawyer, 151 Mass. 64, 23 N. E. 726.

But the court said:

"We are not prepared to go further than to allow compensation for services which were beneficial to the estate. Beyond that point we must throw the risk of his conduct on the assignee, as he was chargeable with knowledge of what might happen. It does not appear how far the services to the assignee were beneficial. Therefore the questions of the Circuit Court of Appeals cannot be answered in full. But the principles as to which it desired instruction may be stated sufficiently for the disposition of the case upon a subsequent finding of facts. None of the claims is entitled to preference under the deed. The charge for the preparation of the assignment properly may be proved as an unpreferred debt of the bankrupt. The services to the voluntary assignee may be allowed so far as they benefited the state, and inasmuch as he would be allowed a lien on the property if he had paid the sum allowed, the appellants may stand in his shoes and may be preferred to that extent. No ground appears for allowing the item for services in resisting an adjudication of bankruptcy. * * * We answer the questions as follows: (1) No. (2) Not under the deed, but, so far as the assignee would be allowed for payment of the claim, the claim may be preferred in the right of the assignee. (3) Not on the facts appearing in the certificate. (4) The charge for the preparation of the deed may be proved as an unsecured claim."

Commenting on this, the court in the Matter of Standard Fuller's Earth Company, supra, said:

"I can perceive no difference in the application of the rule declared in Randolph v. Scruggs, supra, and other authorities, to the case of a general assignment and to a proceeding in a state court instituted by a stockholder in an insolvent corporation against said corporation, praying an administration and winding up of said corporation, and obtaining the appointment of the treasurer and general manager of the corporation as receiver in the cause. The bankruptcy jurisdiction, when properly invoked, supersedes the prior proceedings in the state court for the winding up of said estate, as to which the jurisdiction is not concurrent. In re Zier & Co., Wilbur & Watson, and other authorities, supra."

And therefore, in final disposition of the case, this Georgia District Court said, in language in which we must concur:

"My opinion is that the referee erred in decreeing that the compensation of the receiver in the state court and of his attorneys therein as fixed and allowed by the state court is a priority claim against the estate in bankruptcy, and the same is reversed, and the cause is remanded to the referee, to determine the amount of compensation that should be allowed the attorneys for professional services rendered in the bankruptcy proceedings, which is a priority claim to be paid out of the assets of said estate; also to ascertain and determine the expenses incurred by the receiver in the state court in the preservation and care of the assets of the estate turned over to the bankruptcy

court. Such expenses to include reasonable compensation for legal services required and actually rendered the receiver, and which were beneficial to the estate. The claim for such professional services is to be claimed and preferred in the right of the receiver, and as part of his expenses in the preservation and care of the estate."

Loveless v. Southern Grocer Co., 20 Am. Bankr. R. 181, 159 Fed. 415, 86 C. C. A. 395, seems from the syllabus to hold contrary to the cases just cited, but a careful consideration of the opinion suggests that the decision is based on an entirely different state of facts.

[4] There can be no doubt that, if the state court acquires jurisdiction more than four months before the bankruptcy petition is filed, its jurisdiction cannot be interfered with. 1 Loveland on Bankruptcy (4th Ed.) p. 142, and cases there cited. In the Matter of Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, Mr. Justice Fuller said:

"The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The Bankruptcy Law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

The question of the referee as certified to this court is therefore answered in the negative. The receiver of the state court has not the authority to take from the assets in his possession at the time of the adjudication in bankruptcy the fees and expenses thereafter allowed by the state court and turn over the balance to the trustee, but should turn over to the trustee the property just as it was at the date of adjudication, without diminution.

In view of the comity that exists between this court and the state court, the trustee should first request the receiver to turn over to him the moneys withheld, as aforesaid, at the same time giving him a copy of this opinion, in order that he may be advised as to this court's conclusions on the question referred. If this request is refused by the receiver, then the trustee in this cause should make an application to the appropriate state court, requesting that court, in consideration of the comity existing between this court and the state courts, to direct its receiver to pay all sums in his hands at the time of bankruptcy, including fees and expenses allowed by it as aforesaid to the trustee in this cause, attaching to such application a copy of this opinion. The trustee will then report to this court the reply of said state court and said receiver, together with a statement of his expenses incident to his application to the state court that the same may be collected from the receiver if the judgment of this court so directs.

The court in Mauran v. Carpet Lining Co., 23 R. I. 344, 50 Atl. 387, 6 Am. Bankr. R. 734, upon a similar state of facts, reaches a conclusion differing from that at which we have attained; but, after careful consideration of all the cases, it is clear that the decided weight of authority, practically the unanimous holding of the federal bench, is in accordance with our decision.

We are indebted to B. C. Miller, clerk of this court, and a member of the bar of this court, for the briefing in this matter.

In re NASHVILLE LAUNDRY CO. et al.

(District Court, M. D. Tennessee, Nashville Division. January 29, 1917.)

No. 4473.

1. PRINCIPAL AND SURETY ⊂=164—JUDGMENT—EXECUTION—LEVY—EFFECT.
Shannon's Code Tenn. §§ 4756, 4757, providing that, in case judgment is against a principal and surety, the property of the principal shall be first exhausted on execution, is merely directory to the collecting officer, and does not affect the rights of the parties.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 456–465.]

2. BANKRUPTCY ⊂=309—PARTNERSHIP OBLIGATIONS—"PERSON PRIMARILY LIABLE"—RIGHTS OF CREDITORS.
Two partners, in payment of property purchased by one of them individually for an object unconnected with the partnership business, executed notes to the seller; the partner making the purchase signing as principal and the other as surety, though the notes contained an absolute undertaking of each partner to pay the same. The partners were residents of Tennessee, and the holder of the notes a resident of Kentucky. The uniform Negotiable Instrument Acts of both states (Ky. St. 1909, § 3720b, subsec. 191; Acts Tenn. 1899, c. 94) define the "person primarily liable" on an instrument as one who by its terms is absolutely required to pay the same. On bankruptcy of the partners, the holder of the notes desired to prove them against the partnership assets. Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 547 (Comp. St. 1913, § 9589), declares that the net proceeds of the partnership property shall first be appropriated to the payment of partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts, while any remaining surplus in either fund shall be applied to the other. *Held* that, as the provision was in accordance with the general equitable rule and earlier laws, the holder of the notes could not prove them against the firm assets, for they were obviously individual obligations of the partners, though as between the partners themselves the one signing as surety might, under Shannon's Code Tenn. §§ 4756, 4757, be entitled to have the property of the principal first exhausted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 1201–1214.
For other definitions, see Words and Phrases, First and Second Series, Primarily Liable.]

In Bankruptcy. In the matter of the bankruptcy of Leo D. Wege and J. H. McPhail, copartners doing business as the Nashville Laundry Company. Exceptions by Lewis Tillman, trustee, to the claim of Frank Frei against the firm assets, were sustained, and claimant petitions to review the order. Order affirmed.

Lewis Tillman, G. N. Tillman, and W. P. Cooper, all of Nashville, Tenn., for trustee.

Moreau P. Estes, of Nashville, Tenn., for Frank Frei.

SANFORD, District Judge. Wege and McPhail, partners engaged in business at Nashville, Tennessee, under the firm name of the Nashville Laundry Co., were adjudged bankrupts in this proceeding, both as a firm and individually. The petitioner Frei, a resident of Glascow, Kentucky, holding four notes signed by Wege and McPhail individual-

ly, after first filing a proof of claim on these notes against the individual assets of Wege and McPhail, thereafter withdrew his claim against the individual estates and filed an amended proof of claim on these notes as against the partnership estate. The trustee excepted to this proof of claim as against the partnership estate. This exception was sustained by the referee, and an order entered by him adjudging, in substance, that these notes were merely the individual debts of Wege and McPhail, and entitled to share in their individual estates, but not having been incurred in the name or for the benefit of the partnership, that Frei was not entitled to share thereon pro rata with creditors of the partnership. Wege has filed a petition to review this order.

These notes were executed at Nashville, Tennessee, as the purchase price of property purchased from Frei by Wege individually. The place of payment is not specified. The consideration for them was entirely foreign to the business of the partnership; and no benefit whatever accrued to it therefrom. The name of the partnership does not appear on the notes. They recite on their face that Wege is the principal and McPhail surety, and are signed by them as principal and surety, respectively. Each, however, contains an absolute undertaking on the part of both Wege and McPhail to pay both principal and interest of the notes, with reasonable attorneys' fees in the event of suit.

The sole theory upon which Frei's claim is based is that these notes are as a joint debt of the partners entitled to share pro rata with partnership creditors in the partnership assets. This theory is thus stated in the petition to review:

"These notes or instruments are joint and a joint judgment could have been obtained against both of the partners of the Nashville Laundry Company, to-wit, J. H. McPhail and Leo D. Wege, and being joint as to both partners, they are entitled to participate in the joint assets of the two partners even though those joint assets consist of the property of the two partners in the Nashville Laundry Company. The bankrupt law did not change the law of partnership, as it was under the common law, and under the common law, a partnership was a nullity in so far as being a separate entity from the partners composing it, and under the common law a joint debt even though it arose for matters outside of the partnership business, was entitled to participate equally with the firm creditors in the division of the firm assets, or other joint assets."

After careful consideration my conclusions are:

[1, 2] 1. Since both Wege and McPhail, signing on the face of the notes as joint makers, absolutely undertook to pay the same, it may well be that, as between themselves and Frei, the description of them in the notes and signatures as principal and surety, respectively, is to be treated as merely descriptio personæ, and the notes regarded, as to Frei, as a joint debt for which both are primarily liable, under the general provision of the Uniform Negotiable Instrument Law, then in force both in Tennessee and Kentucky, defining the person "primarily" liable on an instrument as one "who by the terms of the instrument is absolutely required to pay the same." Acts Tenn. 1899, c. 94, pp. 139, 140; Carroll's Kentucky Statutes (1909) § 3720b, subsec. 191, p. 1515. And see Graham v. Shephard (Tenn.) 189 S. W. 867. And if both Wege and McPhail are primarily liable to Frei upon the notes, it

would appear that McPhail, although as between himself and Wege merely a surety or accommodation maker, would not be entitled to insist that a judgment rendered against himself and Wege jointly should be first satisfied by exhausting Wege's individual property, under sections 3028 and 3029 of the Tennessee Code (Shan. §§ 4756, 4757); since the provisions of those sections apply by their terms only in favor of a surety "whose liability on the debt or contract is posterior to that of another." Furthermore these provisions are merely directory to the collecting officer. Bryant v. Rudisell, 4 Heisk. (Tenn.) 656, 660.

2. Even, however, if these notes are joint debts of Wege and McPhail upon which both are primarily liable to Frei, so that he would be entitled to a joint judgment and satisfaction out of the individual estate of each, they are still merely joint individual debts of Wege and McPhail, having no connection with the partnership business, and are not in any sense partnership debts. They are hence, in my opinion, not entitled to participate with partnership debts in the administration of the partnership assets in the bankruptcy proceedings.

From 1841 down to the present time, the several Bankruptcy Acts have so far recognized the doctrine of the separate entity of a firm as distinguished from its individual partners, as to specifically enforce in bankruptcy the equitable rule of distribution, generally recognized aliunde in the Federal courts, that the net proceeds of the partnership property are to be first appropriated to the payment of partnership debts; the individual estates of the partners, to the payment of their individual debts; and any surplus in either fund, to be applied to the other. Act Aug. 19, 1841, c. 9, § 14, 5 Stat. 448; In re Warren, 2 Ware, 322, 29 Fed. Cas. 266, 269; Act March 2, 1867, c. 176, § 36, 14 Stat. 534 (R. S. 5121); In re Nims, 16 Blatchf. 439, 18 Fed. Cas. 255, 257. Act July 1, 1898, § 5; Francis v. McNeal, 228 U. S. 695, 700, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706; In re Telfer (6th Circ.) 184 Fed. 224, 231, 106 C. C. A. 366; and Re Weisenberg (D. C.) 131 Fed. 517, 518.

Section 5f of the present Act of 1898 specifically provides that the "net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts," and that any remaining surplus in either fund shall then be applied to the other. In Francis v. McNeal, 228 U. S. at page 700, 33 Sup. Ct. 702, 57 L. Ed. 1029, L. R. A. 1915E, 706, the court, after considering various provisions of the Act in reference to partnerships, said that undoubtedly—

"these clauses taken together recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets and that of individual debts upon the individual estate."

In construing these several Bankruptcy Acts giving partnership debts priority of payment out of partnership assets, it has been held by the Federal courts, from the beginning, that joint debts of the individual partners of a firm, not created in furtherance of the business of the firm or in its behalf or for a consideration passing to it, are

merely the joint individual debts of the partners entitled to share in their individual assets, and are not partnership debts entitled to share as such in the distribution of the partnership property in bankruptcy proceedings. This was held, under the Act of 1841, in Re Warren, 29 Fed. Cas. at page 269; under the Act of 1867, in Re Roddin, 6 Biss. 377, 20 Fed. Cas. 1084 (principal and surety), Re Herrick, 7 N. B. R. 341, 12 Fed. Cas. 41, and Re Nims (C. C.) 18 Fed. Cas. at page 257 (Blatchford, Circ. Judge), 255; and under the act of 1898, in Re Weisenberg (D. C.) 131 Fed. at page 520. No case appears to the contrary other than Re Nims (D. C.) 10 Ben. 53, 18 Fed. Cas. 254, which was reversed by the Circuit Court in Re Nims, 18 Fed. Cas. Supra.

To the same effect is Forsyth v. Woods, 11 Wall. 484, 486, 20 L. Ed. 207. This was a suit brought by Woods, as assignee in bankruptcy of a firm, under the Act of 1867, to recover on an account due from Forsyth to the firm. Forsyth pleaded, by way of counterclaim, that at the joint request of the individuals who composed the bankrupt firm he had signed as surety the bond of one of the partners as administrator of an estate, upon their joint representation that they intended to make the administration of this estate a matter of partnership, and that he would, in effect, become the surety of the firm and not merely the surety of the partner to whom the letters of administration were granted; and that in consequence of the default of the administrator he had been compelled to pay as surety a large sum of money, thereby creating in his favor, a claim against the partnership estate. The court, in determining whether the agreement of the individual partners, regarded as their joint individual agreement merely, not incurred for the firm as such or in connection with its business, created a debt against the firm itself, said, in language directly applicable to the present case:

"If * * * such a joint request as is pleaded * * * raised an implied promise on the part of those who joined in the request to reimburse the defendant, it is, perhaps, still not clear that it was a partnership promise, creating a debt of the partnership, and therefore entitled to priority in bankruptcy over private debts of the partners. * * * If a firm be composed of two persons, associated for the conduct of a particular branch of business, it can hardly be maintained that the joint contract of the two partners, made in their individual names, respecting a matter that has no connection with the firm business, creates a liability of the firm as such. The partnership is a distinct thing from the partners themselves, and it would seem that debts of the firm are different in character from other joint debts of the partners. If it is not so, the rule that sets apart the property of a partnership exclusively, in the first instance, for the payment of its debts may be of little value. That rule presumes that a partnership debt was incurred for the benefit of the partnership, and that its property consists, in whole or in part of what has been obtained from its creditors. The reason of the rule fails when a debt or liability has not been incurred for the firm as such, even though all the persons who compose the firm may be parties to the contract."

To the same effect, by necessary implication, are the other Federal cases arising under the Bankruptcy Acts of 1867 and 1898, which hold that an obligation executed by the members of a firm, in their names, may share as a partnership debt in the administration of the partnership assets in bankruptcy proceedings, upon extrinsic evidence

showing that the obligation, although executed in the names of the partners individually, was in fact intended as a partnership obligation, incurred for its benefit in furtherance of the firm business and for a consideration received by it. Davis v. Turner (4th Circ.) 120 Fed. 605, 610, 56 C. C. A. 669; Mock v. Stoddard (9th Circ.) 177 Fed. 611, 614, 101 C. C. A. 237, affirming In re Stoddard Lumber Co. (D. C.) 169 Fed. 190; Frederick v. Citizens' Bank (3d Circ.) 231 Fed. 667, 671, 145 C. C. A. 553; and In re Thomas, 8 Biss. 139, 23 Fed. Cas. 923.[1] Each of these decisions is based upon an express finding that the obligations in question, though on their face merely the joint debts of the individual partners, were in fact shown by the proof to have been intended as obligations of the firm, incurred in its behalf by the partners in either individual names, and hence in fact obligations of the firm, and in each it is assumed, as the basis of the decision, that if they had not been shown by the proof to have been in fact firm obligations and had been the mere joint debts of the individual partners, they would not have been entitled to participate ratably in the partnership assets.

The established Federal rule is also directly supported by Harvey Weston, Appellant, 12 Metc. (Mass.) 1, 2, in which two partners, having signed their individual names as sureties to a note, and thereafter assigned their joint and separate estates for the benefit of creditors under the insolvency laws of the State, it was held that as the sureties had signed their individual names to the note, and there was no evidence that they meant to act in their partnership capacity, the legal result was that they bound themselves individually, and not as partners, and the note should hence be proven against their separate estates. So, too, in Brownlee v. Lobenstein (Tenn. Ch. App.) 42 S. W. 467, 470 (1897), it was held, in applying the established principle "that partnership assets are first liable to partnership debts," that an appeal bond executed by the two members of the firm, as principal and surety, respectively, to secure a decree rendered against one of them individually, was not a partnership debt. This opinion was affirmed orally by the Supreme Court of Tennessee, and is not, as I view it, necessarily in conflict with either the earlier or later cases of Anderson v. Norton, 15 Lea (Tenn.) 14, 54 Am. Rep. 400, Carver Gin Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. Rep. 803, and Bedford v. McDonald, 102 Tenn. 358, 364, 52 S. W. 157, holding that a mortgage executed by all the members of a firm conveying property of the firm to secure the debt of one or all the individual partners, creates a valid lien as against firm creditors.

The English case of Hoare v. Oriental Bank, 2 App. Cas. 589, holding that under the bankruptcy law of England, as it existed in

[1] In Re Webb, 2 N. B. R. 614, 29 Fed. Cas. 493, Re Holbrook, 2 Lowell, 159, 12 Fed. Cas. 317, 319, Strause v. Hooper (D. C.) 105 Fed. 590, Re Jones (D. C.) 116 Fed. 431, and perhaps other cases, the right of joint debts of the individual partners to share in the partnership assets was at first denied, even when shown by the proof to have been intended as firm obligations, executed in the partnership business for a consideration passing to the firm. This is not, however, the rule now established by the great weight of authority, as shown by the citations in the body of this opinion.

1841, a joint debt of the two members of a firm not connected with their partnership business, could be proven against the partnership estate pari passu with partnership creditors, on the suggested ground that before insolvency a judgment could have been recovered against the two partners jointly and execution taken out thereon against the partnership estate, is, in my opinion, clearly distinguishable, since, as pointed out by Judge Blatchford in Re Nims, 18 Fed. Cas. at page 258, the bankruptcy law of England then contained no controlling statutory rule of administration as in our Bankruptcy Act, giving preference to partnership debts in the administration of the partnership estate.

For similar reasons, Moore Furniture Co. v. Prussing, 71 Ill. App. 666, holding that joint debts of the individual partners are entitled to share with partnership debts in the equitable distribution of partnership assets, Saunders v. Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472, Citizens' Bank v. Williams, 128 N. Y. 77, 28 N. E. 33, 26 Am. St. Rep. 454, and Laswell v. Bryan's Adm'r, 9 Ky. Law Rep. 149, holding that a judgment recovered against the individual members of the firm upon a joint obligation, not an indebtedness of the firm, under which execution has been levied upon the firm property, will prevail against general firm creditors not armed with process, and other cases upon which the petitioner relies, are likewise, in my opinion, not controlling. Without analyzing these cases in detail, it is sufficient to say that none of them involved a statutory rule of distribution requiring that partnership debts be given priority in the distribution of partnership assets; that in none of them were the joint debts of the individual partners held to be partnership debts, but the right of creditors of the individual partners to reach the firm assets in satisfaction of their debts were worked out, in the main, upon the theory of the waiver of the right of the individual partners to have the partnership property applied to the payment of partnership debts in preference to those of any individual partner. Clearly, however, these cases are not controlling as authority in a case such as the present, involving the application of a controlling statutory rule of distribution giving priority in the distribution of partnership assets to partnership debts alone.

I therefore conclude, that, both upon authority and principle, the notes in question are at most the joint debts of Wege and McPhail individually, and not in any sense "partnership debts," and that under the statutory rule of distribution prescribed by section 5 of the Bankruptcy Act, the petitioner is hence not entitled to share thereon with partnership creditors in the ratable distribution of partnership assets; which, under the terms of the Act, are to be first applied in satisfaction of the partnership debts.

I accordingly find no error in the order of the referee, and a decree will be entered confirming the same, but without prejudice to such right, if any, as the petitioner may have, through appropriate proceedings, to share, as a creditor of the individual partners, in the surplus, if any, of partnership assets which may remain after the payment of the partnership debts.

## WILSON v. STUDEBAKER CORP. OF AMERICA.

(District Court, E. D. Pennsylvania. April 3, 1917.)

No. 4228.

1. SALES ⟸416(1)—ACTIONS FOR BREACH OF CONTRACT—EVIDENCE.
In an action for breach of a contract to sell and deliver automobiles to plaintiff, a dealer, who resold the same, the defendant seller can take advantage of plaintiff's breach of a similar contract the previous year only by way of set-off, and hence evidence of such breach is inadmissible to raise an inference that, because defendant had forgiven plaintiff's breach of contract, plaintiff should extend a like indulgence to defendant; but evidence of the number of cars sold by plaintiff the previous year was admissible as bearing on the volume of business which he was able to command during the year of the breach.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1171.]

2. WITNESSES ⟸236(1)—EXAMINATION—ARGUMENTATIVE QUESTIONS.
Where facts on which an argument was sought to be based had been developed, a question to a witness, wholly argumentative in character, and not directed to any question of fact, is properly excluded.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 817, 819, 824, 826.]

3. SALES ⟸405—CONTRACTS OF SALE—CONSTRUCTION.
A contract for the sale of motor cars to a dealer, who disposed of them to the trade, provided that the contract might be annulled at any time. The defendant manufacturer, without notifying the dealer of cancellation, defaulted in delivering cars. *Held* that, as the contract contained mutual obligations, and as business men cannot be deemed to enter into an agreement which is of no effect, it must be construed as valid, unless notice of cancellation should be given, and hence the dealer might recover thereon.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1147-1155.]

4. SALES ⟸421—JURY QUESTION.
In such case, plaintiff, who sold out his business, also sold the right to sell defendant's make of automobiles. Defendant promoted the sale and consented, but suggested that the consent take the form of a cancellation of the contract. The contract provided, not only for cancellation, but for termination. The cancellation was in writing, and recited that it was made in pursuance and for the purpose of carrying out the understanding reached by the parties. *Held* that, there being evidence that the understanding of the parties was the contract should be assigned, it was proper for the trial court to submit to the jury what the reference related to, and the refusal of the court to flatly charge that the legal effect of the written instrument was to cancel the contract was not error.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1203.]

5. TRIAL ⟸136(3)—PROVINCE OF COURT AND JURY—WRITTEN INSTRUMENT.
The construction of written instruments is for the court.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 326.]

At Law. Assumpsit by Orin S. Wilson against the Studebaker Corporation of America. There was a verdict for plaintiff. Sur motion of defendant for new trial. Rule discharged.

J. B. Colahan, 3d, of Philadelphia, Pa., for plaintiff.

Sheldon F. Potter and Sheldon Potter, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. A summary of the reasons for a new trial now urged and the rulings of this court thereon may be helpful in the subsequent proceedings in the cause.

[1] 1. The cause of action was the breach of a contract to sell and deliver automobiles. The jury found a contract and its breach in the failure or refusal of the defendant to deliver the automobiles agreed to be delivered. The parties had had a similar contract covering the transactions of the previous year. During that year the plaintiff accepted and paid for a less number of automobiles than the number ordered. There was nothing to indicate whether the defendant had acquiesced in this breach of the prior contract by plaintiff. No such breach was in issue by pleadings or otherwise. The defendant offered, and the trial judge excluded, evidence of this shortage. If the evidence had been admitted, it would have founded an argument advancing the inference that, because the defendant had good-naturedly forgiven the breach of its contract, the plaintiff should extend a like indulgence to the defendant for its breach of its contract, or it might have been used as the basis for the proposition that the parties had construed the contract to be not an absolute one of sale and purchase.

The evidence was excluded on the ground that the breach of one contract by the plaintiff would be no legal justification for the breach of another contract by the defendant. The latter could avail itself of prior contracts as a defense only through the medium of what would be in substantial effect a set-off. The mere fact that the plaintiff had breached a former contract would not justify the inference, nor be any evidence, that the parties had, by a course of dealings or otherwise, defined for themselves the meaning of the subsequent contract. The ability of the plaintiff to find sales for the number of automobiles ordered was to some extent in issue, and the volume of business he had been able to do the previous year did have some bearing upon the volume of business which he was able to command for the following year. To this extent the inquiry was permitted, and the answer went in evidence. The inquiry excluded was confined to the point of whether the defendant had forgiven the breach of the prior contract. The complaint of the above ruling is embodied in the first reason for a new trial.

[2] 2. The question referred to in the second reason followed a series of questions through which defendant had sought to elicit the fact that the plaintiff had parted with his claim to the moneys in suit. The fact upon which the question was based had already been developed to found any argument which might be based upon it. The question was wholly argumentative, in the sense that it sought to elicit the answer of the witness to the argument presented. As it was not directed to any question of fact, we think it was properly excluded.

3 and 4. Reasons 3 and 4 must be based upon an error. The question referred to in reason 3 was directed on re-examination to the testimony given by the witness on cross-examination as to the transactions of the previous year. The question was therefore allowed to the extent to which it had permitted the defendant to go into the transactions of the previous year. It developed, however, from the answer, that

the witness was being interrogated, not as to the features of the previous year's transactions, which had been gone into on cross-examination, but to the feature which had been excluded. A motion was then made to strike out, and this motion was allowed by the court, and not denied, as stated in reason 4.

The remaining reasons, other than purely formal ones, relate to complaints of the charge, and will be considered together. They will be discussed in the order in which presented in the brief submitted.

[3] The first proposition goes to the whole charge, in that the position taken is that binding instructions should have been given for the defendant. This in turn is based upon clause 25 of the contract. This clause in effect was that the contract might be annulled at any time. The proposition is that because of this the contract was a nullity ab initio, upon which no right of action could be found. Velie v. Kopmeier, 194 Fed. 324, 114 C. C. A. 284, and other cases, are cited. The contracts of business men are assumed to have a practical purpose. They are not to be assumed to be the absurdity of a contract which is agreed to be no contract. There was a substantial practical purpose which the arrangement between these parties was to serve. That purpose was to meet certain practical conditions. The practical conditions were that each of these parties were selfishly interested; the one to sell as many automobiles as possible, and the other to manufacture and deliver all it was able to do. It was not, however, known by the plaintiff how many cars it could find a market for, nor by the defendant how many cars it would be able to deliver to any particular locality. For the protection of each against the consequences of an absolute undertaking, the provision for cancellation was inserted.

The contract, therefore, on the part of the defendant, in practical effect meant this: So far as we now know, we will be able to deliver to you 300 automobiles whenever you are ready to take and pay for them; the deliveries, however, to be made at the times mentioned in the accompanying schedule. It may, however, be that we will not be able to live up to this contract, and because of that uncertainty we reserve the right to cancel at any time. The plaintiff was in a like situation and reserved the like right. It is, of course, obvious that no court would attempt to enforce such a contract, so far as it was executory and related to the future. Such an attempt would be futile, inasmuch as the party required to perform could abrogate the contract. If, however, this right was not exercised, and the contract remained in full force so far as it became an executed contract, it is difficult to explain why it should not be given full effect.

The position of the plaintiff may be summed up in this: The contract to deliver was in force until annulled. It is conceded that the defendant had the right to annul it. The effect of such annulment would have been to have relieved the plaintiff of his contractual obligations. Whatever the practical consequences of the annulment might have been to the plaintiff, he would have had no legal grounds of complaint; but the defendant could not leave the contract in force and refuse to comply with it.

There is nothing in the cases cited inconsistent with this. The rule in the Velie Case, in which a somewhat similar contract was under con-

sideration, was that "so long as the contract remained executory it was not enforceable against defendant." All the facts of the cited case do not appear from the report. It does appear, however, that the case was ruled upon demurrer, and that the court viewed it as an action based upon breach of an executory contract. The contract bears date September 23, 1909, and by its terms was in force until October 31, 1910. The agreement of the defendant was that it would order for shipment at least 50 automobiles before October 31, 1910. The contract was repudiated February 21, 1910. The action was for damages for the breach. Under the agreement the plaintiff was not bound to do anything. It is evident that this action was really one to enforce the contract in the respect in which it was executory. The ruling that the plaintiff could not enforce an executory contract of the character of the contract in suit is one which could be easily vindicated, if such vindication were called for.

Oakland v. Indiana, 201 Fed. 499, 121 C. C. A. 319, was a somewhat similar case in its facts, except that the litigants were reversed, and the dealer was there the plaintiff, and the manufacturer the defendant. The defendant there was under no obligation to deliver, unless it had received and had accepted orders to deliver, and it had also reserved the right to cancel. Plaintiff had agreed to purchase 50 cars during the term of the contract, and as many more as it could handle and the defendant could supply. The agreement was dated September 16, 1908, and expired on September 1, 1909. The case was to recover damages for the breach of the contract. The breach was the cancellation of the contract by the defendant on October 31st. At the trial the plaintiff limited its claims to the failure to deliver the 50 automobiles, abandoning all further claims for damages. There was a verdict and judgment in the court below for the plaintiff. This judgment was reversed, and the ruling of the appellate court supports three propositions: (1) That the right of cancellation made the contract, so far as executory, unenforceable. (2) That there was no contract, even to deliver the 50 cars, unless an order was first given therefor, and accepted. (3) That the contract for future supply and delivery of cars was unenforceable, because there was no agreement as to the kind or character or value of the cars to be delivered.

Ellis v. Dodge (D. C.) 237 Fed. 860, was also the case of dealer against manufacturer. This case was ruled upon a demurrer. The declaration set forth a contract by which the defendant granted the plaintiff the right to sell its cars within a prescribed territory. There was a provision as to the prices to be paid by the plaintiff for the cars supplied to him by the defendant. There was a provision for cancellation, which operated as a cancellation of all unfilled orders. The dealer agreed to accept and pay for such cars as should be shipped to him under the agreement, subject to his right to cancel; but there was no agreement on the part of the manufacturer to deliver any cars. There was an averment of the failure and refusal of the defendant to supply cars, but no date of repudiation of the contract is given. It would appear that the contract was allowed to run its course without any act of the defendant, other than its failure to supply the cars

which the plaintiff called upon it to supply. The demurrer to the statement was sustained.

It is to be observed that the action there was upon the contract, and the cause of action the failure of the defendant to supply cars. The ruling is therefore supported by the proposition that the defendant could not be held answerable for a failure to supply cars which it had not agreed to supply. The court, it is true, expressed itself to be of opinion that a contract which may be determined at the will of either party is no contract at all, and therefore cannot be made the basis for an action of damages. This is voiced in the expression that "to agree to do something, and reserve the right to cancel the agreement at will, is no agreement at all." The court further stated its view that, even if there had been a contract to deliver, the reserved right to cancel would have made this undertaking no contract at all. It is clear that these expressions are purely obiter and have a wholly argumentative purpose. If an agreement to deliver, subject to the right of cancellation, is a nullity ab initio, of course, the absence of the agreement would present the a fortiori argument.

The case is authority for the proposition that where a defendant has not agreed to deliver he cannot be held answerable in damages for not having delivered, but it is not an authoritative ruling for the proposition that a defendant who has agreed to deliver need not comply with his contract because he had the right to end it at will. The expressions quoted are not to be taken as the view of the court as to the law of the case now before us. They certainly do not carry any implication beyond the effect of the words used. It may be well said of a contract, as was said in the case under consideration, that a contract to do a thing, coupled with the right of revocation at any time, would indeed seem to be no contract at all. This is, however, an entirely different thing from ruling that, where a party to a contract has defaulted, he may not be held answerable for his default, even although he had the right to have relieved himself of the obligation by a revocation. The retort would be invited that he had the right to thus relieve himself from his obligation, but if he wished to be relieved he should have exercised his right within the time given to him in which to exercise it, and that he could not refuse to exercise it, and thus hold the other party to the contract as written, and yet receive all the benefits of a revocation which he never made.

All the court in Ellis v. Dodge said is what any one would say of such a contract, that a contract which could be called off is no contract at all. This is true, but what is meant is this: All the party who made this contract is required to do is to declare it off. This, of course, he will do, and because of this it is nothing. If, however, he does not call it off, but elects to keep it in force, it is difficult to understand why he should not be bound by it. Such a contract is the equivalent of this agreement: You may send me orders for delivery, and you may assume I agree to fill them, unless I notify you to the contrary. The other party has the right to act upon this assumption. The practical situation of parties affected by such a contract is illustrated by the facts of this case. The plaintiff expected, as he had the right

to expect, to get the automobiles he had ordered. On the strength of this he made contracts of sale which he could not meet. This was an injury, complaint of which is met by the answer: "We had the right to cancel our agreement at any time." The reply is obvious: "You should have either lived up to your contract or cancelled it." We are of the opinion that the contract here to fill the orders given for automobiles was a binding contract as long as in force, and that the defendant is answerable for its breach, and that its termination is a defense to be proven, and is not to be presumed, and that proof of the power to end it is not proof that it was ended.

[4, 5] The final standing ground of the defendant presents the real defense to this action, if there be any. The plaintiff sold out his business. Among the things he sold was the business of selling the defendant's make of automobiles. His right, whatever it was, to get a further supply, went with the business. The defendant was promoting the sale, and was conferred with about it, and was, indeed, an active party to it. The defendant's consent to the sale was practically indispensable. It did consent, but suggested that the consent take the form of a cancellation of the contract. It was in effect agreed that the cancellation operate as an assignment of the contract. There was a provision in the contract both for its termination and its cancellation. The distinction between the two things was preserved, and the effect of each upon the rights of the parties to the contract carefully defined. The assignment, termination, or cancellation (whichever it was in fact) was in writing. Its construction was because of this for the court. It was, however, preceded by the statement that the writing had been made in pursuance of and for the purpose of carrying out the "understanding" reached by the parties. This might, it is true (as is argued by defendant), have had reference to the contract. On the other hand, it might have had reference to something else. The trial judge could not determine this, and evidence was admitted to what it did refer. This, if credited, established the fact that the reference was to the oral agreement reached with respect to the operation of the paper and that it was given solely for the purpose of effectuating the transfer of the business.

The proper course would, therefore, seem to have been for the trial judge to have submitted to the jury to find to what the reference in the cancellation paper was, and to have instructed them that, if it had reference to the agreement reached at the conference, it took effect as an ending of the contract for the future; if the reference was not to this, then the only thing to which it could refer was the contract itself (or rather the modification of it, eliminating the 10 days' notice of cancellation), and that the paper then operated as a cancellation, affirming the seventh point of defendant. This was clearly the instruction meant to be given and as given. Reading simply the formal answers to the points, without the explanations given in the presence of the jury, this does not so clearly appear. The exceptions taken by defendant do, however, show it clearly, because the only exception taken was to the refusal of the court to flatly charge that the legal effect of the paper signed was to cancel the agreement

and render it a nullity. This the court would not have been justified in doing in the face of the evidence of to what the paper referred. This position is consistently reflected in the reasons for a new trial and in the paper book submitted. The testimony sent the paper along with the testimony to the jury, and the court was not bound to construe it as a paper unaffected by oral evidence.

The rule for a new trial is discharged, and plaintiff has leave to enter judgment on the verdict.

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## In re PROGRESSIVE WALLPAPER CORP.

## In re LOTBINIERE LUMBER CO.

(District Court, N. D. New York. March 19, 1917.)

1. BANKRUPTCY ⟸326—CLAIM—SET-OFF.

Claimant sold spruce pulp wood to the bankrupt, receiving notes in payment. Shipments in excess of the amount called for by the contract were made, and, the bankrupt complaining that the payment of freight embarrassed it, the parties entered into an agreement, reciting that the bankrupt had an interest in and a lien upon the wood to the extent of the freight payment, and that it should be entitled to use and appropriate such wood as fast as it might be needed in the prosecution of its business and the running of its mill, and should report the amount used each month, giving its notes in payment therefor at a fixed price per cord. The bankrupt used nearly two-thirds of the wood before bankruptcy proceedings were instituted. Bankr. Act July 1, 1898, c. 541, § 68, 30 Stat. 565 (Comp. St. 1913, § 9652), declares that in all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor the account shall be stated, and one debt shall be set off against the other, and that the balance only shall be allowed or paid. *Held*, that as the agreement between the parties recognized the obligation of the claimant to pay the freight on the wood shipped in excess of the contract, the claim for freight paid by the bankrupt should be offset against the notes held by claimant and the lien of the bankrupt estate on such wood extinguished.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514.]

2. BANKRUPTCY ⟸326—PROCEEDINGS—AMENDMENT OF CLAIM.

In such case, though the claim as first filed stated there was no offset or counterclaim thereto, the bankruptcy court, being empowered to allow amendments, may allow the claim to be amended so as to set up the claim of the bankrupt and aver that it should be offset against that of the claimant so as to discharge the lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514.]

In Bankruptcy. In the matter of the bankruptcy of the Progressive Wallpaper Corporation. Application by the Lotbiniere Lumber Company for confirmation of the special master's report in bankruptcy, holding that the claim of the bankrupt estate against the Lotbiniere Lumber Company, secured by a lien on property of the company, might be set off against the claim of the company on notes of the bankrupt, and extinguished. Report approved and findings adopted.

See, also, 222 Fed. 87, 224 Fed. 143, and 230 Fed. 171.

This is an application for the confirmation, etc., of the special master's report in bankruptcy, holding that the claim of the bankrupt estate against Lotbiniere Lumber Company, which is secured by a lien on certain wood of that company, growing out of the payment of freight charges for the transportation of such wood, may be set off and thereby extinguished, against the claim of the said Lotbiniere Company on certain promissory notes of the bankrupt held by the Lotbiniere Company given for the purchase price of wood sold by the Lotbiniere Company to the said Wallpaper Company, and which formed a part of the same mass of wood on which the lien exists, and that the Lotbiniere Company, after deducting the amount of the claim of the Wallpaper Company, may prove and have allowed its claim for the balance of such notes. The trustee in bankruptcy asserts that such asserted right of set-off does not exist, and that he, representing the Wallpaper Company and its creditors, may assert its lien and collect its claim in full, leaving the Lotbiniere Company to the receipt of its percentage in distribution. The Lotbiniere Company also asks to amend its claim by setting up as an offset or counterclaim to its said claim the said demand of the bankrupt corporation.

John H. Booth, of Plattsburgh, N. Y., for petitioner Lotbiniere Lumber Co.

B. A. Pyrke, of Port Henry, N. Y., for trustee.

RAY, District Judge (after stating the facts as above). [1] The said Lotbiniere Lumber Company holds six notes of the Progressive Wallpaper Corporation, now bankrupt, amounting, exclusive of interest, to the sum of $16,271.50 given for wood sold and delivered. Most of the wood was delivered under and pursuant to a written agreement made about August 7, 1913. The contract called for from 1,000 to 1,500 cords of spruce pulp wood of specified lengths, and same was to be delivered f. o. b. on the cars at St. Georges Branch of Quebec Central Railway. Payments were to be made by check or interest bearing notes on or before the 20th day of each month for all wood delivered the preceding month. Deliveries were made under the contract, and notes were given. In November and December, 1913, and January, 1914, the Lotbiniere Company shipped wood to the Progressive Wallpaper Corporation considerably in excess of the total quantities called for by said contract or ordered, and same was unloaded on the grounds of said vendee at Plattsburgh, N. Y., and that corporation paid the freight thereon. After a time the overshipments were observed, and the attention of the vendor was called to the fact, and that payment of freight on excess shipments was an embarrassment financially to the vendee. The vendee was told to unload the wood and pay the freight and it would be adjusted later. But for a subsequent written agreement what was said and done would have passed title to this wood, all of it, to the Progressive Wallpaper Corporation. April 4, 1914, the parties met, and the following agreement was made:

"Memorandum of agreement, made this 4th day of April, 1914, between the Lotbiniere Lumber Company, of Lyster, Province of Quebec, a corporation, party of the first part, and the Progressive Pulp & Paper Company, of Plattsburgh, Clinton county, New York, party of the second part; witnesseth: That the party of the first part is the owner of fifteen hundred (1,500) cords of pulp wood piled upon the grounds and lands of the party of the second part at the party of the second part's mill at Plattsburgh, New York. That the said party of the second part has an interest in and lien upon said wood to the extent and amount of four ($4.00) dollars per cord, for freight and transportation charges thereon.

"It is further agreed between the parties hereto that the party of the second part shall and does have the right to use and appropriate said wood as fast as it may be needed by the party of the second part in the prosecution of its business and the running of its said mill. That when and after the party of the second part shall commence the use and consumption of said wood, it shall report to the party of the first part at the end of each month the amount of wood so used and consumed and shall accompany each report with its promissory note, payable to the party of the first part, at three months' time, for the amount of wood used and consumed during the month immediately preceding, figured at the rate of eight and fifty one-hundredths ($8.50) dollars per cord.

"Witness our hands and seals the day and year first above written.

"[Signed] The Lotbiniere Lumber Company,
"Per W. H. Mitchell, Manager.
"Progressive Pulp & Paper Company,
"Per A. S. Derby, Treasurer."

This agreement recognized the title of the Lotbiniere Company in this excess wood, the claim or demand of the Progressive Wallpaper Company (Progressive Pulp & Paper Company) thereon for freight and transportation charges paid by it to the extent of $4 per cord, (about $6,000), and a lien thereon to that amount. It also gave the Progressive Corporation the right to take and use as much of this excess wood as it desired in its business, reporting the amount taken and sending its notes in payment at $8.50 per cord. At the time of the filing of the petition in bankruptcy 629.07 cords of this wood remained. Under the agreement the title was in the Lotbiniere Company, and the Progressive Wallpaper Corporation had its lien thereon under such agreement for $2,516.28, at $4 per cord. Thus the bankrupt corporation owed the Lotbiniere Company $16,271.50, as stated, and the latter company owed it $2,516.28 as security for which it had, under such agreement, a lien on such wood remaining. The wood subject to this claim belonged to the Lotbiniere Company as stated.

The Lotbiniere Company placed its notes in the hands of its attorneys, Weeds, Conway, and Cotter, at Plattsburgh, N. Y., but the facts were not stated to them as to this claim of the Progressive Corporation, and that firm filed a claim in bankruptcy on the notes for $16,271.50, and stated in said claim there was no offset or counterclaim thereto.

This proceeding seeks to amend the claim and set up the counterclaim of $2,516.28 and secure the set-off of that amount and have the claim on the notes allowed for the balance only. This is clearly just and proper if the $2,516.28 is properly a set-off under the bankruptcy law. The trustee claims it is not. These claims are mutual and grow out of the same transaction or transactions under the same agreements between these parties. As the Progressive Wallpaper Corporation took and used wood of the excess shipments under the agreement of April 4, 1914, at $8.50 per cord, and it gave its notes therefor, many of which are included in the proof of claim, the lien on such wood so taken and used was extinguished. The freight, after the excess shipments were discovered, was paid at the request of the Lotbiniere Company under a promise of adjustment, which meant payment. Subsequently there was a recognition and promise to pay the entire amount.

The dealings and claims were mutual. The account was a charge for wood sold and delivered on the one hand and credit for notes given and paid and freight paid on excess shipments of wood on the other. Under the last agreement each company owed the other. The Bankruptcy Act provides (section 68):

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

There can be no question that at the time the petition in bankruptcy was filed against the Progressive Wallpaper Corporation it owed the Lotbiniere Company $16,271.50 on its notes, and that the Lotbiniere Company then owed the Progressive Corporation $2,516.28 for freight charges paid. Collier on Bankruptcy (9th Ed.) p. 976, says:

"It seems that the rule with respect to set-offs is the same even though the claim of the creditor against the bankrupt is fully secured."

In Steinhardt v. National Park Bank, 120 App. Div. 255, 105 N. Y. Supp. 23, it was held that, in an action by a trustee to recover moneys of the bankrupt on deposit with the bank at the time the petition was filed, the bank was entitled to set off the amount of certain demand notes made by the bankrupt which it then held, but for which notes it held securities greater in value than the amount of the notes, and though by reason of their depreciation 17 months thereafter, when sold, the securities did not realize enough to pay the notes. In that case the trustee in bankruptcy sued the bank which held security for its debt and sought to have the offset allowed, while here the Lotbiniere Company presents its claim against the bankrupt estate, and seeks to have the secured claim of the bankrupt estate against it offset and thereby discharged. I discover no reason why this should not be done. It is urged by the trustee that the claim of the now bankrupt corporation was purely in rem, that is, by enforcing its claim or lien on the wood, and that no suit for the amount of the freight paid, etc., could have been maintained against the Lotbiniere Lumber Company even after the execution of the second written agreement made to adjust the matter. I cannot concur in this view. The claim of the Progressive Corporation was recognized, as was the obligation of the Lotbiniere Company to pay it. It was competent to show the whole transaction and the consideration for the agreement of April 4, 1914. It appeared that the freight was paid for the benefit of the Lotbiniere Company, and the now bankrupt made its claim, which was duly recognized.

[2] I do not doubt the power of this court to open up the matter and allow the proposed amendment to the claim presented. If the claim of the Progressive Wallpaper Corporation was and is a proper offset, there was a mistake of fact in making and presenting the claim of the Lotbiniere Company in the form and containing the statement referred to, and equity and justice demand that the error be corrected. The power of this court to allow claims to be amended is well settled. It seems to me very clear that if this now bankrupt corporation before its bankruptcy had sued the Lotbiniere Company to enforce its

claim, evidenced by the agreement to adjust, that is, repay the several sums paid for freight on the wood and later by the memorandum agreement, the defendant in such action could have offset the amount due it on the notes. See United States Trust Co. v. Western Contract Co., 81 Fed. 454, 468, 26 C. C. A. 472, 486, where Taft, C. J., said:

"If B. is enforcing a lien against A.'s property, A. can remove the lien by paying to B. the amount secured by it. If so, why may he not be permitted to cancel the lien by forgiving B. the debt B. owes him; i. e., by setting it off? We are clearly of opinion that he may do so. Justice is thereby done, and circuity of action is avoided."

Now that bankruptcy has intervened, can it be said the Lotbiniere Company must accept its dividend on its entire demand and pay its indebtedness to the bankrupt in full? I can discover no justice in such a rule in such a case. See, also, 34 Cyc. 638, where it is said:

"The insolvency of the party against whom the set-off is claimed is, as a broad general rule, held to be such a special equity as will induce a court of equity to take jurisdiction to allow the set-off."

The report of the referee is approved and his findings adopted.

There will be an order allowing the proposed amendment to the claim of the Lotbiniere Company, and the referee will offset the claim of the bankrupt corporation and allow the amended claim for the balance only.

The trustee will pay the special master $20 for his services as such from the assets of the estate, and the order will so provide.

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## ROYAL EXCH. ASSURANCE OF LONDON v. THROWER. *

(District Court, N. D. Georgia. March 12, 1917.)

No. 1319.

1. INSURANCE ⊂⊃665(3)—FIRE INSURANCE—SUFFICIENCY OF EVIDENCE—KNOWLEDGE OF INCREASED HAZARD.

In a suit between a fire insurance company and the owner of an insured warehouse, evidence *held* not to show that the insured had knowledge that his lessee had installed machinery in the building which increased the hazard.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1711–1716.]

2. INSURANCE ⊂⊃316—FIRE INSURANCE—INCREASING HAZARD—"CONTROL."

Within a provision forfeiting a fire insurance policy if the hazard be increased by any means within the control or knowledge of the insured, "control" involves some knowledge of the hazardous use of the building, and the policy is not avoided by acts of a tenant increasing the hazard which are not within the owner's knowledge.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 744–747.

For other definitions, see Words and Phrases, First and Second Series, Control.]

3. INSURANCE ⊂⊃146(3)—CONSTRUCTION OF POLICY—AVOIDING FORFEITURE.

Insurance contracts should be construed, if possible, so as to avoid forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295.]

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⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*For opinion on motion for rehearing, see 240 Fed. 1024.

4. INSURANCE ⊂⊃492—FIRE INSURANCE—INCREASED HAZARD—SET-OFF OF PREMIUM.

Where the hazard under a fire insurance policy was increased by acts of a tenant without the knowledge of insured, so as not to avoid the policy, the claim of insured on the policy should be reduced by the amount of additional premiums required for a policy covering the increased hazard.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1262–1265.]

In Equity. Suit by the Royal Exchange Assurance of London against Marvin L. Thrower. Decree entered allowing defendant his claim for set-off against the mortgage held by complainant.

King & Spalding, of Atlanta, Ga., for plaintiff.
Wimbish & Ellis, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This case arises in this way: On the 15th day of June, 1908, Marvin L. Thrower took a policy of insurance on a certain property described as "a one-story frame, composition roof, building and additions thereto attached, occupied for warehouse and storage purposes, situated on Irwin street, Samson street, and the Southern Railroad, in Atlanta, Georgia," for $5,000. Attached to the policy was the standard mortgage clause, which provided that:

"Loss or damage, if any, under this policy, shall be payable to Mrs. Caroline Hertzfeld, as mortgagee, as her interest may appear."

In this mortgage clause was a provision that:

"Whenever this company shall pay the mortgagee any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor exists, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee the whole principal due or to grow due under the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all of such other securities; but no subrogation shall impair the right of the mortgagee to recover the full amount of her claim."

On the 12th day of June, 1909, the building covered by the policy was destroyed by fire and was a total loss. The insurer claims that the policy was void as to Thrower, the mortgagor, and the company paid to the mortgagee, Mrs. Hertzfeld, the amount of the mortgage, having the note and loan deed transferred to it, and instituted the proceeding here to foreclose the mortgage. The defendant, Thrower, set up in his answer, by way of defense, that the payment of the mortgage did not amount to a purchase of the note, but was a payment for his benefit under the policy of insurance issued to him, and that he is entitled to have the amount due him under the policy offset against the amount of the note. The contention of the company is that the policy has been rendered void by the insured by an increase of the hazard.

The question really presented here for determination, and the question about which evidence had been offered, and on which the case was argued and submitted, is whether there was a liability by the com-

pany on this policy issued by it to Thrower, or whether, by increasing the hazard, there had been a forfeiture of all rights under the policy, and there is no right of recovery, and has not been since the alleged increased hazard leading to the forfeiture.

The evidence shows that the property was insured as a building occupied for warehouse and storage purposes, and it was leased to the A. A. Smith Cotton Products Company, under a lease for 12 months, entered into on September 14, 1908. It is an established fact in the case, and not disputed, that the building was entirely destroyed by fire; it being a considerable conflagration, which originated over a block away, and involved, it seems, a lumber yard near the property in question here, and extended through that property to this building. The business carried on in the defendant's property, which was insured here, had nothing to do with the conflagration. The decision here comes under the provision in the insurance policy which provides that:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured."

It is claimed, on behalf of the insurance company, that this provision was violated by allowing this building to be occupied by the Cotton Products Company and by the business carried on by it therein, prior to and up to the date of the fire, not, as has been stated, that this in any way brought about the fire and the loss, but that there was a forfeiture of the policy, and the same became void, several months prior to the fire, by reason of the increase of the hazard.

[1] It is probably true from the evidence that the hazard was increased by the use to which this building was put by the Cotton Products Company. It seems that there was some machinery in it, and that cotton was what is called "reconditioned." While it is unnecessary to determine it here, in the view I take of this case, it may be fairly assumed, for the purpose of determining the question involved, that the hazard was increased, and if Thrower, the insured, had been responsible himself for this increased hazard, the policy would have been forfeited and rendered void at the time the building was devoted to the use indicated. The policy provides, however, that it shall be void if the hazard be increased "by any means within the control or knowledge of the insured." So that the question made here by counsel, and which clearly arises under the evidence, is whether Thrower had knowledge or control of the use to which this building was being put by the tenant.

M. L. Thrower, in his testimony before the court, made certain answers to questions put to him as follows:

"Q. The lease took effect on the 22d day of September, 1908, did it not? A. Yes, sir. Q. Did you lease it to anybody else after that, before the fire? A. No, sir. Q. Did you make any repairs or do any work on that building after you made this lease? A. None that I recall. Q. Didn't you put in an elevator? A. No; I think that was done about the time we leased it. Q. Wasn't it done at that time, in fact? A. I think so; there was one stipulation of the lease, when they leased it, they were to have an elevator. Q. What was the elevator put there for? A. To handle the goods, I guess. Q. Was there any

specific reason given or assigned why the elevator should be put there? A. None that I know of. Q. What? A. Only for ordinary purposes; he had to have it to run his business. Q. Do you recall any reason why the elevator should be put there? A. Not especially. Q. Do you remember about any reason having been assigned for putting the elevator there? A. No, sir; I do not. Q. You do not—did you have—

"The Court: An elevator to take the stuff from down in the stone part up on the other floor?

"The Witness: Yes, sir.

"Q. Were there any other tenants in this building between this time and the time of the fire? A. No; not that I know of. Q. Who did you deal with in regard to this property for the lease? A. I talked to Mr. Smith and Mr. Speer, who were then partners in it. Q. Who? A. Mr. Smith and Mr. Speer. Q. What building is your office in? A. Grant Building. Q. What building is the office of the Smith Cotton Products Company in? A. The same building. Q. What business do they conduct? A. They had a cotton business and fertilizer business. Q. What kind of a cotton business? A. Why, I never investigated that. Q. It says 'cotton products'; what do they mean by that? A. The handling of cotton. Q. What do they mean by 'cotton products?' A. I don't know, sir; I never saw their business; I never was out there in the building; I don't know what they were doing out there at all. Q. I am talking about what knowledge you had of the business they conducted—the character of the business they were conducting? A. I never investigated anything about Mr. Smith's business. Q. You knew he was in the cotton products business? A. I supposed he was by the lease."

He was again asked the further questions:

"Q. Did you know how they were using it at any time? A. No, sir; I didn't know there was a piece of machinery in there."

He was asked, then, this question, and made this answer:

"Q. Did you tell Mr. Brooks in that conversation, or in any conversation at any time, that you knew what they were using that building for, and the reason you did not tell the company was because you were afraid they would raise the rates on it? A. No, sir; I did not."

The above is the testimony, substantially, of Thrower on the subject of his knowledge as to the use to which this building was being put. It is positive, and is only questioned on account of the fact that he ought to have known, must have known, should have known, and some importance seems to be attached to the fact that Thrower and the tenant had their offices in the same office building in Atlanta. I think it must clearly be determined, from all the evidence taken together, that Thrower had no knowledge as to the particular use to which this building was being put by the tenant.

[2] It is urged here that he had control of the building. The language here is "any means within the control or knowledge of the insured." To control the matter it would seem to be necessary that Thrower should have had some knowledge of what was being done in this building. It does not seem to me that an owner can be held to the duty of controlling that of which he does not know.

[3] The rule of law is everywhere, and especially recognized by the Supreme Court of Georgia, that insurance contracts should be construed in such way, if possible, as to avoid forfeiture. In Clay v. Phœnix Insurance Co., 97 Ga. 44, 25 S. E. 417, the rule is stated in this way in the first headnote:

"Without sacrificing the substantial limitations imposed upon the liability of an insurer by the contract between the parties, stipulations and conditions in policies of insurance, like those in all other contracts, are to have a reasonable intendment, and are to be so construed, if possible, as to avoid forfeitures and to advance the beneficial purposes intended to be accomplished."

In Massachusetts Benefit Life Association v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261, the second headnote states:

"If a policy of insurance is capable of being construed in two ways, that interpretation must be placed upon it which is most favorable to the insured."

The well-recognized rule of law in this state, and everywhere else, is that, if possible, forfeitures should be avoided. If it is held that there is no liability in this case by the insurance company to the insured, it must be upon the ground that the forfeiture resulted from the use to which this building was put, notwithstanding that use had nothing to do with causing the fire and the loss, and, if possible, that result should be avoided. So, in my opinion, the duty to control involved, reasonably and fairly, some knowledge of the hazardous use of the building; otherwise the forfeiture would be worked simply because Thrower was the owner of the building, and the people who caused the hazard were his tenants. The language of the policy would be given no effect, that the forfeiture should result from the increased hazard by means within the "control or knowledge" of the insured.

There is abundant authority for holding that, where there was language like this in the policy, the owner is not responsible for increase of the hazard by a tenant without the knowledge of the landlord. Beach on Insurance, vol. 2, § 712, discussing this question, says:

"The Supreme Court of Nebraska approved the following instructions in this branch of the case in the trial court, to wit: 'If you find from the evidence that an addition was placed on said building after the insurance was taken, but that the same was placed there without the knowledge or consent or by the authority of the [assured], and was built by the tenant without the consent, authority, or knowledge of the [assured], and that the fire did not originate in said addition, or in the building to which it was attached, then the building of such addition would not prevent the assured from recovering in this action.' The Supreme Court added, with reference to whether the acts of the tenant bound the assured: 'We believe the rule to be this: That when a tenant, without the knowledge or consent of the assured, erects an addition to the house covered by the policy, it does not void the policy unless it contains a stipulation to the effect that an increase of the risk by a tenant will render it null and void.'"

In a note a long list of cases are cited as supporting the text; one of these cases being Merrill v. Insurance Co. of North America (C. C.) 23 Fed. 245. In that case, which was by Judge Nelson, in the United States Circuit Court for the District of Minnesota, the headnote embodying what was decided on that subject is as follows:

"Where a fire insurance policy provides that any change increasing the hazard, either within the premises or adjacent thereto, within the control of or known to the assured, and not reported to the company and agreed to by indorsement thereon, will render the policy null and void, to defeat a recovery in action for loss, the company must affirmatively prove that changes made by a tenant, which increased the hazard, were made by the consent of the owner or his agent."

In 3 Joyce on Insurance, § 2222, this is said:

"When, however, the policy was conditioned to be void in case of any changes within the 'control or knowledge' of the insured, it was held that acts of tenants in violation of the conditions of the policy, and of which the insured had no knowledge, would not defeat a recovery on the policy."

It is this language, "within the control or knowledge of the insured," that differentiates policies like this from many policies as to which it has been held that the act of the tenant is the act of the landlord. In the second volume of Briefs on the Law of Insurance, by Cooley (page 1639), on the question here, this is said:

"The condition, whether specific or general, sometimes provides that the change must be one within the control or knowledge of the insured in order to forfeit the policy. Where this is the condition, the policy will not, of course, be forfeited, unless the change in use is within the knowledge or control of the insured."

In North British Mercantile Ins. Co., etc., v. Union Stockyards Co., 120 Ky. 465, 87 S. W. 285, on this question the opinion of the court says:

"In the policy being considered the stipulation is not in any sense a warranty; on the other hand, it admits, at least by implication, that extrahazardous use may be made of the insured building without the policy being affected, for it is provided that the policy will be voided only in the event the 'hazard be increased by means within the control or knowledge of the assured.' If the assured was ignorant of it, although it was a matter which he might have controlled, had he known of it, the policy is not affected; or, although he knew of it, yet if it was a thing beyond his control, neither is it affected. Such seems to us to be the reasonable construction of the language as setting forth the intention of the parties."

The particular expression important here being, if the assured was ignorant of it, although it was a matter which he might have controlled had he known of it, the policy is not affected.

In East Texas Fire Ins. Co. v. Kempner (1886) 12 Tex. Civ. App. 533, 541, 34 S. W. 393, 396, it was held as follows:

"It is insisted that the policy is void because the risk was increased. The policy provides that it shall be void if the risk be increased by any change in the occupation of the building or premises, or by the erection of occupation of adjacent buildings, or by any means whatever within the knowledge of the assured. The evidence shows that Kempner, the assured, did not have any knowledge of the change in occupancy, or of any use or act that would increase the risk. His want of knowledge of the use of the gasoline stove, in our opinion, by the terms of the policy, settled this question against the appellant."

Other authorities might be cited to the same effect, but the above are believed to be enough for present purposes. There are other authorities, undoubtedly, which take different views in different ways of the question involved here; but I am satisfied that the great weight of authority is in line with the cases cited and quoted from above, and that Mr. Thrower is entitled to have this policy recognized as valid and binding as against the insurance company, under the facts shown here, on the ground, particularly, that he had no knowledge of the extra hazard, if there was such extra hazard, connected with the use to which the building was put.

The right to have this policy enforced is really interposed as a defensive plea to the foreclosure proceeding, but the question, after all, is as to the validity of the policy, and whether it was forfeited or not, as has been stated. The result of the foregoing is that the defendant, Thrower, is entitled to a decree allowing his claim under the insurance policy for the entire amount of the loss sustained set off against the claim of the insurance company under the mortgage.

[4] I think, however, that there should be deducted from the claim on the policy the amount of additional premiums which would have been required at the rate named in the evidence for the business that was actually carried on there. What this would be counsel can readily ascertain, and the respective amounts due on the insurance policy and the mortgage adjusted.

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JOYCE v. BULGER, Supervising Inspector, et al.

(District Court, W. D. Washington, N. D. July 14, 1916.)

No. 94.

1. SHIPPING ⊂⊃16—LICENSING OF STEAMBOAT OFFICERS—APPEAL FROM ACTION OF BOARD OF INSPECTORS.

The right of appeal to the supervising inspector from the decision of a board of local steamboat inspectors refusing to grant a license, or suspending or revoking a license, given to "any person deeming himself wronged by such refusal, suspension, or revocation," by Rev. St. § 4452 (Comp. St. 1913, § 8214), is given only to an interested party, and an appeal by a stranger to the proceeding is a nullity, and confers no jurisdiction on the supervising inspector.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 30–44.]

2. SHIPPING ⊂⊃14—LICENSE OF OFFICERS OF STEAM VESSELS—REVOCATION OR SUSPENSION.

A license granted to an officer of a steam vessel can be revoked by the board of local inspectors only on the grounds stated in Rev. St. § 4450 (Comp. St. 1913, § 8212), and after notice and hearing as therein provided.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 28, 29.]

In Equity. Suit by George E. Joyce against John K. Bulger, as Supervising Inspector, First District, and Bion B. Whitney and Harry C. Lord, as Local Inspectors at Seattle, Wash., in the Steamboat Inspection Service, Department of Commerce, of the United States. Decree for complainant.

Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for plaintiff.
Clay Allen, U. S. Atty., of Seattle, Wash., for defendants.

NETERER, District Judge. The bill in equity alleges: That the plaintiff is a citizen of the United States and a resident of Seattle; that the defendant Bulger is the acting supervising inspector of the First district steamboat inspection service, Department of Commerce of the United States, located at San Francisco, and the defendants Lord and Whitney are local inspectors for Seattle in said steamboat inspection service. That February 19, 1916, in pursuance of law and rules

and regulations plaintiff was granted by the local inspectors a license as "third mate of ocean steam vessels." That on the 7th of March, 1916, one P. Mullen filed with the board of local inspectors, in Seattle, a notice of appeal to the supervising inspector from such action of the local inspectors. That on the 22d of June, 1916, the supervising inspector notified the local inspectors of Seattle, Wash., to cancel such license, and the local inspectors had requested plaintiff to present his license for cancellation pursuant to such order. Plaintiff alleges that the local inspectors are threatening, and unless enjoined and restrained will cancel such license, and that he will be unable to secure any employment for which he is fit, and will suffer irreparable loss and damage before the matter can be heard on notice, and will be damaged in the sum of $3,500. A show-cause order was issued to the local board to appear before the court and show why it should not be restrained from revoking this license.

Section 4440 of the Revised Statutes (Comp. St. 1913, § 8202) provides that, when any person applies for authority to be employed as chief, second or third mate of ocean or coastwise steam vessels, the inspectors shall require satisfactory evidence of the knowledge, experience, and skill of the applicant, and, if satisfied of his qualifications and good character, they shall grant him a license authorizing him to perform such duties for the term of five years upon the waters upon which he is found qualified to act, *"but such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, unskillfulness, or want of knowledge of the duties of his station, or the willful violation of any of the provisions of this title."* (Italics ours.)

It is the duty of the local board of inspectors to investigate all acts of incompetency or misconduct committed by any licensed officer, and after reasonable notice in writing given to the delinquent of the time and place of such investigation witnesses may be examined under oath touching the performance of duties of such licensed officer, and if the board shall be satisfied that such officer is incompetent, or has been guilty of misbehavior, negligence, or unskillfulness, or has endangered life, they shall immediately suspend or revoke his license. Section 4450, Rev. Stat. (Comp. St. 1913, § 8212). Whenever the local inspectors refuse to grant a license, or suspend or revoke a license, any person deeming himself wronged by such refusal, suspension, or revocation may, within 30 days thereafter, on application to the supervising inspector of the district, have his case examined anew by such supervising inspector, and such supervising inspector may revoke, change, or modify the decision of such local board. Section 4452, Rev. Stat. (Comp. St. 1913, § 8214).

[1, 2] I think it is apparent that the right of appeal is given only to an interested party, that a stranger to the proceeding has no standing, and that Mullen's appeal is a nullity, and the action of the supervising inspector, therefore, without jurisdiction, and his act can have no legal effect, and the threatened act of the local inspectors to revoke such license without notice and hearing (section 4450, supra), is arbitrary, and not authorized by law. I think the board should be

enjoined from enforcing the order of the supervising inspector, and that, if the plaintiff is incompetent or guilty of misconduct, or amenable under the law, he should be proceeded against as provided by the laws and general rules and regulations, and given an opportunity to be heard before being deprived of a right which has been accorded him by the local board.

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FREDENBERG et al. v. WHITNEY et al.

(District Court, W. D. Washington, N. D. January 10, 1917.)

No. 113.

1. SHIPPING ⊜16—PENALTIES—BOARD OF STEAMBOAT INSPECTORS—REVIEW OF FINDINGS.
   The courts are without authority to review findings of steamboat inspectors by writ of certiorari.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 30–44.]

2. EQUITY ⊜46—JURISDICTION—"ADEQUATE REMEDY AT LAW."
   To defeat the jurisdiction of equity on the ground of an "adequate remedy at law," the remedy at law must be as complete, practical, and efficient to the ends of justice and its prompt administration as a remedy in equity.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159–163.
   For other definitions, see Words and Phrases, First and Second Series, Adequate Remedy.]

3. SHIPPING ⊜16—PENALTIES—EQUITABLE JURISDICTION—ADEQUATE REMEDY AT LAW.
   Equity has jurisdiction of a suit by an officer of a steam vessel to set aside an alleged illegal order suspending his license, and to enjoin the enforcement of fines aggregating $13,000 assessed against him for acting after such suspension, on the ground that his right to make a defense to any proceeding against him to enforce such penalties, which may or may not be instituted at the option of the government, does not afford him an adequate remedy at law.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 30–44.]

4. EQUITY ⊜46—JURISDICTION—ADEQUATE REMEDY AT LAW.
   A legal remedy, to be adequate, and to exclude the jurisdiction of equity, must be a remedy which the party himself controls and can assert at the moment.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159–163.]

5. SHIPPING ⊜14—REVOCATION OF OFFICER'S LICENSE—AUTHORITY.
   The provisions of Rev. St. §§ 4440, 4450 (Comp. St. 1913, §§ 8202, 8212), authorizing the suspension or revocation of the license of a licensed officer of a steam vessel by the local board of inspectors for bad conduct, violation of rules, etc., are clearly penal, and must be strictly construed. The board is without authority to suspend or revoke a license, except for a cause plainly stated in the statute and after a hearing on written notice to the officer, advising him of the charge against him and giving him an opportunity to be heard thereon.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 28, 29.]

In Equity. Suit by John H. Fredenberg and the Kingston Transportation Company against Bion B. Whitney and Henry C. Lord, as

Local Inspectors at Seattle, Wash., in the Steamboat Inspection Service, Department of Commerce of the United States, and John K. Bulger, Supervising Inspector for the First District, and Roscoe M. Drumheller, Collector of Customs, District No. 30, United States Customs Service. On motion to dismiss bill. Denied.

Peterson & MacBride, of Seattle, Wash., for petitioners.

Clay Allen, U. S. Dist. Atty., and Winter S. Martin, Asst. U. S. Dist. Atty., both of Seattle, Wash., for defendants.

NETERER, District Judge. The bill in equity alleges: That the petitioner Fredenberg is a citizen of the United States, and the Kingston Transportation Company a corporation of the state of Washington, having paid its annual license fee as required by statute; that Fredenberg is mate and pilot of steam vessels under government license No. 54040-2-3. That defendants Whitney and Lord are local inspectors in the United States steamboat inspection service, with headquarters at Seattle. That defendant Bulger is the supervising inspector of the First district of said service. That Drumheller is the collector of customs for district No. 30, United States Customs Department, under the Treasury Department of the service. That on June 23, 1916, Fredenberg was navigating the steamer Bremerton from Seattle en route to Bremerton, and about 4 o'clock p. m. the steamer Flyer, also en route from Seattle to Bremerton, struck the Bremerton in the stern. That no damage was done to either vessel, but that petitioner reported the matter in writing to the local inspectors, Whitney and Lord. That on the 15th of August, 1916, charges were made by the local inspectors against petitioner as follows, omitting caption:

"You, as a licensed officer of steam vessels, are hereby charged with violation of article 25, rule IX, page 10, of the Pilot Rules for certain inland waters of the Atlantic and Pacific Coasts and of the coast of the Gulf of Mexico, in connection with the collision between the steamer Kitsap and the steamer Flyer on June 23, 1916, which article specifies that 'in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.' You are directed to appear at this office on Thursday, August 17, 1916, at 10 a. m., to make answer to said charge. You may be represented by counsel if you so desire."

That on September 1st, following, the defendants Whitney and Lord, acting as local inspectors, rendered a decision wherein it was held that the charge against petitioner Fredenberg was sustained, and pursuant to sections 3 and 4 of the Pilot Rules for certain inland waters, approved June 7, 1897, and which read as follows:

"Sec. 3. That every pilot, engineer, mate or master of any steam vessel, and every master or mate of any barge or canal boat, who neglects or refuses to observe the provisions of the preceding section, shall be liable to a penalty of fifty dollars, and for all damages sustained by any passenger in his person or baggage by such neglect or refusal: Provided, that nothing herein shall relieve any vessel, owner or corporation from any liability incurred by reason of such neglect or refusal.

"Sec. 4. That every vessel that shall be navigated without complying with the provisions of this act shall be liable to a penalty of two hundred dollars, one-half to go to the informer, for which sum the vessel so navigated shall be

liable and may be seized and proceeded against by action in any District Court of the United States having jurisdiction of the offense"

—a fine of $50 was imposed against Fredenberg and $200 against the vessel; and on the 18th of September following the defendant Drumheller, as collector of customs, made demand upon the petitioner for the payment of such penalty, and on the same day made demand upon the claimants of the vessel for the sum of $200. It is further alleged that, in addition to the penalty placed against the petitioners, the defendants Whitney and Lord attempted to suspend the license of Fredenberg, and made an order purporting to effect such suspension; that thereupon Fredenberg appealed from the decision of the local inspectors to Supervising Inspector Bulger, and on September 28, 1916, the defendant Bulger, as supervising inspector, affirmed the decision of the local inspectors. It is then alleged: That the acts of the local inspectors and of the supervising inspector in suspending the license was contrary to law and without jurisdiction and void. That following such suspension, and pending the appeal, the petitioner continued to act as mate and pilot on the steamer Bremerton, and the following letter was addressed to Fredenberg by the defendant Drumheller, dated October 27, 1916, omitting caption:

"Referring to office letter of the 18th ultimo, relating to penalty incurred by you, for acting as mate and pilot, on the American steamer Bremerton, while without authority of license to act in that capacity, owing to suspension of your license, this office has been instructed by the Secretary of Commerce to impose a penalty of one hundred dollars, under section 4438, Revised Statutes, for each voyage made by you in the capacity of mate and pilot since September 2, 1916. You are therefore requested to pay to this office immediately, the sum of thirteen thousand dollars, it having been shown that the vessel made one hundred and thirty trips with you acting as mate and pilot without authority of license to so act. * * *"

That a penalty in a like sum was on the same day assessed against the steamer Bremerton, and a like demand made for the payment of this sum. The prayer is that the order of suspension against Fredenberg be declared null and void, and that the defendants, and each of them, be permanently enjoined from enforcing the order of suspension, or enforcing any penalties for the violation thereof in any sum whatsoever.

The defendants have moved to dismiss the bill—

"upon the ground that the facts as stated therein do not constitute a cause of action for equitable relief, and for the further reason that the plaintiffs have an adequate remedy at law by writ of certiorari, or by defending and setting forth the facts upon which they pray for relief in this cause, in their answer, in the event that proceedings be taken by the collector to recover the penalties, and for the reason that there is a misjoinder of parties defendant."

[1] The ground of the motion that there is an adequate remedy at law by writ of certiorari, I think, has been practically abandoned, and, if not abandoned, I think that Williams v. Potter, 210 Fed. 318, affirmed 223 Fed. 423, 139 C. C. A. 17, disposes of the contention. The Circuit Court of Appeals (223 Fed. at page 424, 139 C. C. A. at page 18) said:

"The courts have no authority to review the findings of the steamboat inspectors by appeal or writ of error. The most they can do is to see that the

inspectors act within their jurisdiction, and that the Constitution and statutory rights of citizens are not impaired."

[2, 3] The contention that there is a misjoinder of parties does not appear. The contention that there is an adequate remedy at law by defense to a suit to recover the penalty, I think, must likewise fail. In order to be adequate, the remedy at law must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as a remedy in equity. Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. The Supreme Court of the United States, in Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, held that a suit by stockholders against the corporation to enjoin the directors and officers from complying with the provisions of a state statute, alleged to be unconstitutional, was properly brought within the equity rule of the court. This was a case where the Minnesota rate law was in question. It was contended that there was an adequate remedy at law, for that the officers could make defense when they were arrested and brought to the bar of the court. The court held that it would not be equal protection to an individual to allow him to come into court and make his defense upon condition that, if he fails, the penalty would subject him to imprisonment, or to extravagant and unreasonable loss. The law, under such circumstances, would impose such conditions as would work abandonment of individual rights, and such a gross hardship as would deny a speedy and adequate remedy at law, especially when penalties are so enormous as to deter a person from asserting a constitutional right and jeopardizing his liberty, or resulting in great loss of property. In Barber v. Barber, 21 How. 591, 16 L. Ed. 226, and Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82, the Supreme Court has held, in effect, that the remedy, to be adequate, must, to the chancellor, in exercising sound discretion, appear to be as plain, practical, efficient, and speedy as the remedy in equity, in order to decline jurisdiction; and that the legal remedy, both in respect of the final relief and the motive of attaining it, must be as efficient in law as in equity, was held by the same court, in Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005, and unless it appears that the legal remedy is neither obscure or doubtful as to its adequacy or completeness, the chancellor should not decline to extend the equitable arm of the court.

[4] The legal remedy, if any, which could be asserted when formal action is entered to recover the penalty, is a remedy which rests solely in the will of the government. No action has been instituted. Demand has been made. When action will be instituted, and opportunity to make legal defense afforded, rests solely with the discretion of the public officials. "Adequate remedy at law," in Wheeler v. Bedford, 54 Conn. 244, 7 Atl. 22, is said to be a remedy vested in the complainant, to which he may at all times resort at his own option, fully and freely, without let or hindrance; and in Bank v. Stone (C. C.) 88 Fed. 383, at page 397, the court said:

"It would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary

chooses to give it to him. A remedy at law cannot be adequate, if its adequacy depends upon the will of the opposing party."

The Supreme Court of the state of Washington, in Ritterhoff v. Puget Sound Bank, 37 Wash. 76, at page 81, 79 Pac. 601, at page 602 (107 Am. St. Rep. 791), in an action brought to cancel a note held by the bank, which plaintiffs claimed was forged, in taking equitable cognizance, said:

"Respondents' credit may be continuously affected, or injured, by reason of the existence of this claim, for appellant, at its election, may continue to hold the note and assert a claim thereon for an indefinite period, and then commence an action at law for its enforcement immediately prior to such time as the note would be barred by the statute of limitations."

In the instant case the petitioners, having assessed against them, respectively, $13,000, have their credit destroyed to that extent. They are powerless to have their rights adjudicated in a court of law until the defendants seek to collect the penalty in a court of law. This may be postponed indefinitely. The statute of limitations, perhaps, never would run against the government, and hence the petitioners would be remediless, unless through the equity side of the court. In these days of industrial expansion, parties should have a right to have any issue which involves their financial status speedily adjusted, and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the party himself controls and can assert at the moment. When there is a doubt in the mind of the chancellor as to the adequacy of the remedy, that doubt should be resolved in favor of the petitioners. Simpkins, Equity Suit, p. 25; Rumbarger v. Yokum (C. C.) 174 Fed. 55.

[5] The court having concluded to entertain the petition, it must be determined whether it states any grounds for relief. It is contended that, an appeal having been prosecuted, the operation of the order of suspension was suspended by the appeal until the appeal was disposed of, and that otherwise the right of appeal would be inoperative, because in many cases the penalty would have been suffered by the time the appeal was heard by the supervising inspector; and it is further contended that the license could not be suspended, as the charge made against the petitioner did not provide for suspension of license as a penalty for violation. It is conceded that petitioner was charged only for violation of article 25, rule IX, for the violation of which suspension of license is not a penalty. It is contended, however, by the defendants, that the inspectors had authority to suspend the license by virtue of section 4439, Rev. Stat. (Comp. St. 1913, 8201), which reads:

"Such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, incapacity, inattention to his duties, or the willful violation of any provision of this title applicable to him"

—and that:

"Section 4450 [section 8212] is enlarged by the Pilot Rules, and in any event misconduct of any kind, whether it grows out of the violation of a pilot rule or whether it would be classed as negligence or misconduct, broadly speaking,

without regard to any statute, comes clearly within the terms of section 4450 and gives the local board jurisdiction to revoke or suspend a license."

It is observed, however, that this section provides that the accused must have reasonable notice in writing of the time and place of such investigation, and notice implies advice of charge to be investigated.

The rules of practice promulgated by the Department of Commerce for the steamboat inspection service (May 13, 1916, Ed., page 125) further emphasizes this fact. The first paragraph provides:

"1. *Suspension and Revocation of License.* The inspector shall, when charges have been duly filed against a licensed officer of a vessel, furnish the accused with a copy thereof, setting forth specifically their character and the section of the statutes or the rules of the board that have been violated."

The law in issue is clearly penal, and under all of the authorities, must be strictly construed. Liberal construction, as suggested by the defendants, cannot prevail in such a proceeding. Nor can the penalty be invoked and the provisions enforced unless the penalty is plainly imposed by the statute. Tiffany v. Bank, 18 Wall. 409, 21 L. Ed. 862. Nor can a party be subjected to a penalty for the violation of a requirement upon which he has not been afforded opportunity to answer. If it was sought to suspend the license of the petitioner, he should have been notified of the charge made and afforded an opportunity to defend. This court, in Joyce v. Bulger et al., 240 Fed. 817, said:

"Section 4440 of the Revised Statutes [Comp. St. 1913, § 8202] provides that when any person applies for authority to be employed as chief, second or third mate of ocean or coastwise steam vessels, the inspectors shall require satisfactory evidence of the knowledge, experience, and skill of the applicant, and, if satisfied of his qualifications and good character, they shall grant him a license authorizing him to perform such duties for the term of five years upon the waters upon which he is found qualified to act, '*but such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, unskillfulness, or want of knowledge of the duties of his station, or the willful violation of any of the provisions of this title.*' It is the duty of the local board of inspectors to investigate all acts of incompetency or misconduct committed by any licensed officer, and after reasonable notice in writing given to the delinquent of the time and place of such investigation, witnesses may be examined under oath touching the performance of duties of such licensed officer, and if the board shall be satisfied that such officer is incompetent, or has been guilty of misbehavior, negligence, or unskillfulness, or has endangered life, they shall immediately suspend or revoke his license. Section 4450, Rev. Stat. [Comp. St. 1913, § 8212]."

That the rules of procedure are valid, and authority lodged in the department to make them, and as such have the force and effect of law, has been frequently recognized. United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; Cosmos Exploration Co. v. Gray Eagle Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230. The license was suspended arbitrarily, without notice, and the assessment of the penalty of $26,000 is therefore not warranted.

What has been said disposes of the motion to dismiss, and no opinion is expressed as to the effect of the appeal upon the order suspending the petitioner's license.

The motion is denied.

## NORRIS et al. v. MONTEZUMA VALLEY IRR. DIST. et al.

(District Court, D. Colorado. December 2, 1916.)

No. 6532.

WATERS AND WATER COURSES ⇐231—IRRIGATION DISTRICTS—POWER OF ASSESSMENT—DISTRICT BONDS.

Irrigation Act May 3, 1905 (Sess. Laws Colo. 1905, p. 246), providing for the organization of irrigation districts, has for its object the authorization of local improvements, to be paid for by special assessments on the lands to be benefited, on the basis of the acre unit. It provides that lands which will not be benefited by the improvement shall be excluded from the district, and that those included shall be subject to an annual assessment for the payment of the district bonds and interest, and that for the purpose of such assessment they shall be valued at the same rate per acre, and in case of a shortage of water it shall be prorated on the acre basis; that the fund produced by the assessments shall be kept separate from all other funds. *Held*, that land subject to assessment under such act can be required to bear only its proportionate share of the cost of the improvement; that when an assessment has been levied by a county board on the lands of a district to pay the annual interest on the district bonds, and sufficient in amount, the board has no power to reassess lands which have paid the assessment to make up a deficiency caused by the failure of other lands to pay.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320.]

At Law. Action by Mark Norris and others against the Montezuma Valley Irrigation District and others. Petition by plaintiffs for mandamus to enforce judgment. Denied.

Hayt, Dawson & Wright, of Denver, Colo., and Mark Norris, of Grand Rapids, Mich., for plaintiffs.

Ritter & Buchanan, of Durango, Colo., W. F. Mowry, of Cortez, Colo., and S. W. Carpenter, of Mancos, Colo., for defendants.

LEWIS, District Judge. The petitioners obtained a judgment in this court on January 19th last for the sum of $5,415.10 on interest coupons detached from irrigation district bonds issued by the respondent District, and now apply for writ of mandamus to compel a levy to be made for its payment. There is an answer resisting the issuance of the writ on the grounds set up.

The Montezuma Valley Irrigation District was organized under the act approved May 3, 1905 (1905 Session Laws, p. 246), and its powers and purposes are set forth in that act.

On May 1st, 1907, it issued its negotiable bonds in denominations of $500.00 each, to the amount of $795,000, and thereafter on December 1st, 1910, a second issue of the same denomination to the amount of $10,000, both issues bearing interest at the rate of six per cent. per annum, represented by semi-annual coupons attached, payable June 1st, and December 1st each year. The interest coupons on which the judgment was obtained fell due on December 1st, 1914. Substantially all of the interest prior to that date had been paid and the coupons

taken up. It thus appears that the annual interest on the total bonded indebtedness of $805,000, amounted to $48,300.

The Board of County Commissioners of Montezuma County is authorized and directed under the act to make annual levies to meet the interest payments, and in the latter part of 1913, as the act required, they made the levy to pay the interest falling due in 1914. The levy would have produced when fully discharged $43,848.88. It was anticipated on representation to the commissioners by the district board that the balance required over and above the levy to meet the interest for that year would be made up out of about $12,000, that was expected to come in from other sources provided for in the act, and that amount did actually come in, so that the levy with the additional fund from other sources exceeded in amount the interest falling due in 1914, but the levy was not all paid off. The shortage on account of failure of different land owners to pay was about $20,000. Interest coupons maturing that year are still outstanding to the amount of about $15,000, of which $225 is of the second issue and the remainder of the first issue. There is now about $1,400 in the treasury applicable to their payment.

It thus appears that the levy to meet the interest for 1914 was amply sufficient for that purpose if all payments required under it had been made.

The bonds were in form negotiable and on their face stated the title of the act (supra) under which they were issued and the date of its approval, as the statute required. To now compel another levy for the payment of the 1914 interest is to require lands that have already discharged the 1913 levy to make up the deficiency caused by a failure to realize the amount assessed against other lands in the district; and this the respondents insist cannot lawfully be done. They say that when one levy ample in amount has been made to meet the accruing interest and every step taken authorized by the law to enforce its payment, the power given under the act is exhausted, that the act is one for local improvements, that it only authorizes assessments in proportion to the benefits received, that no power is given to the respondent Board of County Commissioners or any other officer either expressly or by implication to levy a general tax on the property in the district, that by necessary implication from the terms of the act such power is withheld, that the tracts which have discharged the levy for the 1914 interest have met their whole obligation, and that to now re-assess them for the purpose of making up the deficiency caused by the failure to discharge the levy on other tracts would violate the plain purpose and requirement of the act and would take, without due process of law and without compensation, the property of the owners of the tracts that have paid.

The one and only purpose of the act is to provide for making a local improvement, the cost of which is to be assessed by the acre unit against the lands to be thereby benefited. All lands not benefited are expressly excluded from bearing any of the burden, the third section requiring their exclusion by the board. The first section exempts all ditches theretofore constructed and not owned by the district and lands watered thereby. The second section authorizes only resident free-

holders to take part in the formation of the district. By the fourth section no one who is not a qualified elector and a resident freeholder can at any time vote on any question concerning the establishment and management of the district. Section 17 reads:

"Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as herein provided."

Section 19 provides:

"All lands within the district for the purposes of taxation under this act shall be valued by the assessor at the same rate per acre: Provided, that in no case shall any land be taxed for irrigation purposes under this act, which from any natural cause cannot be irrigated, or is incapable of cultivation,"

and also excludes from assessment the improvements on the lands to be assessed. By section 20 the taxes levied under the act are denominated "special taxes," and by section 21 the funds collected from the assessments to pay bonds and interest must be kept separate from all other funds and from each other. If water is insufficient for all, it must be pro rated (section 29), and by the following sections other lands that may be thereafter included shall bear their pro rata share of the entire burden.

Without more, the terms of the act are strongly conducive to support respondents' contention; but I do not regard that question as open for discussion. It is agreed that the Colorado act is substantially a copy of the California act, adopted in 1887 (St. 1887, p. 29) and commonly known as the Wright Act, and when Colorado adopted the legislation of that state she accepted and adopted the construction theretofore placed on the act by the courts of that state.

Prior to May, 1905, the Supreme Court of California in Turlock Irrigation District v. Williams, 76 Cal. 360, 18 Pac. 379, had the Wright Act under consideration in a proceeding by the district against its secretary in which it was sought to compel him to sign the district bonds authorized by the act. It was said, among other things, that the act provided for local improvements, and that it came under the rule that charges for such improvements are to be apportioned in some just and reasonable mode according to the benefits received, citing Hagar v. Reclamation District, 111 U. S. 705, 4 Sup. Ct. 663, 28 L. Ed. 569.

Again, in San Diego v. Irrigation District, 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33, that court had occasion to consider the act. The City of San Diego contended that the three thousand acres which it owned within the district were not subject to assessment under the Wright Act; that by the Constitution of the state the lands were expressly exempt from taxation. The decision was rendered in 1895, and in response to the contention the court said:

"But the assessment to satisfy which the lands in question were sold is not a tax, within the meaning of said provision of the Constitution. * * * The district, when formed, is a local organization, to secure a local benefit, to be derived from the irrigation of lands from the same source of water supply, and by the same system of works. It is, therefore, a charge upon

lands benefited, or capable of being benefited, by a single local work or improvement, and from which the state, or the public at large, derives no direct benefit, but only that reflex benefit which all local improvements confer. In Taylor v. Palmer, 31 Cal. 241, 255, the court defined the term 'assessment,' as distinguished from 'taxation,' thus: 'It is not a power to tax all the property within the corporation for general purposes, but the power to tax specific property for a specific purpose. It is not a power to tax property generally, founded upon the benefits supposed to be derived from the organization of a government for the protection of life, liberty, and property, but a power to tax specific property founded upon the benefits supposed to be derived by the property itself from the expenditure of the tax in its immediate vicinity.' "

Other western states have passed acts quite similar to the Wright Act and their courts have reached the same conclusion in this respect. See Board v. Peterson, 4 Wash. 147, 29 Pac. 995; Lundberg v. Irrigation District, 40 Utah, 83, 119 Pac. 1039; Irrigation District v. Bradley, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201; Board v. Collins, 46 Neb. 411, 64 N. W. 1086; and the Supreme Court of Colorado in Thomas v. Patterson, 159 Pac. 34, apparently adopts the construction given the Wright Act in this respect in its reference to Jewell v. City of Superior, 135 Fed. 19, 67 C. C. A. 623.

When a controversy involving a construction of the Wright Act reached the Supreme Court (Irrigation District v. Bradley, 164 U. S. 112, 176, 17 Sup. Ct. 56, 41 L. Ed. 369), that court, of course, accepted the construction given the Wright Act by the Supreme Court of California, and accepting that construction it decided the case in accordance with the rules applicable to assessments for local benefits. That this was the conclusion is further demonstrated by French v. Barber Asphalt Paving Co., 181 U. S. 340, 21 Sup. Ct. 625, 45 L. Ed. 879, Houck v. Little River District, 239 U. S. 262, 36 Sup. Ct. 58, 60 L. Ed. 266, and St. Louis Land Co. v. Kansas City, 241 U. S. 430, 36 Sup. Ct. 647, 60 L. Ed. 1072.

In view of the foregoing I am of the opinion that the annual levies required by the Colorado act are not to be regarded in the light of levies for general taxes, and must be considered as assessments to pay for local improvements, and that the total burden thus placed upon each acre must be reasonably proportionate to the benefits received. The owners cannot be taxed disproportionately to each other. Realty Co. v. Granite Co., 240 U. S. 55, 59, 36 Sup. Ct. 254, 255, 400, 60 L. Ed. 523. Such assessments are only sustainable when the benefits received by the property assessed are proportionate to the burden placed upon it. Ill. C. Railroad v. Decatur, 147 U. S. 190, 199, 13 Sup. Ct. 293, 37 L. Ed. 132; Hagar v. Reclamation District, supra; City v. Knowles, 17 Colo. 204–212, 30 Pac. 1041, 17 L. R. A. 135; City v. Robinson, 12 Colo. 593, 599, 21 Pac. 899; City v. Kennedy, 33 Colo. 80, 80 Pac. 122, 467; Cooley's Constitutional Limitations (5th Ed.) 617.

That act gives the county assessor and the Board of County Commissioners the power and imposes on them the duty to make the annual assessment and levy (sections 17, 18, 19, 20) only on the lands to be benefited; it provides that the bonds and interest shall be paid by revenue derived from an annual assessment upon the real property of the district which shall remain liable to be assessed for such pay-

ments as therein provided; and the assessments and levy are restricted to the property to be benefited, each acre subject to irrigation and cultivation being in the judgment of the Legislature equally benefited by the improvement. The power thus given and the manner of its exercise is specific and excludes any implication of any other or greater power. The method provided by the act for the payment of the bonds and interest is exclusive, and the court cannot require the board to depart from the method prescribed for it in the act. Stryker v. Board, 77 Fed. 567, 574, 23 C. C. A. 286.

The proposition that the passing of the coupons to judgment has not enlarged the rights of the petitioners to obtain payment, is not seriously controverted.

There is no dispute here between holders of interest coupons over the fund now on hand and in the treasury as in Thomas v. Patterson, 159 Pac. 34, though there are outstanding coupons due at the same time those that passed to judgment were due. There, as here, the assessment and levy was not made separately to pay the interest on the first and second issues, but one levy only was made to cover both. Under that case it was held that each coupon was entitled to only its proportionate share of the money in the treasury. It may be doubted whether that holding can be said to be a construction of the state statute. However, I feel that a good purpose is served in keeping the procedure uniform in state and federal court in the same jurisdiction, and will follow the practise adopted in that holding.

The testimony adduced is, I think, sufficient to enable counsel to agree on the proportionate amount that should be paid on the judgment, and time will be given until the 27th inst. for that purpose. If they are unable to agree the court will then fix the amount and the writ will issue against the county treasurer for the amount named.

The writ prayed for against the Board of County Commissioners and the County Treasurer to make assesssment and levy will, for the reasons above stated, be denied. An order to that effect may be entered.

## THE IMBERHORNE.

(District Court, S. D. Alabama, S. D. February 13, 1917.)

No. 1640.

1 SEAMEN ⟸24—WAGES—PART PAYMENT AT INTERMEDIATE PORTS—FOREIGN VESSELS.

Seamen's Act March 4, 1915, c. 153, § 4, 38 Stat. 1165, amending Rev. St. § 4530, and providing for part payment of seamen's wages at intermediate ports, by its terms applies to seamen on foreign vessels while in ports of the United States, and, when invoked, must be enforced by the courts.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 123–128.]

2. SEAMEN ⟸23—SUIT TO RECOVER PART WAGES—CONSTRUCTION OF STATUTE.

Dingley Act June 26, 1884, c. 121, § 10, 23 Stat. 55 (Comp. St. 1913, § 8323), as amended by Seamen's Act March 4, 1915, c. 153, § 11, 38 Stat. 1168, makes it unlawful to pay any wages to a seaman in advance of their having been earned, and provides that "the payment of such advance wages * * * shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages." It further provides that "this section shall apply as well to foreign vessels while in waters of the United States as to vessels of the United States." *Held* that, in a suit by seamen to recover one-half the wages earned on arrival in a port of the United States, under Rev. St. § 4530, as amended by section 4 of said Seamen's Act, the court cannot deduct from the wages earned the amount of advances made to them when they shipped, although they are aliens, serving on a foreign vessel, and the advances were made in a foreign country, where they were not unlawful.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 118–122.]

In Admiralty. Suit by John Koskiner and others against the Russian ship Imberhorne. Decree for libelants.

Rickarby & Austill, of Mobile, Ala., for libelants.
Harry T. Pegues, of Mobile, Ala., for claimant.

ERVIN, District Judge. This is a libel filed by various seamen employed on the Russian ship Imberhorne, in which they claim under the provisions of section 4530 of the Revised Statutes, as amended by what is commonly called the "Seamen's Act," one-half of the wages that had been earned by said seamen up to the time the Imberhorne arrived at Mobile. The seamen were shipped at Grenock, Scotland, on or about December 1, 1916, and so had served about 55 days at the time when they reached Mobile. The proof shows that they then demanded of the master one-half of the wages that had been earned by them, and that the payment was refused by him, because he claims that he paid to each of these seamen one month's pay in advance, which, taken together with the subsequent payments made by the master to such seamen, amounts to more than one-half the total wages earned by such seamen up to the time of their demand on the captain.

The libelant contends that, under the provisions of section 10 (a) and

10 (e) of the Seamen's Act, the deduction of advanced wages is prohibited. The master contends that the seamen have deserted, and under the provisions of section 4596 of the Revised Statutes, as amended by said Seamen's Act, that they have forfeited their wages.

The master and mate have been examined on behalf of the vessel, and the seamen have also been examined on their own behalf. Both the master and mate claim that the seamen have deserted, and that such desertion has been entered on the log of the ship. The seamen claim that they did not desert, but that they demanded one-half of the pay, which they claim they are entitled to, and that they have been ordered ashore by the master, and that they came ashore as a result of such order. The master denies ordering them ashore.

Upon a careful consideration of the evidence of the master, I am convinced that, while he has entered upon the log book the fact of the absence of the seamen for more than 24 hours, still he does not consider that these seamen have deserted; but he still considers that they have a right to return and continue under their original employment with the vessel. I find, therefore, that there has been no desertion on the part of these seamen.

There is another question presented in this case by the Russian consul, wherein he files a protest against this court's assuming jurisdiction of this question, because the terms of the treaty between Russia and the United States gives to the Russian consul exclusive right to hear such questions as this. I find, however, that the provisions of this treaty have been abrogated, and the terms of this act are in force as well against this vessel as against vessels of the United States. The Ixion (D. C.) 237 Fed. 142.

[1] The Supreme Court, in the case of Patterson v. Bark Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, say:

"Yet when a foreign merchant vessel comes into our ports, like a foreign citizen coming into our territory, it subjects itself to the jurisdiction of this country. * * * It follows from these decisions that it is within the power of Congress to prescribe the penal provisions of section 10, and no one within the jurisdiction of the United States can escape liability for a violation of those provisions on the plea that he is a foreign citizen or an officer of a foreign merchant vessel. It also follows that it is a duty of the courts of the United States to give full force and effect to such provisions. It is not pretended that this government can control the action of foreign tribunals. In any case presented to them they will be guided by their own views of the law and its scope and effect, but the courts of the United States are bound to accept this legislation and enforce it whenever its provisions are violated. * * * And this legislation, as plainly as words can make it, imposes these conditions upon the shipment of sailors in our harbors, and declares that they are applicable to foreign as well as to domestic vessels. Congress has thus prescribed conditions which attend the entrance of foreign vessels into our ports, and those conditions the courts are not at liberty to dispense with."

It is true here the court was passing upon a shipment of seamen made within this country, but the language used certainly carries with it the idea that, regardless of whether the shipment may have been made here or elsewhere, when the vessel comes here it becomes immediately subject to our laws on this question. This must be necessarily true, because the same court (190 U. S. on page 173, 23 Sup. Ct. on page 822, 47 L. Ed. 1002) says:

"When, as here, the statute declares in plain words its intent in reference to a prepayment of seamen's wages, and follows that declaration with a further statement that the rule thus announced shall apply to foreign vessels as well as to vessels of the United States, it would do violence to language to say that it was not applicable to a foreign vessel."

That court follows this statement by holding that this enactment is not invalid because invasive of the liberty of contract guaranteed by our Constitution.

[2] This brings us to the main question in the case. In the case of The State of Maine (D. C.) 22 Fed. 733, Judge Brown, in construing the Dingley Bill (Act June 26, 1884, c. 121, 23 Stat. 53), holds that, where advances were made to the seamen in a foreign jurisdiction in order to induce them to sign, such advance is not included under the prohibitory clause of the act, and hence such advance on wages should be deducted from the one-half of the wages earned by the seamen. His opinion is strongly and clearly written, and I agree in the main with what he there says in holding that the penalties declared by this act cannot be imposed upon the master or the vessel for acts done in a foreign jurisdiction.

The Dingley Bill was amended by what is commonly called the "Seamen's Act," but the provisions of the Dingley Bill as to forbidding advances on seamen's wages do not seem to be changed by the amendment. The question in my mind is one that does not seem to have been considered by Judge Brown, and is whether the provisions of section 10 of the Dingley Act, as amended by the Seamen's Act, does not lay down a rule which a judge in this country is bound to follow in passing upon how one-half of the wages of a seaman is to be calculated. In other words, that even though the penalties declared by the act cannot be applied to or enforced against the vessel, still when we come to figure the one-half of the seaman's wages that have been earned, we are directed by the terms of the act to exclude any advances which may have been made by the ship to the seaman, whether made in a foreign jurisdiction or not, and we must follow this rule in calculating the wages of the seaman when a libel is filed in the admiralty courts of this country.

The act, in amending section 4530, says:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall *have then earned* at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void."

Section 10 (a) of the Dingley Act, as amended, provides:

"That it shall be, and is hereby, made unlawful *in any case* to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. * * * The payment of such advance wages or allotment shall *in no case* except as herein provided *absolve the vessel* or the master or the owner thereof from the *full payment of wages* after the same shall have been actu

ally earned, and shall be no defense to a libel suit or action for the recovery of such wages." (Italics mine.)

Section 10 (e), as amended, reads:

"That this section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States."

In considering the question of whether or not the advance on the wages which has been made in a foreign jurisdiction should be excluded, I am struck in the first place with the statement contained in section 10 (a):

"The payment of such advance wages or allotment shall *in no case* except as herein provided *absolve the vessel* or the master or the owner thereof from *full payment of wages* after the same shall have been actually earned, and shall be *no defense to a libel* suit or action for the recovery of such wages."

Now, in the first place, here is a direct instruction to the court to reject the advance on the trial of this question, and the language seems to me to necessarily exclude the advance, because it says "in no case" is the advance to be allowed.

We are necessarily bound to concede that the act is to have some force, even though the shipping of the seaman and the advance on his wages was made in a foreign port, because the provision requiring the payment of the one-half of the wages earned by the seaman is before the court for enforcement, and this provision is to be enforced, notwithstanding the fact that the seaman was shipped in a foreign jurisdiction. If, then, some part of this act is applicable on this state of facts, then the question is how far the provisions of the act shall be applied. What provisions of the act are applicable, and what provisions are inapplicable, on this state of the facts? If we should say that, because the seamen were shipped in a foreign jurisdiction, none of the provisions of the act are applicable, we should have an entirely different question, because we would be controlled, not by the provisions of the act, but by the general maritime law; but the moment we concede that the seaman, under the provisions of this act, is entitled to the payment of one-half of the wages he *may have earned,* then it seems to me that we must also concede that the other provision of the act which rejects the advance on the wages must also be in force, no matter where such advances may have been made, and to my mind the provisions of section 10 (a) lay down the law which this court is bound to follow.

Again, it will be noticed that the advance to the seaman on his wages before the same have been earned is declared by the act to be unlawful. Certainly it cannot be contemplated that the courts of this country would enforce an agreement or transaction which Congress has declared to be unlawful here, even though such agreement or transaction was not unlawful where the same transpired. Such agreement or transaction would still be unlawful here. 2 Chitty on Contracts, 972 (11th American Edition).

In my opinion, when a libel is filed in the United States by a seaman seeking to recover one-half of the wages earned by him, and it

is shown that there has been paid to such seaman in a foreign port an advance on his wages, this court is bound by the provisions above quoted to reject the advance in ascertaining the one-half of the seaman's wages which may now be due him.

Tending to further support the construction which I have given to this act, it occurs to me, are the provisions of section 16 of the Seamen's Act, which provides:

"That in the judgment of Congress articles in treaties and conventions of the United States, in so far as they provide, * * * and any other treaty provision in conflict with the provisions of this act, ought to be terminated, and to this end the President be, and he is hereby, requested and directed, within ninety days after the passage of this act, to give notice to the several governments, respectively, that so much as hereinbefore described of all such treaties and conventions between the United States and foreign governments will terminate on the expiration of such periods after notices have been given as may be required in such treaties and conventions."

Certainly, unless Congress intended these provisions to be applicable in the United States, it would not require the President to take steps to abrogate any treaty provisions which were in conflict with the provisions of the act.

I am, therefore, of the opinion that the libelants are entitled to recover, and a decree will be entered accordingly:

| | |
|---|---|
| A. Waltonen, the sum of | $ 29.02 |
| Artur Alto, the sum of | 27.84 |
| John Olson, the sum of | 24.68 |
| John Koskiner, the sum of | 22.44 |
| Adolf Mul, the sum of | 33.48 |
| Total | $137.46 |

—for which said amounts a decree will be entered against the said ship Imberhorne.

## In re FAIRBURN OIL & FERTILIZER CO.

(District Court, N. D. Georgia. March 27, 1917.)

No. 5366.

1. BANKRUPTCY ⟸164—PREFERENCES—WHAT CONSTITUTE.
Where an insolvent corporation, which was subsequently adjudicated a bankrupt, made deposits in a bank to which it was indebted on notes just a few days before bankruptcy, it being understood that the amount of the deposit was to be applied on notes, such deposit is preferential, the bank before applying it on the notes receiving checks from the corporation, for in such case, as the purpose of the deposit was to discharge the notes, the bank could not, as in ordinary cases, set off the amount thereof against indebtedness due it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267.]

2. CORPORATIONS ⟸545(6)—PREFERENCES TO OFFICERS.
Where notes of an insolvent corporation were indorsed by persons who were either directors of the creditor bank or of the bankrupt company, and in some instances both were satisfied pro tanto by the application of deposits made by the insolvent company only a few days before bankruptcy, such payments cannot be upheld on the ground that a bank has the right to apply a balance to a customer's credit against his indebtedness; Park's Ann. Civ. Code Ga. § 2222, declaring that directors primarily represent the corporation, and when it becomes insolvent they are bound to manage the remaining assets for the benefit of creditors, and cannot use their power to obtain a preference or advantage to themselves.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2172.]

In Bankruptcy. In the matter of the bankruptcy of the Fairburn Oil & Fertilizer Company. On intervention by the Fairburn Banking Company. Report of referee striking the claim of the intervener from the files, but allowing it to retain a preferential payment, on payment of the difference between the dividends it would have received and the payment, confirmed.

J. H. Longino, of Fairburn, Ga., for claimant.
J. S. James and J. R. Bedgood, both of Atlanta, Ga., for trustee.

NEWMAN, District Judge. The report of the referee on this branch of the Fairburn Oil & Fertilizer Company litigation is as follows:

"In the above-stated matter the Fairburn Banking Company filed three certain proofs of claim against said Oil & Fertilizer Company, amounting in the aggregate to $18,935.09. The trustee filed objections to said proofs, and prays an order disallowing the same on the ground that within four months of the 20th of June, 1916, when the involuntary petition to have said Oil & Fertilizer Company adjudged bankrupt was filed, the said Banking Company had been paid by said Oil & Fertilizer Company $5,174. On said petition said Oil & Fertilizer Company was adjudged bankrupt July 10, 1916, and that at the time of said payment the Oil & Fertilizer Company was insolvent, and that the said Banking Company knew said Oil Company was insolvent, and also knew that said payment would work a preference for said Banking Company. I find from the evidence that said Oil Company at the time of

said payment was insolvent, and that the said Banking Company knew of said insolvency, and that said payment would work a preference in its favor.

"The Banking Company insists that the law gave it the right to credit said sums of money on the indebtedness of said Oil Company, and that it had notified said Oil Company that the bank would not allow the Oil Company to draw out said money. After said notice it appears that the Oil Company drew its checks, one for $1,335.56, dated May 24, 1916, one for $3,575, dated June 16, 1916, and one for $263.50, dated June 17, 1916, on said Banking Company, and the amount thereof was credited on notes due said Banking Company. I find that when said Banking Company failed to credit said deposit on the notes due and held by it on said Oil Company, and write off said deposit without the consent of the Oil Company, but took checks from said Oil Company and applied same as credit upon said notes, that the law construes that as a voluntary payment on the part of the Oil Company, and therefore had the effect to take the transaction from under said principle of law allowing the Banking Company to credit said deposit upon said notes and write the deposit off without the aid or consent of the said Oil & Fertilizer Company. I find said payments contrary to law, being within four months from the filing of said involuntary petition, and said Oil & Fertilizer Company being insolvent, and the Banking Company knowing that it would work a preference.

"It is therefore ordered that said proof be disallowed and stricken from the files, unless said Banking Company shall, within 10 days, pay into the hands of the trustee the sum of $5,174, the amount paid said Banking Company by said checks. In the event said Banking Company pays to said trustee said sum of money, to wit, $5,174, then said Banking Company shall have the right and privilege to increase the sum of its claim by the exact sum, to wit, $5,174, so refunded as aforesaid, or to prove an additional claim for said sum of $5,174.

"Ordered, further, that said Banking Company have 10 days from this date in which to petition for review.

"Dated January 9, 1917."

On January 12, 1917, the referee amended his report as follows:

"The foregoing order and judgment is so far modified and amended as to allow the Fairburn Banking Company to hold said sum of $5,174 and account for same as dividends are paid. Said Banking Company is hereby required to pay to the trustee only the difference between said $5,174 and the amount of the dividends to be paid said Banking Company out of the amount of said bankrupt estate."

[1] The definite question in the case is whether or not the Banking Company should be allowed to retain the $5,174 as an offset and credit upon its claim against the bankrupt company, on the ground that the money deposited in its bank was so situated as that it should have been allowed as a set-off prior to the bankruptcy. It appears from the report of the referee and by the evidence that the amount named was drawn from the bank by checks and credited on notes of the bankrupt company, indorsed by certain individuals. The checks were drawn as follows: $1,335.56, May 24, 1916; $3,575, June 16, 1916; and June 17, 1916, $263.50.

While I do not know that the statement of the referee that this was paid by voluntary checks would, of itself, be sufficient to justify the recovery of the amount named as a preference, by the trustee, under the decision in Studley v. Boylston National Bank, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313, still I am satisfied that, under the facts

of this case, the manner in which this money was accumulated in the bank, and the way in which it was paid over to it by the officers of the bankrupt company, such payment constituted a preference. In the case of Studley v. Boylston National Bank, supra, it is true that the money was taken by the bank without reasonable cause to believe that a preference would result; still it was very clearly held that the payment by checks would not, of itself, be sufficient to prevent the right of set-off given to banks as against bankrupts by section 68 of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1913, § 9652]). Yet all of the additional facts here satisfy me that it was clearly a preference created by money received by the bank from the bankrupt company when the officers of the bank had every reason to know that a preference would result; that is, that the Banking Company would get more on its general claim against the bankrupt than other creditors of the same class.

In the case of American Bank & Trust Co. v. Coppard, 227 Fed. 597, 142 C. C. A. 229, the decision was by the Circuit Court of Appeals for this circuit, and is important here for that reason. While the set-off was allowed in that case, part of the language of the court, in the decision, is as follows:

"The question presented is of great importance to the business of banking, upon which the prosperity of the country so largely depends. It is true that if an insolvent, within four months antecedent to bankruptcy, should make deposits or give checks to a bank to enable it to secure a preference, the transaction would be inimical to the bankruptcy law, and would be held void as a preference. But when an insolvent customer makes a deposit with his bank, in good faith and in the usual course of business, at any time within four months before the petition in bankruptcy is filed against him, the bank is allowed to credit the amount on notes of the bankrupt held by it."

Now, in the testimony in this case it seems perfectly clear from the evidence that these deposits were made for the purpose of being credited on the bank's debt and going to pay the bank's debt in that way. The testimony of Mr. Green, the cashier of the bank, before the referee in this case, is to this effect:

"Q. You recall when that money was brought there to deposit that it was the intention at the time to use it for this payment? A. Which money is that? Q. When the money was brought by the officers of the Fairburn Oil Company, it was brought there with the intention, at the time, of applying it, at the time, on this indebtedness? A. Their account, as I remember it, was fairly active at that time, you know; they were collecting various sums from people who owed them at that time. Of course, I understood all they had would be applied to their indebtedness. Q. You recall this was a separate fund, with the intention it would be paid on this indebtedness? A. I thought all the amount they had would be applied to their indebtedness. Q. In other words, all the deposits they were making was intended to be applied on this indebtedness? A. Yes, sir."

This and much other testimony along the same line shows very clearly that the money was not, in the language of the Circuit Court of Appeals, deposited "in the usual course of business," but was put in the bank with the understanding that it would be applied to the debts of the bank. As the great bulk of the payments on the debts to the bank

was just a few days before the bankruptcy, and as it is perfectly clear that the officers of the bank knew that the Fairburn Oil & Fertilizer Company was in a failing condition, this money cannot be treated as an ordinary deposit in bank against which a set-off would be allowed. The decisions which allow such set-off, notwithstanding the fact that checks were given to pay it to the bank out of the bankrupt's account, do not contemplate a state of facts such as appears to have existed here; that is, that the bank officers, apprehending trouble from the customer, were getting all the money they could into the bank to apply to their own debt, as seems to be true here.

[2] In addition to this, the debts paid off were notes indorsed by persons who were directors either of the bank or of the bankrupt company, or in some instances of both, and who were, apparently, personally interested in thus being relieved of their individual liabilities, and who were parties to the transactions resulting in the payments to the bank. Park's Code of Georgia, § 2222.

I am compelled to hold that the action of the referee in this matter should be approved and confirmed.

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## TOMPKINS v. ST. REGIS PAPER CO.

(District Court, N. D. New York. April 2, 1917.)

1. APPEAL AND ERROR ⟸1207(3)—REVIEW—ALLOWANCE OF COSTS.
After affirmance of a decree on appeal, the trial court cannot take action on the allowance of costs by the appellate court.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4698.]

2. COSTS ⟸256(1)—ALLOWANCES—RECORD.
Where a record is made unnecessarily long and complex by a party, he may not recover the cost thereof, if successful.
[Ed. Note.—For other cases, see Costs, Cent. Dig. § 968.]

3. COSTS ⟸256(1)—ALLOWANCES.
In a suit for the infringement of a patent, defendant, who was successful below and also on appeal, took 29 long depositions from 29 witnesses, and its record on appeal amounted to 450 pages. The original decree allowed costs to defendant, as did the decree on appeal. *Held* that, where complainant did not, before the printing of the record, apply to dispense with the printing thereof on account of his pecuniary embarrassments, he cannot, there being no contention that defendant vexatiously included unnecessary matters in the record, then secure a reduction of the taxable costs; defendant as a matter of right being allowed costs for such items.
[Ed. Note.—For other cases, see Costs, Cent. Dig. § 968.]

In Equity. Suit by John D. Tompkins against the St. Regis Paper Company. A decree for defendant was affirmed on appeal, and complainant petitions for reduction of the costs taxed by the clerk in favor of the defendant. Petition denied.

See, also, 226 Fed. 744; 236 Fed. 221, — C. C. A. —.

Edwin J. Prindle, of New York City, for complainant.

Fish, Richardson & Neave, of New York City, for defendant.

RAY, District Judge. From the decision of the District Court, dismissing the bill of complaint herein, with costs, an appeal was taken to the Circuit Court of Appeals, where the decision of this court was affirmed, with costs, and the costs of such appeal were duly taxed in that court. With that taxation and bill of costs this court has nothing to do, except to make the judgment of that court the judgment of the District Court, and that has been done. On the final hearing in this court prior to the appeal there was no suggestion that unnecessary testimony had been taken or unnecessary expense incurred, or that defendant was not entitled to full costs. The defendant has presented to the clerk for taxation a bill of costs and disbursements in this court, amounting to $1,329.54, from which the clerk struck out $370.17, leaving the taxed bill $959.37. He either largely reduced or struck out entirely many items or charges.

[1] The application to this court for a further reduction of this bill of costs is based on the following allegations: That the patent in suit describes a simple process of treating wood fibers and similar materials to make paper stock. The process consists merely in the employment of an upwardly directed current of the treating liquid in a container containing the material to be treated. The patent contains but a single short claim, setting forth in simple language the steps of the process. In presenting its defense the defendant took 29 lengthy depositions from 29 witnesses. Defendant's record amounts to 450 pages, and the witnesses' and attorney's and examiner's fees and charges for printing the record amount to a sum out of all proportion to the simple character of the invention. Many of such depositions relate to processes used by different companies, not involved in the suit, and the dates of use of same are subsequent to the date of the patent sued upon. The petition also calls attention to the alleged fact that, of the 14 patents set up in the answer of defendant, only one was relied upon by this court in deciding the case, and that in its opinion this court only referred to the deposition of Mr. Little. The limited means of the plaintiff, and the fact that defendant is one of the largest paper manufacturers in the United States, are also referred to and urged.

The charge in defendant's bill of costs for printing defendant's record was $311.60, and this the clerk reduced by striking out $94.08, leaving $217.52. The charge for reproducing defendant's exhibits, $116.69, was disallowed and struck out, as was the charge for a copy of the opinion in the court below. The charge for printing defendant's brief in the court below was allowed at $258.20. The clerk disallowed all witnesses' fees for attendance and travel not proved to have been actually paid. The bill of costs claimed and included charges for four copies of depositions, but the clerk allowed for one copy only.

[2, 3] In the Northern district it is the rule and practice, and for 25 years or more has been, to print the record and briefs and tax the cost thereof, unless such printing is dispensed with by the order or direction of the court. This is frequently done on application. In this case no such application was made, nor was there any suggestion to that effect. The defendant followed the rule and practice, and the record and

briefs were actually printed. The clerk of this court has had more than 30 years' experience in taxing costs in such cases, and he has struck out all items not allowable, or, when not struck out, the item has been reduced to the proper taxable amount.

In view of the alleged pecuniary situation of the plaintiff, this court regrets that application was not made to dispense with the printing referred to; but, the expense having been actually incurred by the defendant in obeying the rule and practice of this court, I do not see how it can now be disallowed, unless it be that this court may now, after appeal from its decision that the bill of complaint be dismissed, "with costs," and the affirmance of that decision by the Circuit Court of Appeals (236 Fed. 221, — C. C. A. —), change its decision in regard to costs, and give only partial costs, based on the alleged pecuniary embarrassment of the complainant, and not on any partial success of defendant in its contentions. It was not made to appear to the clerk, and has not been made to appear to the court, that witnesses were called or depositions taken or printed for the purpose of vexatiously or unnecessarily swelling or increasing costs. The fact that the court below and the Circuit Court of Appeals do not appear, from the references in the opinions handed down, to have considered *all* the depositions and all the testimony, does not establish that such depositions were immaterial, or not considered by such court. It is presumed, I think, that the court consults, examines, and considers the entire record; but it is under no duty, so far as I am advised, to refer to all depositions or the testimony of all witnesses in its opinion. In fact, a decision may be rendered, and often is, without opinion or specific findings. I cannot find evidence of any action on the part of the defendant which was intended to result in, or which did result in, either unreasonable or vexatious increase of costs.

The claim of the patent in suit reads as follows:

"The herein described art of treating fibrous and other kindred materials for their conversion into paper stock, which consists in effecting the suspension of such materials in a constantly rising current of the treating liquid, and while thus suspended subjecting the material to the heating, cleansing, or chemical action of the suspending liquid."

The specifications are lengthy and somewhat complex, and were necessarily considered. The whole prior art was necessarily presented on the question of the validity of the patent in view of such prior art, and on the question of the true interpretation of such patent in the presence of such prior art. What the courts decide on a given state of facts is generally simple enough after the decision is rendered, but what they will decide on the evidence presented is quite another question, as is the question what testimony will be considered and regarded relevant by them. When a record is made unnecessarily lengthy and prolix by a party, he may not recover the costs thereof, even if successful. If such fact is made to appear and the responsibility can be fixed, the party responsible must or should bear the burden. It is not the final result of the litigation, however, that determines what was material and what immaterial for presentation to the court, in order to protect the

rights of the parties and enable the court to arrive at a just conclusion. The case must be considered from the viewpoint of the parties at the time the testimony and depositions were taken. The record discloses no suggestion at the time that defendant was unnecessarily prolix or vexatious in procuring and offering unnecessary testimony.

As the court below, before the appeal, dismissed the bill and awarded costs to be taxed, and that decision was affirmed by the Circuit Court of Appeals, which awarded full costs in that court, and I fail to find that there is evidence that the defendant is chargeable with conduct intended or calculated to unnecessarily increase costs or disbursements, and the clerk has stricken out all improper or nontaxable items, the petition for a reduction of costs as taxed by the clerk is denied. So ordered.

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## PYRENE MFG. CO. v. CASTLE.

(District Court, E. D. Pennsylvania. March 29, 1917.)

No. 4552.

DISMISSAL AND NONSUIT ⊂=19(2)—DISCONTINUANCE—RIGHT TO DISCONTINUE.

In an action in the federal District Court of Pennsylvania based on diversity of citizenship and the sum in controversy, defendant filed a counterclaim under plea of set-off, the sum of which was less than $3,000. Thereupon plaintiff discontinued the action, instituting another in the state court, while defendant moved for rule to strike off the discontinuance. *Held* that, despite the Practice Act (Act May 14, 1915 [P. L. p. 483]), plaintiff's discontinuance will be stricken off, for, though the court would retain jurisdiction of the action for the purpose of disposing of defendant's counterclaim, nevertheless if an amount in controversy was less than $3,000, and the court would not have jurisdiction had suit been brought for the same, such proceeding was open to attack on the ground of want of jurisdiction, and plaintiff by successive discontinuances might prejudice defendant.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 34, 35.]

At Law. Action by the Pyrene Manufacturing Company against James M. Castle. Sur rule to strike off plaintiff's discontinuance. Rule made absolute.

J. Gowen Roper and Robert S. Bright, both of Philadelphia, Pa., for plaintiff.

Thomas Stokes, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The questions involved in the disposition to be made of this rule are presented by this outline statement of the facts and are embraced in the following propositions:

The plaintiff, a citizen of Delaware, brought its action against the defendant, a citizen of Pennsylvania. The jurisdiction of this court is dependent upon diverse citizenship and the sum in controversy.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.

One of the defenses interposed to the suit is a counterclaim under a plea of set-off. A certificate is asked in defendant's favor for less than $3,000. The plaintiff discontinued its action and brought another in the state court for the same cause of action. The defendant then made the present motion to strike off this discontinuance. The propositions referred to are these:

(1) The Ralston (Pennsylvania Practice) Act preserves to defendants all the rights (so far as affects the present rule) which they before had and confers an additional right. This additional right is to assert any counterclaim that the defendant may have pleaded and to have the action proceed to have the counterclaim determined notwithstanding a discontinuance of plaintiff's suit. Thereafter the action proceeds as if it had originally been brought by the defendant as plaintiff against the plaintiff as defendant on a statement of claim setting forth the counterclaim as the original cause of action.

(2) Before the Ralston Act, and unaffected by its provisions, no action, in the theory of the law, could be discontinued without leave of court. In practice, however, actions were discontinued at the will of the plaintiff; the leave of the court being assumed. The right to the grant of actual leave could be challenged by a rule to strike off. The rule was then heard as an application for leave, and leave was granted or withheld as the facts warranted.

(3) Leave was granted unless the effect of the discontinuance was to deprive the defendant of a substantial right. Mere loss of the opportunity to have the counterclaim adjudicated in the action brought was not, before the Ralston Act, the deprivation of any right of the defendant. Subjection to numerous and vexatious suits for the same cause of action, or forcing the defendant into a distant or foreign jurisdiction, would justify withholding leave to discontinue an action once brought. The soundness of the first proposition is denied by the plaintiff, and it is, on the contrary, asserted that the effect of the Ralston Act is to recognize an absolute right in the plaintiff to discontinue subject to the newly conferred right of the defendant to pursue his counterclaim if he so desires.

The remaining propositions are conceded, but it is denied that, independently of the Ralston Act, the discontinuance of the action affects adversely any right of the defendant.

Without formulating the reasons leading to the conclusion reached, we content ourselves with its statement. The Ralston Act does not, in this respect, affect the former practice further than to confer the additional right given to defendants who have made counterclaims. Upon the other point there are two observations to be made. One is that the plaintiff asks to discontinue the present action in order to bring another. The discontinuance of successive actions would, if there were many of them, at some time justify the inference that they were vexatious in motive and purpose. Such an inference would not be justified by a single instance. The vexatious consequences of one instance would, however, differ only in degree from that of many. The other observation is that this court has jurisdiction to adjudicate the rights

of the defendant to his counterclaim in the action as brought. If an action had been brought in this court for this counterclaim, the sum of which was less than $3,000, the suit must have been dismissed for want of jurisdiction. If therefore after the discontinuance of the action by the present plaintiff the counterclaim is to proceed as if it were the subject of an original action in itself with the original action considered as never having been brought, this court would be without jurisdiction to entertain the suit to recover the counterclaim. This would deprive the defendant of the benefit of the provisions of the state statute. In theory, the defendant is bound to know the legal effect of the statute, and if this court, having once had the jurisdiction of the case, would retain it for the purpose of adjudicating the counterclaim, the defendant in legal intendment would not be harmed, but he would nevertheless be subjected to the practical disadvantage of being compelled to shoulder the burden of maintaining a disputed jurisdiction and of being a party to two actions when the one action as brought would dispose of the whole controversy. We think these considerations bring him within the doctrine of the cases holding that causes may not be discontinued to the prejudice of the defendant. McCredy v. Fey, 7 Watts (Pa.) 496; Consolidated Bank v. McManus, 217 Pa. 190, 66 Atl. 250; Schuylkill Bank v. Macalester, 6 Watts & S. (Pa.) 147; La Touche v. Rowland, 12 Wkly. Notes Cas. (Pa.) 384; Payne v. Grant, 7 Wkly. Notes Cas. (Pa.) 406; Mechanics Bank v. Fisher, 1 Rawle (Pa.) 341.

The rule is made absolute.

## THE ROCKAWAY.
## THE RICHARD F. YOUNG.

(District Court, E. D. Virginia. February 16, 1917.)

COLLISION ⊂=102—STEAM VESSELS IN HARBOR—NEGLIGENT NAVIGATION—MUTUAL FAULTS.

A ferryboat, passing out of her slip in Norfolk harbor, and a tug, which had just passed the end of the slip, but backed to avoid a crossing vessel, and came into collision with the ferryboat, both *held* in fault and liable for injury to a passenger on the ferryboat; the tug being in fault for not keeping a proper lookout and failing to give a backing signal, and the ferryboat for failure to exercise proper care in observing the movements of other vessels, including those of the tug, in time to have avoided the collision.

In Admiralty. Suit by Bannie Barnes against the Ferries Company, owner of the ferryboat Rockaway, and the steam tug Richard F. Young. Decree for libelant against both respondents.

D. Lawrence Groner, of Norfolk, Va., for libelant.
Hicks, Morris, Garnett & Tunstall, of Norfolk, Va., for Ferries Co.
Hughes & Vandeventer, of Norfolk, Va., for The Richard F. Young.

WADDILL, District Judge. The libelant, a passenger on the Rockaway, a ferry steamer plying between the cities of Norfolk and Portsmouth, Va., on the 21st of March, 1916, paid her fare, and took passage at Norfolk, for Portsmouth, taking a seat in the forward end of the cabin, a short distance abaft the stem of the ship. As the Rockaway left her slip, and had passed some 50 feet in the stream, she came in collision with the steam tug Richard F. Young, which was apparently in backing motion at the time. The side of the ferryboat was crushed in, and the libelant seriously hurt, and for the damage sustained by her she filed her libel against both vessels jointly.

The right of the libelant to recover is undisputed, she sustained the injury without any fault on her part, and as a result of a collision between the steamer, on which she was a passenger, and the tug, which by the exercise of proper care and caution on the part of the respective vessels should have been averted. In any event, the collision cannot be said to have been inevitable, such as would disentitle the libelant to recover.

The most difficult question for determination is whether the loss should rest solely upon one or upon both vessels, and the conclusion of the court, taking into account all the facts in the case and the peculiar circumstances under which the collision occurred, is that both vessels were in fault, and therefore the damages should be divided between them. The collision occurred in broad daylight, in good weather, with nothing to obstruct the view of the Rockaway's master from his pilot house, and ought to have been averted, had either vessel been exercising the degree of care imposed upon it, navigating in a crowded harbor. It is true that the master of the Rockaway, shortly before the collision, observed the Young pass across the end of his slip, headed down stream, and he supposed that his course was clear. He thereupon

looked upstream, and, observing nothing there, or ahead in his course, rang his vessel ahead, and paid no further attention to the Young. At virtually this moment, however, it seems that a naval launch was in the act of crossing the bow of the Young from inshore, and another launch was coming a short distance out from the opposite direction, heading for the naval slip, which adjoined the ferry slip, also crossing her course. In this condition, the tug immediately reversed, and put its engines full speed astern. This maneuver of the tug was proper in this emergency, though it is not clear whether it gave proper reversing signals or not; and while the vessel was moving backwards she came into contact with the ferryboat as above indicated.

The court's conclusion is that the tug was in fault in failing to have a proper lookout, and in not giving signals indicating she would go astern, and that the ferryboat was in fault in that she failed to exercise the degree of care and caution required of her in observing conditions down as well as up the river, after the tug had passed down the river as above indicated. Had she done this, she might have delayed making her departure from the slip at all, or have taken earlier precautions to check her course upon discovering the embarrassments to the tug's navigation.

The failure of the tug to give backing signals, under the circumstances, should not excuse the ferryboat from fault, since it is admitted that the ferryboat observed the tug backing, and should and would have observed the embarrassments incident to its navigation earlier, and probably in time to have averted the accident, had she exercised the degree of care and caution required under the circumstances.

The usual difficulty arises in fixing the amount of damages in this case; but the court thinks, taking into account the age of the libelant, the suffering she endured, and the probable duration of the injury which she sustained, together with the loss to her business, which she is unable to attend to, that an allowance of $1,700 should be made, with costs; and a decree will be entered to that effect when presented.

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## In re DENNY.

(District Court, S. D. New York. March 19, 1917.)

ALIENS ⊂⊃68—NATURALIZATION—DECLARATION OF INTENTION—NAME OF FORMER SOVEREIGN—MISTAKE.

The requirement of Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Comp. St. 1913, § 4352), that the preliminary declaration of intention shall state, among other things, the name of the former sovereign, allegiance to whom the applicant is to abjure, is not jurisdictional; and where an alien, who had been naturalized in another country, named by mistake in his declaration the sovereign of his birth, he can be admitted on abjuring allegiance to the sovereign of his naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145.]

Application by Benjamin Denny for naturalization. Applicant admitted to citizenship.

The applicant, being born in Russia, lived in Natal, South Africa, and was naturalized as a subject of George V, king of Great Britain, on his own petition. His declaration of citizenship and his petition each asserted his intention to abjure his allegiance to the emperor of Russia. Upon final hearing upon his petition it transpired that this allegation in each document is erroneous, and that he must abjure allegiance to King George to be admitted, which he is willing to do, if allowed. There is no reason to suspect that the error was intentional, and no conceivable reason to assume that it was.

LEARNED HAND, District Judge (after stating the facts as above). I am sorry that I cannot agree with In re Lewkowicz (D. C.) 169 Fed. 927, In re Lange (D. C.) 197 Fed. 769, and In re Friedl (D. C.) 202 Fed. 302; but as none of these are authoritative, and as I entertain a quite positive belief, it seems to me that the applicant is entitled to its benefit, especially as only in this way can the matter be authoritatively determined for future guidance in this circuit. It is, however, proper for me to give some reasons.

The question is whether, when in his declaration and petition an applicant has honestly mistaken the name of the sovereign whose allegiance he means to abjure, he may, upon final hearing, abjure the proper sovereign, and, if necessary, correct the declaration and petition. At the outset I may observe that, unless there be some particular jurisdictional reason, every reasonable motive should allow the relief, which would be allowed at the present day in every other form of legal proceeding, so far as I know. No one wants gratuitously to impose upon naturalization proceedings that technical spirit which easily follows a literal application of so detailed a statute, and which results in vexatious disappointment, and in needless irritation, to a defenseless class of persons necessarily left to the guidance of officials, except in so far as the courts may mitigate the rigors of their interpretation. The decisions in question have, therefore, all depended upon the supposed jurisdictional nature of the requirement.

The section controlling the case is section 4, which provides the preliminaries upon which the citizen may apply for admission. The first formalty is the "declaration of intention" to become a citizen and to renounce his allegiance "to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject." This must be at least two years before his admission, and must be followed by a petition, three months before his admission, which must repeat the earlier expression of his intention in the same words. Under our notions of national fealty, accepted in part by other nations, a subject may voluntarily and with the consent of his new sovereign change his allegiance. His own consent is to be manifested by his oath of abjuration and his oath of allegiance. Hence the critical fact for the change in allegiance is the oath; that is the definitive act by which

the change takes place, and perhaps even an innocent mistake in that is fatal. At least that question may be reserved. However, the applicant's prior declarations, either in the "declaration of intention" or in the "petition," are both mere preliminaries, designed to assure the new sovereign of the persistency of the applicant's purpose, and perhaps in a measure as well to identify him by his existing allegiance.

What part of these prescribed preliminary formalities shall be taken as jurisdictional, and what, as regulative, is entirely a fluid matter, depending upon the importance ascribed to anyone of them by the court. It is possible to treat literal compliance with every particular provision as an absolute condition sine qua non of any hearing, but such a meticulous temper does not suit a court. There is, indeed, no difference in the formal expression of the statute regarding any one of them which can serve as a distinction. No one, I suppose, would insist that a mistake in "declaration of intention" as to the age, occupation, personal description, place of birth, date of arrival, name of vessel, and present place of residence in the United States would be beyond correction. No one would insist that a mistake as to similar particulars in the petition was fatal to the petition; yet there is not a particle of warrant in the statute for assuming that these particulars go less to the jurisdiction that the one in question. Obviously, unless the rule is that every statement is vital to the whole, the court must determine from their character, which statements Congress intended to be crucial, and this must depend upon the substantive significance of the statement itself. The identity of the applicant certainly is in part determined by his former allegiance; but that is not conclusive, as appears from the allusion already made to the other identifying particulars. The only vitally necessary allegation in this connection is his explicit purpose to assume his new allegiance and to abjure his former sovereign, whatever he may suppose it to be. It would be an extreme of scholastic technicality to suggest that, where an applicant has twice asserted his intention to become a citizen of the United States and to renounce his fealty to the sovereign of whom he was then the subject, any doubt could be cast upon that intention because he had by mistake named the wrong sovereign. Yet just that is, as it seems to me, the necessary implication of the existing rule. With deference I cannot see any necessity arising from the statute for the supposed jurisdictional requirement, or any administrative convenience. I am not disposed, in the absence of both, to construe the statute so as to make pitfalls for applicants out of mere formalities.

The applicant will be admitted.

## In re L. POPKIN & CO., Inc.

(District Court, S. D. New York. October, 1916.)

1. BANKRUPTCY ⇐116—CLAIMS—ADVERSE CLAIMS.
Where a sheriff has made a levy, and is in possession of property of an alleged bankrupt, he is, until adjudication, to be deemed an adverse claimant, and cannot be compelled, on motion, to deliver to a receiver possession of such property.

2. BANKRUPTCY ⇐116—CLAIMS—ADVERSE CLAIMS.
After adjudication in bankruptcy, a sheriff, who levied on property prior to bankruptcy, must, on motion, deliver possession to the receiver or trustee, on payment of his lawful fees.

In Bankruptcy. In the matter of the bankruptcy of L. Popkin & Co., Incorporated. On motion to compel sheriff to deliver possession of personal property. Motion denied.

George W. Olvany, of New York City, for sheriff.
Max Miller, of New York City, for receiver.

MAYER, District Judge. [1] This is a motion to compel the sheriff to deliver certain property to the receiver herein. The facts, briefly stated, are that the sheriff has made a levy and is in possession of the property of the alleged bankrupt under an execution on a state court judgment. The levy was made prior to the filing of the petition in bankruptcy and the appointment of the receiver in bankruptcy. As yet there has not been an adjudication in bankruptcy. It is well settled that prior to adjudication the sheriff under these circumstances is regarded as an adverse claimant, and cannot be compelled to deliver the possession of the property on which he has levied. Matter of Andre (C. C. A., 2d Cir.) 13 Am. Bankr. Rep. 132, 135 Fed. 736, 68 C. C. A. 374. See, also, In re W. J. Schmidt & Co. (C. C. A., 2d Cir.) 21 Am. Bankr. Rep. 593, 165 Fed. 1006, 91 C. C. A. 665.

[2] After adjudication the sheriff must deliver the property to the receiver or trustee in bankruptcy upon the payment to him of his lawful fees and poundage. Laws 1890, c. 523, § 17, subd. 2, as amended by Laws 1892, c. 418; In re W. J. Schmidt & Co. (C. C. A., 2d Cir.) 21 Am. Bankr. Rep. 593, 165 Fed. 1006, 91 C. C. A. 665. I have conferred with Mr. Olvany, counsel to the sheriff, with a view of having him co-operate with receivers, where the sheriff is in possession under a levy and there is no adjudication. Every effort should be made to keep the expense down as much as possible, and Mr. Olvany has been helpful to the court, and has stated that he will be very glad to co-operate in that regard.

It will be advisable for receivers to confer at once with the sheriff or his counsel, when they find a situation similar to that here presented.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

## In re INDEPENDENT PUB. CO. et al.

## INDEPENDENT PUB. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1917.)

No. 2740.

1. CONTEMPT ⟸6—ACTS COMMITTED IN PRESENCE OF COURT—FEDERAL STATUTE.

Under the provision of Judicial Code, § 268 (Act March 3, 1911, c. 231, 36 Stat. 1163 [Comp. St. 1913, § 1245]), that the power of the federal courts to punish contempts "shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice," the physical nearness to the place where the court is in session of the actual commission of the act charged as a contempt is not important, but, as in the law of constructive presence in criminal cases, the misbehavior is committed where it takes effect.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 6, 9, 10, 13.]

2. CONTEMPT ⟸9—ACTS CONSTITUTING—NEWSPAPER PUBLICATIONS.

The public press is not immune from the provisions of such statute authorizing punishment for contempts, but the freedom of the press guaranteed by the Constitution is subordinate to the independence of the judiciary and a newspaper article tending to interfere with the orderly procedure of the courts or to obstruct the administration of justice in accordance with legal standards is a contempt which is committed wherever the newspaper is intended to and does in fact circulate.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 8, 15–18.]

3. CONTEMPT ⟸3—ACTS CONSTITUTING—NEWSPAPER PUBLICATION.

Respondents, the publisher and managing editor of a newspaper, published in a city where a federal court was in session, and circulated extensively in the city and throughout the state, permitted to be published therein an article containing statements relating to the defendant in a criminal case then on trial, such as that he was a paroled convict from the penitentiary of another state, was said to have committed other crimes described and other statements, not based on any evidence in the case nor admissible therein, but which were extremely prejudicial to the defendant. The article was read by some of the jurors in the case, and made it necessary to discharge the jury and continue the case. *Held*, that the court was within its power in imposing a fine for contempt on the publisher of the paper and also on the managing editor, although he did not personally see the article before its publication, on the ground that he failed in his duty to exercise proper editorial supervision.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 4.]

4. CONTEMPT ⟸66(1)—PROCEEDINGS FOR PUNISHMENT—REVIEW ON ERROR.

The decision of the trial tribunal on the facts in a proceeding for contempt is not reviewable on a writ of error.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 214.]

5. CONTEMPT ⟸72—PUNISHMENT OF CRIMINAL CONTEMPT—DISCRETION IN FIXING FINE.

It is within the discretion of the court, in imposing a fine for a criminal contempt which made it necessary to discharge the jury and grant a continuance in a criminal case then on trial, to take into consideration the increased costs thus incurred by the government.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 249–256, 273.]

In Error to the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Proceeding for criminal contempt against the Independent Publishing Company and Will A. Campbell. From the judgment respondents bring error. Affirmed.

For opinion below, see 228 Fed. 787.

Information charging the Independent Publishing Company and Will A. Campbell, its managing editor, with misbehavior in obstructing the administration of justice in publishing matter concerning and prejudicial to the defendant then on trial. From a judgment holding respondents to be guilty of contempt of court, as alleged in the information, and imposing a fine therefor, respondents bring this writ of error.

During a special term of the United States District Court for the District of Montana, held in the city of Helena, in November, 1915, an information under oath was filed in the court by the United States District Attorney for the District of Montana, from which it appeared that on November 26, 1915, there came on for trial the issue joined upon an indictment then pending in that court against one William T. Poe, charging the defendant with having wrongfully, unlawfully, and feloniously devised an artifice or scheme to defraud certain parties named, and, in furtherance of said scheme, had used the United States mails by placing, or causing to be placed, in the post office of the United States at Harlem, Mont., a letter, contrary to the statute in such case made and provided. A jury was impaneled to try the case, and, when the time for the adjournment of the court for the day had arrived, the cause was still pending, undetermined. The court thereupon duly admonished the jury as to its conduct during the adjournment, and adjourned the court and the trial of the cause until 10 o'clock in the forenoon of the following day; the jury separating and going to their respective places of abode in the city of Helena.

There was at that time published in the city of Helena a daily newspaper, named The Helena Independent, published by the Independent Publishing Company, a corporation, with Will A. Campbell as its manager and editor. This paper was the only morning newspaper published in Helena, and it had a large circulation in that place and elsewhere. On the morning following the adjournment of the court mentioned above, the Independent contained the following article, to wit:

"'Slick' Mr. Poe is Now on Trial.

"Former Auditor of North Dakota City, Ex-Convict, "Charged with Fraud.

"Was Sentenced to 32 Years for Embezzlement in North Dakota and Gets in Trouble Shortly After He is Paroled from Prison.

"W. T. Poe, former city auditor of Williston, North Dakota, ex-convict, homesteader and alleged forger, was placed on trial in the federal court yesterday to answer an indictment charging him with using the mails to defraud. The government got under headway with its presentation of the evidence against the defendant yesterday afternoon and the case is expected to go to the jury some time today.

"Poe is charged with using the United States mails to defraud E. C. Carney and company of Williston, North Dakota. It is alleged in the indictment that Poe, under the alias of J. C. Cross, secured a loan from Carney and company of $300, giving a mortgage on the farm of Alf Larson. Poe, it is alleged, forged the name of Larson to the checks sent him by the Carney Company.

"Juggled City Funds.

"Poe was city auditor of Williston, North Dakota, for nearly four years. A little more than two years ago he was caught in a number of forgeries and embezzlements, it is said, and was sentenced to an aggregate of 32 years in

the penitentiary of North Dakota. His sentences would have been in part concurrent and would have given him a total of 12 years in prison. One embezzlement of which Poe was convicted was the raising of a $1.50 check to $1,500. North Dakota officials who are here to testify for the government say that Poe destroyed many of the records of his office before his peculations were uncovered.

"After Poe had been in the North Dakota penitentiary for two years he was given a parole after his wife had worked incessantly in his behalf. His wife had previously come to Montana and taken up a homestead and he was allowed to leave North Dakota under his conditional pardon on condition that he was to come to the Montana homestead and live a quiet life with his wife.

"Other Alleged Wrongs.

"Other alleged shady acts on the part of Poe are now under investigation in the eastern part of the state, say the officials. It is also stated that Poe, who is a young man, comes of good people in North Carolina, but escaped prosecution in his native state on his promise to leave North Carolina and remain away for good.

"In the present trial Poe is being defended by Attorney W. W. Patterson. United States Attorney B. K. Wheeler and Deputy Attorney Homer G. Murphy are prosecuting the case.

"The jurors are John Pearson, H. M. Ogden, F. H. Dean, George W. Hart, W. S. Marshall, Frank A. Fellows, John Dorfler, E. L. Fiske, W. H. Ogle, V. L. Hagman, R. G. Dixon and W. D. Nield."

The information charged that this article was not based upon the facts introduced in evidence on the trial of the case, but was written and published for the purpose of giving to the public generally, and to all persons who should read said newspaper and the said article, certain facts relating to the past life of the defendant, and to inform the jury, and the members thereof who might read the newspaper and the article, of certain facts concerning the defendant which were highly prejudicial to his character and reputation, and would, when read by the jury, or any members thereof, tend to bias and prejudice them against the defendant and prevent the jury, and the members thereof who had read the article, from giving the defendant a fair and impartial trial, for the reason that it brought to their attention certain facts concerning the life of the defendant which were not material to the issues of the cause and could not be proven on the trial of the cause against the defendant unless on the trial of the cause he had taken the witness stand in his own behalf, or placed his good character in issue.

When the court convened on the following day pursuant to the adjournment, it appeared to the court that certain members of the jury had read the article so written and published, and by reason thereof had been informed and advised of the alleged facts so published about the defendant and his life and reputation, and it further appeared to the court that the defendant, by reason of the facts stated, could not have a fair and impartial trial by the jury; and, by reason thereof, the court, upon the request and consent of the defendant, was compelled to discharge the jury from a further consideration of the cause, continue the trial thereof, and remand the defendant to the custody of the United States marshal until the case could thereafter be tried.

The court thereupon cited the Independent Publishing Company and Will A. Campbell, its manager and editor, to show cause why they should not be punished for contempt for publishing said article, which said article, it was charged, was calculated to excite prejudice against the said defendant and prevent him from having a fair and impartial trial, thus obstructing and interfering with the due administration of justice in the said court and the cause on trial. In response to this citation, the Independent Publishing Company and Will A. Campbell appeared and filed their answer to the information and citation, in which the ownership and management of the Independent newspaper and the publication of the article in question, as charged in the information, was admitted. It was admitted that Campbell was charged with the editorial supervision of the paper, and alleged that he exercised reason-

able care in the selection and employment of editors and reporters. It was also admitted that the article was not based on facts admitted in evidence at the trial. It was alleged that Campbell, as editor and manager, exercised reasonable care in excluding from the paper articles reflecting upon the courts or in any manner tending to interfere with the administration of justice. The answer recited the circumstances connected with the publication of the article, and it was alleged that it was prepared by W. H. Perkins, one of the reporters of the paper, *and published without editorial supervision;* that Perkins received the data for the article from a reliable source, and that he wrote and published the article in good faith, without intending to interfere with the administration of justice. It was also alleged that neither Campbell, nor any officer of the corporation, had any knowledge of the contents of the article until after publication. It was not denied that the publication of the article was an obstruction of and an interference with the due administration of justice, as charged in the information.

The matter was thereupon submitted to the court upon the information and answer, no evidence being introduced at the hearing, and thereupon the court recited the facts as stated in a written opinion (In re Independent Pub. Co. [D. C.] 228 Fed. 787), and found as a fact that the article in question was calculated to influence the jury and judge and prevent a fair and impartial trial, that the article was calculated to obstruct the due administration of justice, and that the misbehavior of the respondents was so near to the court as to obstruct the due administration of justice therein.

E. C. Day and Walsh, Nolan & Scallon, all of Helena, Mont., for plaintiffs in error.

Burton K. Wheeler, U. S. Atty., of Butte, Mont., Homer G. Murphy, of Helena, Mont., and Frank Woody, Asst. U. S. Attys., of Butte, Mont.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). It was admitted by the plaintiffs in error in their answer to the information charging them with contempt that the article in question was not based upon the evidence introduced upon the trial of the case; and it was not denied that the publication contained facts relating to the past life of the defendant, highly prejudicial to him, and when read by the jury tended to bias and prejudice them against the defendant and prevent them from giving him a fair and impartial trial; and it is not denied that the publication obstructed the progress of the cause on trial, and compelled the court to discharge the jury impaneled to try the case, resulting, as the court found as a fact, in the infliction of pecuniary damages to the government, in costs uselessly incurred, amounting to $617.95.

[1] 1. The contention of the plaintiffs in error is that the publication is not within the scope of the statute. Section 268 of the Judicial Code (section 725, R. S.; Act of March 2, 1831) provides:

"The said courts shall have power * * * to punish * * * contempts of their authority: Provided, that such power * * * shall not be construed to extend to any cases except the misbehavior of any person in their presence, *or so near thereto as to obstruct the administration of justice.* * * *" Comp. St. 1913, § 1245.

This statute had its origin in the act of March 2, 1831 (4 Stat. 487, c. 99, § 1), from which it differs only slightly in language, not in substance. The original Judiciary Act of September 24, 1789 (1 Stat. 83,

c. 20, § 17), provided that the "courts of the United States shall have power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."

The interesting and able argument of counsel for plaintiffs in error traces the history of this statute through the impeachment proceedings of Judge Peck in 1830, and subsequent cases, to the conclusion that it does not apply to newspaper publications under any circumstances. The case of Ex parte Poulson (1835) Fed. Cas. No. 11,350, does undoubtedly support that view. The court was there dealing with a publication very similar in character to the publication in this case. Referring to the limitation provided in the act of March 2, 1831, Mr. Justice Baldwin said:

"The court is disarmed in relation to the press; it can neither protect itself, or its suitors; libels may be published upon either without stint; the merits of a cause depending for trial or judgment may be discussed at pleasure; anything may be said to jurors through the press, the most willful misrepresentations made of judicial proceedings, and any improper mode of influencing the decisions of causes by out of door influence practiced with impunity."

Referring to the circumstances under which the statute was enacted, the court said:

"It was enacted shortly after the acquittal of Judge Peck, of Missouri, on an impeachment preferred against him for issuing an attachment against a member of the bar for making a publication in relation to a suit which had been decided by that judge. On the trial the law of contempt was elaborately examined by the learned managers of the House of Representatives and the counsel for the judge. It was not controverted that all courts had power to attach any person who should make a publication concerning a cause during its pendency, and all admitted its illegality when done while the cause was actually on trial. It had too often been exercised to entertain the slightest doubt that the courts had power, both by the common law and the express terms of Judiciary Act, § 17 (1 Stat. 83), as declared by the Supreme Court, to protect their suitors by the process of attachment."

An examination of the proceedings in Congress against Judge Peck shows that the court correctly interpreted the character of the prosecution. The impeachment charges were pressed largely because of the fact that the publication containing the article criticizing the court was made after the judge had delivered his opinion, finished the case, adjourned the court and had descended from the bench; and for that reason it was contended that the publication was not in contempt of the authority of the court "in any cause or hearing before the same." Mr. Buchanan, then a member of the House, afterwards President of the United States, favored the impeachment of Judge Peck, and was one of the managers on behalf of the House in the proceedings. In the House and before the Senate, Mr. Buchanan was careful to explain that the publication held by Judge Peck to be a contempt of court was made after Judge Peck's judicial functions in the particular case had ceased, and that all the authorities, both in England and America, held that such publications were not contempt of court. But notwithstanding this feature of the case was clearly presented, Judge Peck was acquitted on January 31, 1831; the vote in the Senate being 21 for, and

22 against conviction. It is said that the acquittal resulted from a belief on the part of the senators that Judge Peck acted in good faith in exercising jurisdiction and in holding the publication in question a contempt. Constructive Contempt, by Thomas, page 171. Then followed a report of a bill from the judiciary committee of the House by Mr. Buchanan, its chairman, entitled "An act declaratory of the law concerning contempts of court," which passed both houses without debate and became the act of March 2, 1831. A fair and reasonable construction of this declaratory statute in the light of these proceedings is that Congress intended to so limit the power of the court to punish for contempt that the summary authority exercised by Judge Peck, in a case where *the judicial authority had ceased,* would thereafter be prohibited; but it was not intended to disarm the courts to such an extent that in a pending case they would not be able to protect themselves, the jurors in attendance, or suitors, from the misbehavior of others that would obstruct the administration of justice.

This we find to be the construction generally placed upon the statute by the federal courts and by state courts where similar statutes have been construed. It was held by the Supreme Court of the United States in Ex parte Robinson, 86 U. S. (19 Wall.) 505, 510, 22 L. Ed. 205, that the act of March 2, 1831, limited the power of the circuit and district courts to inflict summary punishment to certain specified cases, among others (following the words of the statute), "where there has been misbehavior of a person in the presence of the courts, *or so near thereto as to obstruct the administration of justice.*" It is true the court says, further:

"As thus seen, the power of these courts in the punishments of contempts can only be exercised *to insure order and decorum in their presence,* to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes."

But the question we are now considering was not before the court. Robinson sought to be relieved from an order of the district court in Arkansas, disbarring him for an alleged contempt in its presence. The Supreme Court held that the district court in this particular case had no authority to enter a summary order of disbarment as a punishment for contempt; that before a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense. This opportunity Robinson had not had, and the contempt proceedings were accordingly reversed. The opinion in this case was written by Mr. Justice Field, and it is clear that the general expression concerning "order and decorum in their presence" was not intended as a construction that the statute was so limited, and the words, "so near thereto as to obstruct the administration of justice," were to be ignored.

In Sharon v. Hill (C. C.) 24 Fed. 726, Mr. Justice Field, sitting with Judge Sawyer, had under consideration the conduct of the defendant, Sarah Althea Hill, in that case, who drew a pistol and threatened the life of counsel during the examination of a witness before the examiner in chancery. The matter being reported to the court by the examiner, Judge Sawyer, speaking for the court, said:

"It is unquestionably a contempt. It is a contempt committed before an officer lawfully taking testimony in this case, the proceeding being a part of the trial of the case, in the chambers of the judge adjoining the courtroom; the examiner being an adjunct of the court—a part of the court itself. This act reported is undoubtedly as distinctly and clearly a contempt of court as though committed in the presence of the judge, in the courtroom, while in the act of trying a case, either with or without a jury. This point is well discussed by Judge Hammond, of the District of Tennessee, in U. S. v. Anonymous, a case of much milder type of contempt [C. C.] 21 Fed. 761."

Referring to the case here cited with approval, we find that Judge Hammond says ([C. C.] 21 Fed. 761):

"The courts will find that the Legislature has not taken away any valuable power, when these statutes are properly understood. * * * The mere place of the occurrence may not be an absolute test of that question, and it may depend on the character of the particular conduct in other respects besides the place where it happens. * * * Wherever the conduct * * * ceases to be general in its effect, and invades the domain of the court to become specific in its injury, by intimidating, or attempting to intimidate, with threats or otherwise, the court or its officers * * * while in the discharge of their duties as such, if it be constructive because of the place where it happens, because of the direct injury it does in obstructing the workings of the organization for the administration of justice in that particular case, the power to punish it has not yet been taken away by any statute, however broad its terms may apparently be."

But a summary judgment of contempt was not entered against the defendant in Sharon v. Hill, supra, the court waiving that proceeding and calling the attention of the United States Attorney to the defendant's conduct as a breach of certain statutes of the United States mentioned in the opinion of the court. No action was, however, taken by the United States Attorney, possibly for the reason that orderly behavior by the defendant was expected without such harsh proceedings. The expectation was not realized. The case as it progressed was attended by the conduct of another in her interest of the most contemptuous and flagrant character, and finally resulted in the killing of Judge Terry by the deputy United States marshal at Lathrop, Cal., on the 14th day of August, 1889; the deputy marshal having been detailed by the Department of Justice to guard Mr. Justice Field from assault by parties to the action. See Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

In the case of Savin, Petitioner (1889) 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150, the petitioner had been adjudged guilty of contempt of court in attempting to deter a witness in the District Court from testifying in a case pending therein, and to obstruct or impede the due administration of justice therein. The misbehavior consisted in the petitioner approaching a witness for the United States and endeavoring to deter him from testifying on behalf of the government and afterwards offering the witness money not to testify against the defendant in the action. Neither of these acts was in the actual presence of the court, and neither disturbed the court in its orderly decorum or proceedings. The first act of the petitioner was charged to have occurred in a room adjoining the courtroom, and the second in the hallway of the court building. The Supreme Court held that the conduct of the

petitioner in both acts was misbehavior in the presence of the court, for which he was sentenced to be punished for contempt.

In the case of Cuddy, Petitioner (1889) 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154, the petitioner had been adjudged guilty of contempt of court in approaching a trial juror, prior to his being drawn in a particular case, with a view of improperly influencing the juror in the event he should be sworn as a juror in the case. The difference between the Savin Case, cited above, and this case was that the misbehavior constituting the contempt in the Savin Case occurred in the court building and while the court was in session, whereas the misbehavior charged in this case did not occur in the court building nor, so far as the record disclosed, while the court was in session. The petitioner contended that under no view of the facts could his misbehavior be deemed to have occurred in the presence of the court or so near thereto as to obstruct the administration of justice. The Supreme Court held that the record disclosed a case of contempt, and, not showing it was beyond the jurisdiction of the court, it would be presumed that the evidence made a case within such jurisdiction, to be punished as and for a contempt.

Mr. Justice Field was a member of the Supreme Court in both of these cases, from which, and from the case of Sharon v. Hill, supra, we draw the conclusion that in the Robinson Case he did not intend to construe the statute as limiting the power of the court to punish for contempt to be exercised only for the purpose of insuring order and decorum in its presence.

In McCaully v. United States (1905) 25 App. D. C. 404, the charge was an attempt corruptly to influence a juryman in a pending case before the Supreme Court of the District of Columbia two days before the case was called for trial. It appeared that the appellant had called twice at the juryman's residence without seeing him. Thereupon the juryman called at the appellant's place of business, where the appellant stated to him that there was a man in trouble whom the railroad company was trying to down. The juryman refused to talk, as he was on the jury panel, and thereupon he left. The Court of Appeals states that the contention of the appellant was that the offense, if proven, was not a case of contempt, as it was not committed in the presence of the court or so near thereto as to obstruct the administration of justice, but at a distance from the court, the appellant's place of business being a half a mile or more away; that, the place of solicitation of the juryman being far removed from the courthouse, the statute expressly removed the act from the cognizance of the court as an act of contempt, and simply left it to be punished by the court as an ordinary criminal offense under another provision of the statute. The Court of Appeals held that:

"The question is not one of geography or topography, or propinquity or remoteness, but one of direct influence upon the administration of justice. The administration of justice is equally obstructed wherever the act is done; and the place of the solicitation is absolutely of no consequence whatever. Whether the act was done in the courthouse, or a mile or 100 miles away, the result is precisely the same; the disturbance to the court is precisely the same. The act in its nature is not one dependent upon location for its greater or less influence on the administration of justice. * * * But the bribery

of a juror or the intimidation of a witness pollutes the fountains of justice at their source, and reach at once to the very seat and shrine of the administration of justice, whatever be the place where the formal act is done. Under such circumstances the court is wherever the juror or the witness is; and there is no question of locality in the case. * * * Every juror is part of the court wherever he is. Under our common law the jury is as much a part of what may be designated as the machinery of the administration of justice as is the judge, and a corrupt attempt to influence the jury, or any individual member of it, is an offense differing only in degree from a similar attempt to corrupt the judge. Judge and jury are component parts of the court. An attempt upon the integrity of the jury, or upon the integrity of any individual juror, is a direct attack upon the court; and the court is entitled to protect itself from all such attacks by the methods which the common law has established for the purpose, namely, by the way of summary proceedings for contempt of court."

Petition to the Supreme Court of the United States for a writ of certiorari was denied in this case. 198 U. S. 586, 25 Sup. Ct. 803, 49 L. Ed. 1174.

The case of Kirk v. United States (1911) 192 Fed. 273, 277, 112 C. C. A. 531, 535, in this court, was also a case where jurors in attendance upon the trial court had been approached in the interest of one who had been indicted for a violation of the statutes of the United States and whose trial had been set for a future day. The attempt was to influence the jurors in favor of the accused, with the promise that they would be paid money if they should be in favor of the accused. The place where one of these jurors was approached was distant about nine blocks from the United States court building. These facts being proved, the trial court found the plaintiff in error guilty of contempt of court. It was contended on his behalf in this court that the acts charged were not committed "in the presence of the court, or so near thereto as to obstruct the administration of justice" within the meaning of the statute. Judge Gilbert, speaking for the court and replying to this contention, said:

"It is obvious that any willful attempt improperly to influence jurors in the impartial discharge of their duties in a pending case, whether by attempts to bribe or otherwise, no matter where it is committed, is sufficiently near to the presence of the court to tend to obstruct the administration of justice. It is not to be supposed that in enacting the statute Congress intended to deprive the federal courts of the power to deal summarily with persons who are attempting to corrupt jurors who have been called to decide pending cases, for without that power the courts would be practically helpless in the presence of an organized scheme, such as is shown by the evidence in this case, for the purpose of interfering with the administration of justice. There is every reason why the court should have the power to deal with such attempts at their very inception, so as to prevent the evil, and should not be confined to the remedy by indictment to punish such acts after the evil has been accomplished."

Like the law of constructive presence in criminal cases, the misbehavior is committed where it takes effect.

"The well-established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it become effectual. * * * So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes." Simpson v. State, 92 Ga. 41, 17 S. E. 984, 22 L. R. A. 248, 44 Am. St. Rep. 75.

See, also, State v. Hall, 114 N. C. 909, 19 S. E. 602, 28 L. R. A. 59, 41 Am. St. Rep. 822; The Salton Sea Cases, 172 Fed. 792, 814, 97 C. C. A. 214.

We do not think we need cite further authorities in support of this doctrine. It is the law of this circuit, established as appears upon full and careful consideration of all the cases, and should be followed, not only as binding authority, but upon sound reasoning and in the interest of an efficient administration of equal and exact justice.

[2] 2. We return now to the question before the court: Is the public press immune to the provisions of the statute under consideration? It is not made so by the language of the statute. Is it so by judicial construction?

In the case of In re Daniels (C. C. 1904) 131 Fed. 95, the petitioner, Josephus Daniels, was found guilty of contempt of court for the publication in his paper of an article criticizing the court for its action in the appointment of a receiver for a railroad company. The proceedings in the District Court for the appointment of the receiver had terminated, and the publication in no sense obstructed the administration of justice. Upon habeas corpus in the Circuit Court, that court, referring to the proceedings, said:

"The record does not show that the alleged misbehavior of the petitioner was in the presence of the court, or so near thereto as to obstruct the administration of justice; nor is there anything to show that the alleged misbehavior of petitioner interfered with the court, or that it tended in the slightest degree to disturb the orderly proceedings of the court."

The publication was manifestly not within the statute. But the court said, further, upon this subject:

"The inherent power of the court to punish for contempt is based upon the theory that it is essential that the court should possess ample authority to secure the free and unobstructed exercise of its functions in the enforcement of the law. Therefore it is only such acts as tend to interfere with the orderly proceedings of the court or with the due administration of justice that can be properly punished as a contempt of court."

The court said, further:

"There may be instances where the publication of editorials or other matter in newspapers would bring the author within the limitations of the statute. For instance, if a newspaper editor should publish an article concerning a trial which was being considered by a jury, and should send a copy of the paper containing such article to the jury, or a member thereof, during the progress of the trial, for the purpose of influencing them in their deliberations, it would present a question whether such conduct would not be misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice."

In the recent case of United States v. Toledo Newspaper Co. (D. C. 1915) 220 Fed. 458, a newspaper owned by the defendant company, and the managing editor of the paper, were charged with criminal contempt for the publication of certain articles in the paper calculated and intended to influence the court in its consideration of a pending case by giving the impression that a decision contrary to the wishes of the paper would not only be very unpopular in the community, but would be likely to be met with active opposition. The articles also gave encouragement to popular resistance to any order the court might make fol-

lowing such unpopular decision. In passing upon the question of contempt, the judge rendered a lengthy opinion, in which the facts of the case are recited and the law upon the subject elaborately reviewed by the citation of numerous cases in both the federal and state courts. The court found both the newspaper company and the managing editor guilty of contempt, and imposed a separate fine upon each.

Among the cases cited by the court in support of its judgment is that of Myers v. State, in the Supreme Court of Ohio in 1889 (46 Ohio St. 473, 491, 22 N. E. 43, 44, 15 Am. St. Rep. 638). A judgment of contempt had been entered in that case against the plaintiff in error in the court of common pleas of Franklin county (Columbus) for causing to be published in a daily newspaper in Cincinnati an article reflecting upon the judge of the court in which a case was then pending against the plaintiff in error. The article referred to this pending case, and it is stated that the newspaper had an extensive circulation throughout the state, including the county of Franklin, and was freely circulated, sold, and read about the courthouse and in the courtroom, all of which was known to the plaintiff in error at the time of the writing and publishing. The article was, in fact, read on the day of its publication by many persons in the courtroom and was much talked about within the bar of the court and within the presence and hearing of the court. The statute (section 5639, Rev. St. Ohio) provided that:

"A court, or judge at chambers, may punish, summarily, a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice."

This is almost the identical language of the federal statute. The first question considered by the Supreme Court was whether the misbehavior of the plaintiff in error was in the presence of the court. Upon that question, the court said:

"Indeed, it was written in the city of Cincinnati, though dated at Columbus. But the publication was in the courtroom, as well as elsewhere. It was intended to have effect, and did have effect, in the courthouse at Columbus, and the writer was just as much responsible for that effect as though he had, in the courtroom itself, and while the trial was progressing, circulated and read aloud the article, or uttered the libelous words verbally. The acts were thus done, if not in the very presence of the court, at least so near thereto as to obstruct its business. * * * The statute clearly authorizes, as did the common law, courts to punish summarily, as contempts, acts calculated to obstruct their business. They could not be maintained without such power, nor could litigants obtain a fair consideration of their causes in a court where the jury or judge should be subject, during the trial, to influences in respect to the case upon trial, calculated to impair their capacity to act impartially between the parties."

In Patterson v. Colorado, 205 U. S. 454, 463, 27 Sup. Ct. 556, 558 [51 L. Ed. 879, 10 Ann. Cas. 689] this case is cited by the Supreme Court of the United States as an authority in support of the doctrine, that:

"When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied."

The Supreme Court also cites to the same effect the case of Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280, where the trial court had adjudged two newspapers published in Worcester, Mass., in contempt for publishing articles dealing with and discussing the proceedings in a trial before the court upon the petition of one Loring against the town of Holden for the taking of land of the petitioner for the abolition of a grade crossing. The articles in the two papers which the court found were calculated to obstruct the course of justice in said court were substantially in the same language. In one of the articles it was stated that:

"The town offered Loring $80 at the time of the taking, but he demanded $250, and, not getting it, went to law."

The Supreme Court of Massachusetts, sustaining the judgment of contempt for this publication, said:

"The facts stated, even if they were true, were not admissible in evidence at the trial, * * * and, so far as appears, they were no part of the proceedings at the trial, and, if they were brought to the knowledge of the jurors before they rendered their verdict, were calculated to influence them upon the amount of the damages to be given by their verdict. The newspapers were published and circulated in Worcester, and it was not improbable at the time of publication that the articles would be read by some of the jurors before the trial of the petition was finished. * * * The intention of the publisher of a newspaper is that it should be bought and read by persons within the place where it circulates. Cases * * * should be determined on evidence presented in court. It is an inevitable perversion of the proper administration of justice to attempt to influence the judge or jury in the determination of a cause pending before them by statements outside of the courtroom, and not in the presence of the parties, which may be false, and even if they are true are in law not admissible in evidence."

In Rex v. Davies, 1 K. B. (1906) 32, the question was whether the King's Bench Division of the High Court of Justice had power to punish by attachment contempts of inferior courts. That question is not involved in this case. But the contempt charged was the publication by a newspaper of articles reflecting upon the character and antecedents of an accused person whose case was pending before the inferior court. The publication was very similar in character to the one in the present case. It was admitted, on behalf of the editor of the paper, who was cited to show cause why he should not be punished for contempt, that nothing could be said in his defense or in palliation of the act of publishing such articles concerning a person under remand upon a charge which might lead to a committal. The defense was wholly confined to denying the jurisdiction of the King's Bench. In determining this issue, that court referred to the publication of such articles as tending to poison the stream of justice and calculated to deprive the court of the power of doing that which is the end for which it exists, namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. The court in pursuing this thought found it necessary to ask itself this question:

"What, then, is the principle which is the root of and underlies the cases in which persons have been punished for attacks upon courts and interferences with the due execution of their orders?"

The court answered that:

The principle "will be found to be, not the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of them, but of protecting the public, and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired."

In support of this principle, the court refers to the judgment prepared by Wilmot, C. J., in Rex v. Almon (1765) Wilmot's Opinions, pp. 255, 256, a considerable part of which judgment, the court says, was "devoted to showing that the real offense is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone. * * * The several parts of the system [judicial], he adds, 'act in combination together to attain the only end and object of all laws, the safety and security of the people.'" The court examined the articles complained of, and found that they contained a number of statements respecting the person charged of a character likely to seriously prejudice her case, to create a feeling against her, and to affect the minds of persons who might take part in her trial. It was the opinion of the court that such a case demanded a severe punishment, and accordingly the editor was ordered to pay a fine of £100 and the costs of the proceedings.

3. We come now to the fundamental question in this case, which was also the fundamental question in the case of Patterson v. Colorado, 205 U. S. 454, 462, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689. In that case the constitutional guaranty of the freedom of the press was invoked on behalf of a newspaper as against contempt proceedings. The contempt alleged was the publication of certain articles and a cartoon, which, it was charged, reflected upon the motives and conduct of the Supreme Court of Colorado in cases still pending, and were intended to embarrass the court in the impartial administration of justice. The court had ordered judgment fining the plaintiff in error for contempt. It was contended by the plaintiff in error in the Supreme Court of the United States that the law of contempt, as construed by the Supreme Court of Colorado, abridged the freedom of the press, as guaranteed in the First Amendment to the Constitution of the United States. The court, by Mr. Justice Holmes, answered this contention by saying that:

"The main purpose of such constitutional provisions [the First and Fourteenth Amendments] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. * * * The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all."

The court continues:

"The rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open

court, and not by any outside influence, whether of private talk or public print."

It thus clearly appears that the press is not exempt from the provisions of the statute under consideration. Liberty of the press is subordinate to the independence of the judiciary, and it is not expedient that any class in the community should be privileged to interfere with the rights of litigants or to embarrass or obstruct the administration of justice. 6 R. C. L. 510, § 22.

[3, 4] 4. It is next contended by the plaintiff in error that as the managing editor had no knowledge of the contents of the article or the intention of the reporter, Perkins, to cause the same to be published in the paper, it was error to hold him guilty of contempt of court. The specific charge was that the publication of the article was not based upon the facts adduced on the trial, but upon facts relating to the past life of the defendant; that they were highly prejudicial to his character and reputation; were inadmissible in evidence; prevented him from having a fair and impartial trial; and obstructed the administration of justice. The reply to this charge was that Campbell was charged with the editorial supervision of the paper; that he exercised reasonable care in the selection and employment of editors and reporters; and that it was his duty to exercise reasonable care that articles *reflecting upon the court* or in any manner tending to interfere with the administration of justice were excluded from the columns of the paper. It was not charged in the information or in the citation that the article *reflected upon the court,* and it was not alleged in the reply that it was the duty of the managing editor to exclude from the paper the contemptuous matter that was published and which did interfere with the administration of justice; but it was admitted that the article was printed without any editorial supervision. It was therefore clearly open to the court to find that the managing editor did not perform his duty in supervising the publication, and was negligent in permitting the article to be published; and, as the court found that the accusation in the information was true, we are of opinion that the alleged error is not one for our consideration. "On such a writ [writ of error] only matters of law are considered. The decision of the trial tribunal, court or jury, deciding the facts, is conclusive as to them." Bessette v. W. B. Conkey Co., 194 U. S. 324, 338, 24 Sup. Ct. 665, 671 [48 L. Ed. 997].

[5] 5. It is further contended that the contempt, if any, was a criminal one, and not civil; and that the costs which were incurred in the continuance of the criminal case should not have been considered in the judgment. The judgment is that:

"The Independent Publishing Company, a corporation, and the said Will A. Campbell, should be fined in the sum of $617.95, together with the costs of this proceeding."

The court had a broad discretion in considering the circumstances entering into the measure of punishment. The costs in the continued case were merely used as an element in measuring the fine imposed by the court, and did not change the case from a criminal to a civil one. The fine was plainly imposed to vindicate the authority of the court, and, as such, was fixed at an amount within its discretion.

The judgment of the District Court is affirmed.

## ENRIGHT v. HECKSCHER.

(Circuit Court of Appeals, Second Circuit. February 27, 1917.)

No. 143.

1. COURTS ⟸276—JURISDICTION OF FEDERAL COURT—RESIDENCE OF DEFENDANT—WAIVER OF OBJECTIONS.
The objection that defendant does not reside in the district in which the suit was brought is one which may be waived by defendant, and is waived by his general appearance and by procuring extensions of time to plead, with the agreement that the issue should be of a day certain.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815.]

2. BANKRUPTCY ⟸250(1)—ASSESSMENT AGAINST STOCKHOLDERS—CONCLUSIVENESS—MATTERS CONCLUDED.
An order of the bankruptcy court, directing that an assessment be levied against stockholders who had not been paid the full value of their shares, is conclusive as to the necessity of the assessment and as to the rate, but is not conclusive, in an action against the stockholder, that the stock was not full-paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 235, 350.]

3. CORPORATIONS ⟸269(3)—ISSUANCE OF STOCK—VALUATION OF PROPERTY—FRAUD—EVIDENCE.
In an action by a trustee to collect the balance due on stock issued by the corporation to a director in exchange for mining leases, after it had agreed to sell the stock to others as full-paid at half its par value, evidence *held* to warrant the jury in finding fraud on the part of the directors in valuing the licenses, so that the stock was not full-paid, under Corporation Act (P. L. N. J. 1896, p. 293) § 49, permitting stock to be issued only for money or property, and providing that the valuation of the property by the directors shall be conclusive, in the absence of fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 887, 888, 1154–1159, 2277.]

4. CORPORATIONS ⟸99(2)—ISSUANCE OF STOCK—VALUATION OF PROPERTY—STATE STATUTE.
Under Corporation Act N. J. § 49, authorizing a corporation to issue stock for property which shall be full-paid, and that, in the absence of actual fraud, the judgment of the directors as to the value of the property shall be conclusive, stock can be originally issued for property purchased only to the amount of what is honestly deemed by the directors to be the value of the property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 445.]

5. CORPORATIONS ⟸99(2)—ISSUANCE OF STOCK—FRAUD—VALUATION OF PROPERTY—EFFECT.
A contract for the issuance of full-paid corporate stock in exchange for property fraudulently overvalued by the directors, contrary to Corporation Act N. J. § 49, is void, not merely voidable, and no proceedings are necessary to procure an adjudication of its nullity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 445.]

6. CORPORATIONS ⟸298(5)—DIRECTORS—INTEREST—QUORUM.
A director, whose interest in a matter disqualifies him from voting upon a resolution relating thereto, cannot be counted for the purpose of ascertaining whether a quorum is present when the vote is taken, since a director so disqualified loses, pro hac vice, his character as a director.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1302–1312.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

7. CORPORATIONS ⊂⊃243(1) — STOCKHOLDERS — LIABILITY — ACCEPTANCE OF STOCK.

One who accepts stock issued to him by a corporation at less than par is liable to a receiver for the benefit of creditors, though the resolution authorizing the issuance was void, because no quorum was present.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 943, 946, 957–959, 979.]

8. CORPORATIONS ⊂⊃298(5)—REPRESENTATION BY DIRECTORS—INTERESTED DIRECTOR.

A resolution adopted by the directors of a corporation, fixing the value of property for which stock was issued was a nullity, where no quorum was present, because one of the directors counted in the quorum was adversely interested in the issuance of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1302–1312.]

9. CORPORATIONS ⊂⊃99(2)—ISSUANCE OF STOCK—VALUATION OF PROPERTY—STATUTE.

Corporation Act N. J. § 49, providing that the judgment of the directors of a corporation as to the value of property for which stock is issued shall be conclusive, in the absence of fraud, contemplates an actual appraisement of the property by the board of directors, where stock is to be issued for the property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 445.]

10. CORPORATIONS ⊂⊃232(3)—ISSUANCE OF STOCK—FICTITIOUS VALUE OF PROPERTY—CREDIT FOR REAL VALUE.

A stockholder, to whom stock was issued as full-paid for property fraudulently overvalued by the directors, is entitled to credit for the fair value of the property, in an action by the corporation's trustee in bankruptcy to enforce his liability on the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 884.]

11. CORPORATIONS ⊂⊃232(3)—ISSUANCE OF STOCK—RETURN TO TREASURY—SUBSEQUENT SALE.

Where stock, which had been issued to a director as full-paid in exchange for mining leases, which were fraudulently overvalued, was returned by the director to the corporation as treasury stock, it did not thereby become full-paid, and a purchaser at less than par value, who had knowledge of the facts, is liable for the balance due on the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 884.]

12. CORPORATIONS ⊂⊃230—ISSUANCE OF STOCK—TREASURY STOCK.

Where corporate stock has been lawfully issued as full-paid stock, and then returned to the corporation as treasury stock, the corporation may sell it at any price it can obtain, and the purchaser is not liable for the par value of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 877.]

13. CORPORATIONS ⊂⊃244(5, 7)—ISSUANCE OF STOCK—LIABILITY OF PURCHASER—NOTICE.

Where stock is issued as full-paid on part payment only, a transferee with notice is liable on the stock to the same extent as the transferror, but in the hands of a purchaser without notice the stock is regarded as full-paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 967, 972, 973.]

14. CORPORATIONS ⊂⊃244(5)—ISSUANCE OF STOCK—KNOWLEDGE BY STOCKHOLDER—AGENCY.

Where two directors of a corporation agreed each to take one-half of a new issue of the corporate stock at less than par value, and the offer to the corporation to purchase the stock was made in the name of one of them, but the earnest money was advanced by both, and the broker's

commission on the sale shared by both, the subscribing director was the agent of the other, so that the former's knowledge of the facts which prevented the stock from being full-paid was chargeable to the latter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 967.]

15. CORPORATIONS ⊜247—LIABILITY OF STOCKHOLDER—RELEASE BY CORPORATION.

A stockholder's liability for the balance of the par value of stock issued as full-paid cannot be released by the directors over the objection of one stockholder, or as against the creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 983–997.]

16. CORPORATIONS ⊜99(3)—ISSUANCE OF STOCK—MARKET PRICE—STATUTE.

The rule that a going corporation, whose stock has a market value, may sell subsequent stock issues, made for the purpose of paying its debts or obtaining new capital, at the market value of the outstanding stock, does not apply to a New Jersey corporation, since it is contrary to the statute of that state; Corporation Act (P. L. N. J. 1896, p. 284) § 21, providing that, where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the amount of such share as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy the debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 446.]

17. CORPORATIONS ⊜232(1)—LIABILITY OF STOCKHOLDERS—INTEREST.

Where a stockholder receives stock from a corporation as full-paid, for which he gave less than par, he is liable for interest, as damages for the retention of the money, on the balance of the par value of the stock from the time payment for the stock is due.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 987.]

In Error to the District Court of the United States for the Southern District of New York.

Action by John M. Enright, as trustee in bankruptcy of the Newfoundland Syndicate, a corporation, against August Heckscher. Judgment for plaintiff for part only of the amount sued for, and both parties bring error. Affirmed.

This cause comes here on cross-writs of error to the United States District Court for the Southern District of New York on a judgment for $105,979.35. The plaintiff is a citizen of the state of New Jersey. The defendant is a citizen of the state of New York, and resides in the Southern district of New York. The Newfoundland Syndicate is a corporation incorporated in 1904 under the laws of the state of New Jersey. It will be hereinafter referred to as the Syndicate. The objects for which the Syndicate was formed were, inter alia, to purchase, acquire, or lease mines or mineral lands of every kind, nature, and description, to work, prospect, explore, and develop mines and mineral lands, and to engage in and operate in mining of all kinds.

Nelson S. Spencer and Elbridge L. Adams, both of New York City, for plaintiff.

Parks, McKinstry & Taft, of New York City (Justice Sheffield, of New York City, of counsel), for defendant.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This action is brought by the trustee in bankruptcy of the Syndicate to recover $250,000 upon an assessment made by the bankruptcy court upon unpaid stock of the bankrupt held by the defendant, and which it is claimed was acquired by him with knowledge that it was not full-paid.

On December 29, 1911, the trustee in bankruptcy of the Syndicate instituted proceedings in the bankruptcy court of the district of New Jersey, to assess any stock of the bankrupt corporation which had been issued for less than its par value. An order to show cause why the trustee should not be directed to levy such an assessment was served upon the defendant by mail. He appeared specially and objected to the jurisdiction of the court. The referee considered the objection well taken and dismissed the petition, but his action was reversed in the District Court. In re Newfoundland Syndicate (D. C.) 196 Fed. 443 (1912). Thereupon the defendant appealed, and the United States Circuit Court of Appeals for the Third Circuit affirmed the court below. 201 Fed. 917, 120 C. C. A. 255 (1913). The referee was directed to determine whether an assessment was necessary and if found to be necessary to determine the rate thereof, and to levy the same upon whatever stock may appear prima facie to be subject to assessment.

Thereupon the referee in bankruptcy in the district of New Jersey on April 12, 1915, determined that the debts of the bankrupt amounted to $1,096,027.89 and the assets (not counting liabilities on unpaid stock) amounted to $2,500, and that it was necessary to assess the unpaid stock, and directed as follows:

"That an assessment be and the same hereby is made and levied upon 5,000 shares of the capital stock of the Newfoundland Syndicate issued to J. M. Ceballos & Co., on the 8th of November, 1905, and upon 5,000 shares of the capital stock of the Newfoundland issued to August Heckscher on the 9th of November, 1905, at the rate of 50 per cent. of the par value thereof, of $100 a share, together with interest thereon from November 1905."

The trustee made a call upon Heckscher for the payment of the assessment of $250,000, with interest from November 8, 1905, and, the same not having been paid, brought this action to recover the amount of the assessment.

It appears that the Syndicate was originally organized with an authorized capital stock of $300,000. By an amendment of its charter, in July, 1905, this was increased to $2,000,000. At some time in October, 1905, it found itself in need of additional capital. An attempt was made to interest the banking firm of J. M. Ceballos & Co. in the matter, and interviews with its officers were had. On October 26, 1905, Ceballos & Co. sent to the Syndicate a letter which reads as follows:

"Confirming our several interviews with the officers of your company, we hereby ratify our agreement to take over $1,000,000 of the full-paid and non-assessable capital stock of your company, to provide for which an increase of $1,000,000 in the capital stock is to be duly authorized by the stockholders, that is to say, from $2,000,000, its present amount, to $3,000,000, and to pay

for said $1,000,000 stock the sum of $500,000, we in addition to receive a banker's commission of $100,000 stock of the Newfoundland Syndicate."

The same day this letter was written the directors of the Syndicate met, and the letter was read and its terms accepted. It was voted to call the necessary meeting of the board of directors and the stockholders to authorize the increase of the capital stock as proposed. The meeting was held at the office of the company in Jersey City on November 2, 1905, and the necessary vote was had. A certificate amending the certificate of incorporation and increasing the stock from $2,000,000 to $3,000,000 was executed and filed at Trenton, in the office of the secretary of state of New Jersey. The increase in the capital stock having been authorized, the directors voted to issue it, and also to purchase certain mineral licenses and locations from George P. Mumford, one of their number, which they valued at $1,000,000 and which they agreed to pay for in the new stock, which was to be issued to Mumford as full-paid and nonassessable. This having been agreed upon, Mumford offered to turn back the stock into the treasury and, his offer having been accepted, this was done. Thereupon the directors sold the $1,000,000 of stock to Ceballos & Co., as full-paid and nonassessable stock, for $500,000; and Ceballos & Co. at once turned over to defendant Heckscher one-half of the stock for $250,000, and the claim is that, as Heckscher only paid $250,000 for stock of the par value of $500,000, he is liable to the trustee in bankruptcy of the Syndicate for the balance of $250,000 due on the stock. The case was submitted to a jury, which returned a verdict in favor of the trustee for the sum of $105,000. A new trial was denied and judgment has been entered for the plaintiff. Both parties have taken out writs of error to review the proceedings.

[1] The defendant has raised the objection that the action has been brought in the wrong district. The complaint alleges that defendant resides in the Southern district of New York. On June 17, 1915, the defendant by his attorneys entered a general appearance and obtained a general extension of time to plead, on a condition inserted in a written stipulation that the date of issue was to be as of June 24, 1915. On September 13, 1915, an order was issued to show cause why the defendant should not have leave to withdraw the general notice of appearance and substitute a special appearance for the purpose of moving to set aside the service of the summons and complaint, on the ground that the defendant is not a resident of the Southern district of New York and that the action is not brought in the district of which either the plaintiff or defendant is a resident; the latter claiming to be a resident of the Eastern district of New York. On September 16, 1915, the District Judge denied the motion to set aside the service, and his action in this respect has been assigned for error. The right to be sued in a special district is a personal privilege, which may be waived, and is waived by a general appearance and by procuring extensions of time to plead, with the agreement that the issue should be of a day certain. It is very evident that the plaintiff consented thereby to accept the jurisdiction of the District Court for the Southern District of New York. See In re Moore, 209 U. S. 490, 28 Sup.

Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Interior Construction & Improvement Co. v. Gibney, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401. We may add, however, that it is not clear to us that defendant was sued in the wrong district, as it appears that he has maintained a residence for the past ten years at 576 Fifth avenue, New York City, and that the Syndicate's stock ledger so gives his residence, and that notices of assessment have been sent to him there.

[2] The action of the bankruptcy court is conclusive, so far as the necessity of an assessment against any unpaid stock that may exist is concerned, and also as to the rate of the assessment. In this case the amount of stock assessed, if the whole amount of the assessment were to be collected, would not be sufficient to pay in full the unsecured creditors of the Syndicate. Beyond these facts the defendant was not concluded by the action of the bankruptcy court. He was entitled, in the action brought by the trustee in bankruptcy to collect this assessment, to show that the stock upon which he has been assessed was not assessable because it was fully paid up when he acquired it, or if it were not that that fact was not known to him when he purchased it, or any other defense which he may have upon the merits.

The Corporation Act of New Jersey (Revision of 1896) applicable to the transactions now under consideration, provides in section 21 that where the whole capital stock has not been paid in and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share as fixed by the charter of the corporation or such proportion of that sum as shall be required to satisfy such debt or obligation.

It is also provided in section 48 that nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under the act except in the case of the purchase of property.

And section 49 of the act reads as follows:

"Any corporation formed under this act may purchase mines, manufactories or other property necessary for its business, or the stock of any company or companies owning, mining, manufacturing or producing materials, or other property necessary for its business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full-paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation to be published or filed this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the fact." P. L. 1896, p. 293.

It is said that the stock now held by Heckscher was full-paid and nonassessable at the time it was delivered to Ceballos & Co., and through that firm to defendant, because of the prior sale of the stock to Mumford for his mining licenses, valued, as we have seen, by the directors at $1,000,000. It is necessary, therefore, to consider that transaction more in detail. It appears that on the same day that the

increase of the capital stock was authorized the board of directors met, with five directors out of nine present. A by-law of the company required a majority of the whole board to be present to constitute a quorum to transact business. One of the five directors present was George D. Mumford. At this meeting a resolution was introduced to purchase from Mumford the mineral licenses and locations and to give him therefor $1,000,000, to be paid to him in full-paid and nonassessable stock of the company—10,000 shares, of the par value of $100 each. These licenses gave to Mumford the right to the minerals in the locations specified for one year, with the privilege of obtaining a lease for 99 years. They were obtained at various times between April 14, 1905, and September 22, 1905. The right expired at the end of the year. He paid for them at the rate of $10 a location, which is a fixed fee for which any one can get a license. There were 88 licenses, for which he paid $880. At the time he gave his testimony he was not sure whether he had not been reimbursed by the Syndicate for his expenditures in procuring them, and would not swear that he had not been paid for all of them. The books, however, showed that on September 25, 1905, he was paid $941.75 for disbursements, and he was unable to state what the disbursements were for.

While the resolution as to the purchase of the licenses was under consideration, Mumford retired from the room in which the directors were meeting and did not participate in the action taken. It was adopted, therefore, at a meeting at which a quorum was not present. A resolution was also adopted at the same time and by the same vote, adjudging that the licenses and locations were of the par value of $1,000,000. This action having been taken and made known to Mumford, he immediately assigned the licenses and locations to the Syndicate, and offered to return the stock into the treasury of the Syndicate, to be sold by it for the purpose of raising additional working capital. Thereupon it was voted, no quorum being present, to accept Mumford's offer. The evident purpose of this proceeding was to make the stock full-paid and nonassessable. The fact that no quorum was present when the stock was issued to Mumford does not in itself invalidate the transaction, as will more fully appear hereafter. But the question remains whether the transaction with Mumford was invalid, in so far as it was agreed that the licenses were worth $1,000,000 and that the stock should be regarded as full-paid and nonassessable.

[3] The Corporation Act of New Jersey only permits stock to be issued to the value of the property purchased. The District Judge submitted it as a question of fact for the jury whether the directors overvalued the licenses and issued stock to Mumford in excess of the true value of the property received; and the jury were informed that under the New Jersey statute the judgment of the directors as to the value of the property purchased was conclusive, in the absence of actual fraud. The verdict of the jury establishes the fact that the stock was issued in excess of the value of the licenses, and it also establishes the actual fraud. There was evidence to justify the verdict. In fact, we do not see how the jury could have reached a different conclusion. It is incredible that the licenses were worth $1,000,000,

for it is incredible that Mumford would have given this stock back to the company, and so lost the licenses and the stock in addition, if the licenses had been worth $1,000,000. He would have been giving the company $1,500,000, for he knew that Ceballos & Co. had offered in writing to buy the stock from the Syndicate for $500,000 and that the offer had been accepted. The offer was to take the $1,000,000 of stock, "full-paid and nonassessable," for $500,000. Mumford knew that on the day the offer was made the directors had voted to accept it. He knew that on the next day Ceballos & Co. turned over a check for $50,000 to the Syndicate, to be applied on account of the purchase price of the stock, and it was so applied. He knew that the resolution accepting Ceballos & Co.'s offer was never rescinded, and the $50,000 received in part payment was at no time returned. As the stock was already sold to Ceballos & Co. and in part paid for, it certainly was a most unusual proceeding for the directors to sell the same stock on November 6, 1905, to Mumford in payment for the licenses, and then for Mumford at the same meeting to offer to return the stock gratuitously into the treasury of the company; and then, the offer having been at once accepted by resolution of the directors and with no mention of thanks for Mumford's altruistic conduct, it was immediately voted that the officers of the Syndicate "be and are hereby authorized to deliver to Messrs. J. N. Ceballos & Co. the 10,000 shares of stock of this company so held in its treasury, under and pursuant to the terms of the agreement heretofore entered into between this company and Messrs. J. N. Ceballos & Co., dated October 26, 1905"; and on November 8, 1905, "pursuant to the terms of the agreement" of October 26, 1905, the stock was delivered to Ceballos & Co. as "full-paid and nonassessable." The whole purpose of the transaction with Mumford clearly was to make the stock "full-paid and nonassessable," so as to meet the conditions of the offer to give $500,000 for $1,000,000 of stock, which was to be "full-paid and nonassessable." It is impossible to believe that the directors were acting in good faith when they sold to Mumford stock which they had already sold and fully expected to deliver to Ceballos & Co., and which they subsequently did deliver.

There is no necessity for inferences, for Mumford's own testimony makes the matter perfectly clear. He testified that he knew at the time of the negotiations with Ceballos & Co. which led that firm to make its offer, and that he was uncertain whether he had not himself initiated the negotiations. He admitted that he discussed the matter with Mr. Ceballos and with Mr. Fiske, a member of the firm of Ceballos & Co. prior to the offer of Ceballos & Co. to take the stock. He is a lawyer, and was a director and member of the executive committee of the Syndicate, and its legal adviser at the time. He testified that it was necessary to increase the capital stock, and that the whole matter of how the thing was to be accomplished "so as to comply with the law" was left to him as counsel of the Syndicate. He says he discussed with the president of the company the fact that he was willing to turn over the licenses that were in his name as a basis for the issuance of the $1,000,000 of stock, and that he informed the presi-

dent that in view of the situation that he would be willing, after he got the stock, to turn it back into the treasury of the company "in order that it [the Syndicate] could turn it over to Ceballos & Co. for $500,000." He also testified that it was agreed that the stock would be immediately turned back by him to the treasury. All this was agreed upon before the increase of the stock was voted.

It is evident that the sole purpose of the transaction with Mumford was to make the stock full-paid and nonassessable.

[4] The courts of New Jersey hold that under the laws of that state stock can be originally issued for property purchased only to the amount of what is honestly deemed by the directors the value of the property. See Donald v. American Smelting Co., 62 N. J. Eq. 729, 48 Atl. 771, 1116; Volney v. Nixon, 68 N. J. Eq. 605, 60 Atl. 189. In the first of these cases Mr. Justice Dixon said:

"Their [directors'] honest judgment, if reached without due examination into the elements of value, or if based in part upon an estimate of matters which really are not property, * * * may lead to a violation of this statutory rule as surely as would corrupt motive."

And see Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 144, 82 Atl. 618 (1912).

It does not appear in this record that the directors made any examination into the value of these licenses. In Honeyman v. Haughey (N. J. Ch.) 66 Atl. 582 (1906), stock was issued as fully paid stock to stockholders in exchange for a patent upon which a valuation of $1,000,000 was placed. The stock was then turned back to the treasury. The vice chancellor in commenting on the transaction remarked that:

"If a proceeding of this kind can be sanctioned by the court, it would be a very simple matter for all stockholders to avoid payment for capital stock issued to them."

The remark appears as applicable to the case now before us as it was to the case in which it was made. In that case the vice chancellor had no difficulty in arriving at the conclusion that the transaction was fraudulent and that it was a perfectly clear case of overissue of stock for property at a gross overvaluation.

In Easton National Bank v. American Brick & Tile Co., 70 N. J. Eq. 722, 730, 64 Atl. 1095 (1906), an attempt was made to show that the stock was issued in exchange for certain patent rights and processes, and that the directors after careful consideration had determined that the patents were worth at least the sum of $802,400, and that the directors authorized the issue of 8,024 shares in payment therefor, together with a cash payment of $20,000. In regard to this transaction the New Jersey Court of Errors and Appeals, unanimously affirming the opinion of the vice chancellor in the court below, said:

"We also agree with the view of the vice chancellor that, if we were to accept the claim of the appellants that the directors did determine to issue all the stock in question for the patents, it would result that the proceeding must be considered a mere device on the part of the directors to evade the letter and spirit of the Corporation Act, to accomplish which the patents were intentionally overvalued."

And in the same case the Court of Errors and Appeals, referring to the New Jersey Corporation Act, declares that:

"The whole spirit and policy of the act are so clearly opposed to any arrangement by which corporate stock shall be issued without receipt by the company of an equivalent in value to its par that any agreement to this effect must be deemed void as contrary to the policy of the law. If any doubt has existed upon this question, it must be taken as settled by the decision of this court in Volney v. Nixon, 68 N. J. Eq. 605 [60 Atl. 189], 70 N. J. Eq. 740, 64 Atl. 920, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84."

[5] Moreover, under the New Jersey decisions, if the contract contravenes the Corporation Act, it is not voidable, but void, and no proceedings are necessary to procure an adjudication of its nullity. Easton National Bank v. American Brick & Tile Co., supra; Holcombe v. Trenton White City Co., supra. It therefore follows that the agreement that the stock purchased by Mumford should be regarded as full-paid was void, and affords no obstacle to the relief asked in this suit.

The theory upon which the case was submitted was that, in case the jury found that the value of the licenses was less than $1,000,000, they should place a value upon them as of the time when the Syndicate took them over, and that the difference between such value and $1,000,000 would represent the extent to which the $1,000,000 stock issue was unpaid when it was turned back into the treasury; that one-half of that difference would be the amount Heckscher would have to pay for the one-half of the 10,000 shares he took, and that on that amount he should be credited with $250,000 in cash, which it was conceded he had paid, and that on the balance he should pay interest from November 8, 1905, that being the date when he acquired his stock.

In his charge to the jury the learned District Judge, in referring to the action of the directors in taking over the licenses for $1,000,000 of stock, informed them that:

"It seems from the minutes that there were five directors present, but that Mr. Mumford was interested in this transaction, and left the room or retired while the directors were considering this proposition, and took action upon this proposition, and was not present when it was acted upon. Of course, it would constitute a quorum if he was there, even though he had not voted; but if he left the room, so as to leave only 4 directors present, and 9 were required, it seems equally clear that there would have been no directors' meeting at the time this action was taken, and therefore there would have been no finding by the directors, as required by section 49 of the Corporations Law, that the value of the property transferred was equal to the value of the stock issued."

[6] A director, whose interest in a matter disqualifies him from voting upon a resolution concerning it, cannot, according to the better opinion, be counted for the purpose of ascertaining whether a quorum is present when the vote is taken. A director so disqualified by personal interest loses, pro hac vice, his character as a director, and so cannot be counted. That is the law of New Jersey. Metropolitan Telephone & Telegraph Co. v. Domestic Telegraph & Telephone Co., 43 N. J. Eq. 626, 14 Atl. 908; Id., 44 N. J. Eq. 568, 14 Atl. 907. And it is supported by the weight of authority in other jurisdictions as well. Bassett v. Fairchild, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611; Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co., 130 Cal.

345, 62 Pac. 552, 80 Am. St. Rep. 132; Smith v. Los Angeles Immigration, etc., Ass'n, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53; Hill v. Rich Hill Coal Mining Co., 119 Mo. 9, 24 S. W. 223; Star Mills v. Bailey, 140 Ky. 194, 130 S. W. 1077, 140 Am. St. Rep. 370; 7 R. C. L. 446. But see Gumaer v. Cripple Creek Tunnel, etc., Co., 40 Colo. 1, 90 Pac. 81, 122 Am. St. Rep. 1024, 13 Ann. Cas. 781; Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516.

[7] So far as the issue of the stock to Mumford and the subsequent issue of it to Ceballos & Co. is concerned, it is not important whether a quorum was present or not. The stock was issued, and Mumford accepted it, and so did Ceballos & Co. The acceptance of stock renders the holders liable to a receiver for the benefit of creditors. That is the law of New Jersey as it is of other jurisdictions. Holcombe v. Trenton White City Co., supra. And in See v. Heppenheimer, 69 N. J. Eq. 36, 77, 61 Atl. 843 (1905), it is declared that one who receives stock as full-paid without paying for it, occupies the position of a subscriber to stock who has not paid his subscription.

[8] But the resolution finding that the licenses were worth $1,000,000 was a nullity, as there was no quorum present when it was adopted. The charge of the District Judge on that matter was correct.

[9] The New Jersey statute contemplates that, where stock is issued for property, an actual appraisement of the property should be made by the board of directors. Holcombe v. Trenton White City Co., supra. In this case no such appraisement was ever made.

[10] But the charge that there might be credited on the stock the value of the mineral licenses at the time the stock was purchased by Mumford is correct; for, while the agreement that the stock should be regarded as full-paid was a nullity, yet the holders are entitled to have the fair value of the licenses credited on the stock. In Holcombe v. Trenton White City Co., supra, the vice chancellor held that though an issue of corporate stock for property purchased and at a grossly excessive valuation is a nullity, the stockholders are nevertheless entitled to have credited to the payment of stock the just and fair value of the property conveyed to and services rendered for the company and for which stock was issued. See, also, See v. Heppenheimer, supra; Easton National Bank v. American Brick & Tile Co., supra. This we understand to be the rule generally. Pell's Case, L. R. 8 Eq. 222.

[11] This brings us to inquire what the effect was of turning this stock back into the treasury of the Syndicate. Did it make the stock full-paid and nonassessable, so that it could be sold to Ceballos & Co. for what it would bring in the market? When Mumford acquired this stock for the licenses, if the property transferred for the stock was not worth the nominal value of the stock then Mumford under the New Jersey decisions was liable to the corporation for the difference between the value of the property and the nominal value of the stock. In his hands it was not full-paid and nonassessable; and if then he had sold the stock to Ceballos & Co., who took with full knowledge of the transaction, there can be no doubt that Ceballos & Co. would themselves have become liable to pay the balance due on the stock.

And if the transaction between Mumford and the Syndicate had not occurred, and Ceballos & Co. had bought directly from the Syndicate and paid 50 cents on the dollar for the stock, there can be no doubt under the New Jersey act that Ceballos & Co. would have been liable to make good the difference between the par value and the amount they paid.

It is claimed, however, that because Mumford turned back the stock into the treasury of the company it became converted thereby into "treasury stock," and as such could be sold "as full-paid and non-assessable" to Ceballos & Co. or anybody else for whatever it would bring, even though the purchaser knew all the facts connected with the original sale to Mumford. If that be true, then we are obliged to hold that a transaction which on its face was a sham and intended as an evasion of the statute was effective, and enabled the corporation to sell its stock for less than par, in direct violation of the Corporation Law under which it was organized and derived its powers. We do not believe that such is the law, or that courts can permit a corporation thus to collude with one of its directors to evade and circumvent the positive prohibition of the statute.

[12] When stock is issued by a corporation for property, a part of it is sometimes returned to the corporation as treasury stock, to be disposed of for the purpose of selling it to raise money to carry on its operations. Stock so turned in is known as treasury stock, and the cases hold that a corporation may sell such stock at the best price that can be obtained for it and the purchasers are not liable beyond the agreed price even to creditors. That this is the law we concede, and no citation of authorities is necessary. But this principle assumes that the stock has once been legally issued as full-paid stock. If the stock has never been legally issued as full-paid stock, the principle can have no application. A dishonest and fraudulent sale of the stock, made for the very purpose of defeating the statute violating the positive prohibitions of it, is a nullity. If the Syndicate had issued this stock to Mumford as a gratuity, and he had subsequently returned it into the treasury, would any one contend that it could be sold as treasury stock for less than par? We can see no difference between such a case and the case at bar. If such a transaction can be upheld the prohibition of the statute seems to us to be of no account. In Cook on Corporations, vol. 1, § 46, p. 196, that writer, in speaking of treasury stock, says:

"Such stock having once been *legally* issued as full-paid stock, and then donated back into the corporate treasury, can be legally sold for cash at less than par."

With that proposition we have no quarrel. What we hold is that, where such stock has been illegally issued as full-paid stock and then donated back into the corporate treasury it cannot under the New Jersey Corporation Act be legally sold for less than par. The rule is correctly stated in Marshall on Corporations, page 561:

"It is too clear to admit of question that, when stock has been once issued and fully paid for, there is nothing to prevent the stockholders from returning the whole or part thereof to the corporation, or to a trustee for its use, to be

disposed of for its benefit, and in such a case the corporation or trustee may dispose of the stock at less than its par value without violating statutory or constitutional provisions regulating the issue of stock, and without rendering purchasers thereof liable to creditors beyond the price which they agree to pay. This exception to the general doctrine does not apply, however, where the transaction under which the corporation reacquires the shares is not in good faith, but a mere device on the part of the stockholders to avoid payment in full. Stockholders cannot escape liability to creditors by subscribing for stock, and then surrendering it to the corporation before payment therefor, and afterwards taking the same from the corporation, controlled by them, at a reduced value."

[13] This makes it necessary to inquire whether Heckscher acquired this stock with full knowledge of the circumstances under which it was issued; for the law is clearly established that where stock is issued as full-paid on payment of a part only, and the person to whom it is issued transfers the same to a purchaser with notice, the transferee stands in the transferror's shoes, and will be liable on the stock to the same extent as the transferror. But, if the transfer is to a purchaser without notice, no such liability attaches, and the stock is regarded as full-paid. The judge charged the jury on this subject as follows:

"So, if the stock were not fully paid according to the laws of New Jersey, it would make no difference, as I see it, whether Mr. Hecksher, when he bought the shares, had knowledge of that fact or not, and for this reason: Probably, if he bought it on the stock market or from a purchaser other than the company itself, the rule might be different, if he also purchased in good faith and for value, without notice that the company had not received full value for the stock; in that event he might have been a bona fide transferee, and could not be subjected, under the New Jersey law, for the unpaid stock subscription, if there was any. In this case, however, it is without dispute that he bought this stock either from Ceballos & Co. directly or jointly with Ceballos & Co., who purchased the stock from the company. In either case he knew the stock was being purchased from the company, and that the company had only received 50 cents on the dollar from the par value of the stock, when he made the purchase, and therefore, as I see it, he would not be a purchaser in the open market in the ordinary course of business, and under such circumstances as that he would be charged with knowing that the company did not get full value, if that was a fact, since he was only paying to it, or knew that Ceballos was only paying to it, 50 cents on the dollar, instead of the 100 cents on the dollar. If it was not fully paid up under those circumstances, he would become responsible; and if he did not actually know it to be a fact, it would not exonerate him from liability."

This part of the charge was duly excepted to. The plaintiff's expert on the law of New Jersey testified as follows:

"I think, where there is a transfer of shares which have not been fully paid for, that the transferee is liable for the balance of his shares, unless he can show that he has acquired those shares in the ordinary course of business, for full value, and without notice of the fact that there was an unpaid amount, or illegality about the issue of the shares."

[14] The circumstances of Heckscher's purchase of this stock are as follows: Heckscher and Fiske were members of the board of directors of the Syndicate, and aware of the fact that the company needed to increase its capital, and proposed to do so to the amount of $1,000,000. Fiske conferred with Heckscher as to the advisability of their purchasing the stock it was proposed to issue, and Fiske told

him that his firm of Ceballos & Co. would supply half the money needed to purchase it if he (Heckscher) would furnish the other half, the stock to be bought for 50 cents on the dollar. Heckscher testified that he agreed to furnish half the money. He also testified that on October 26, 1905, 11 days before the company was authorized to issue the stock, he sent Ceballos & Co. his check for $25,000 for his half of a payment on account of the stock, and on that day Ceballos & Co. sent to the Syndicate the letter, which appears in an earlier part of this opinion, making an offer for the stock. On the same day the directors met and accepted the offer contained in the above letter. And on October 27, 1905, Ceballos & Co. sent their check for $50,000 to the Syndicate, to be applied on the purchase, and the Syndicate acknowledged the receipt of the check to Ceballos & Co., in which it stated:

"It is understood that this payment is to be applied on account of purchase of $500,000 to be paid by you for $1,000,000 of Syndicate stock under the terms of your offer of October 26, 1905, accepted by the board of directors upon that date."

Then at the meeting on November 2, 1915, after the deal with Mumford already stated had been consummated, the stock, having a par value of $1,000,000, was authorized to be issued to Ceballos & Co. for $500,000. The certificates were issued to Ceballos & Co. on November 8, 1905, and one-half of the certificates were at once surrendered to Heckscher. It is evident that Ceballos & Co. were acting for themselves and Heckscher in making this purchase. And in law Heckscher, if he did not otherwise have knowledge of the facts, would be charged with notice of the facts known to Ceballos & Co., his agent in the transaction, that they were purchasing from the company $1,000,000 of stock for $500,000.

There is another circumstance in this connection which also shows what the relation was between Heckscher and Ceballos & Co. in the purchase of this stock. The offer to the Syndicate was not simply to pay $500,000 for $1,000,000 in stock, but the purchasers were in addition to receive a banker's commission of $100,000 of the original stock. This was turned over to Ceballos & Co. and the latter transferred one-half of it to defendant Heckscher. This $100,000 of stock would not have been divided with Heckscher, unless the purchase of the new stock had been a joint transaction. This stock was obtained by the Syndicate from the stockholders by a voluntary contribution of 5 per cent. of their respective stockholdings on the basis of the capitalization of $2,000,000. If Ceballos & Co. had bought the new stock for 50 cents on the dollar, and then sold it to Heckscher as full-paid stock for what they paid for it, then Heckscher would not have been liable, unless he had notice of what Ceballos & Co. paid for it; and whether he had notice would have been for the jury. But that is not this case. We think the charge of the judge on this part of the case was, under the circumstances, correct. If Heckscher knew, at the time of his purchase of the stock, of the previous issue of the stock to Mumford for the licenses, he must be held to have had knowledge of the law that that transaction did not make the stock full paid and

nonassessable. And if he did not know that any such transaction had occurred he knew that he was paying $250,000 through Ceballos & Co. to the Syndicate for $500,000 of its stock. So that in either event he would be answerable to the trustee of the Syndicate in this action, unless he is relieved on some other ground. But Heckscher testified that at the time he bought this stock he did not know that it had ever been transferred to Mumford.

In something less than a year after the issue of the new stock Heckscher evidently learned that the issuance of the stock as full-paid when he had only paid 50 cents on the dollar for it was liable to involve him in trouble. He proposed to give back one-half of the issue and asked Ceballos & Co. to do the same. On September 1, 1906, he addressed a letter to Ceballos & Co. in which he inclosed the certificates for 5,000 shares and said:

"I have learned quite recently that the issue of this stock was made under a mistake, which in my judgment makes it proper that a rescission of the transaction be demanded. You will therefore be kind enough to turn over these certificates to the Syndicate, and to deliver to me, in exchange therefor, either the cash, $250,000, paid by me with interest, or else certificates for 2,500 shares of stock, for which the Syndicate has received cash at par.

"Very truly yours, August Heckscher."

On the same day Ceballos & Co. wrote a letter to the Syndicate inclosing their certificates for 5,000 shares and Heckscher's certificates for 5,000 shares, and asked for either the return of $500,000 they paid for the 10,000 shares issued to them, or the cancellation of the stock and the issue of half the number of shares. The letter stated that:

"In view of the mistake on your part, it does not seem to us right or proper that the shares of stock issued should longer remain outstanding."

When on the stand, Heckscher was asked what the mistake was to which he referred in his letter to Ceballos & Co., and he answered that he could not tell, that the letter was written by counsel whom he had requested to look into the affairs of the Syndicate. And Mr. Fiske of the firm of Ceballos & Co. when on the stand was asked the same question and he also replied that he did not know, but that he had been requested by Heckscher to write the letter sent by Ceballos & Co. and he did it; that Heckscher said he (Heckscher) was asked to have that letter written by him (Fiske) on advice of counsel, and he did. He did not compose it, but was given the form and sent it.

[15] It is evident that Heckscher and Ceballos & Co. both desired to escape from liability to pay the $500,000 due on the $1,000,000 of stock which they had received for $500,000. The Syndicate was willing to release them by issuing 5,000 shares, in place of the 10,000 shares they originally delivered to them. But neither a board of directors nor the stockholders themselves can accept a surrender of shares and a release of a shareholder from liability thereon, when to do so would prejudice the rights of creditors. It could not be done if a single stockholder objected. Cartwright v. Dickinson, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. Rep. 910; Wills v. Nehalem Coal Co., 52 Or. 70, 96 Pac. 528; Shelby County R. Co. v. Crow, 137 Mo. App. 461, 119 S. W. 435. If all the stockholders agreed, it could not avail, if debts had been incurred which there were

no means to pay, except out of the capital stock which was released. For as against creditors capital stock and the liability attaching to it cannot be squandered or surrendered. Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135. And where a stockholder claims, as against a creditor or a trustee in bankruptcy, that he surrendered his stock, or the number of his shares was reduced at a time when and under circumstances which permitted it to be done, it would be incumbent on him to show that the time and circumstances were such that it could lawfully be done. Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74. The defendant has shown nothing of the kind in this case.

[16] The stock herein involved was issued by a going concern by way of increase of capital, and it was issued at the value the original stock was selling on the market. So that we are confronted with the question whether stock so issued and sold makes the purchaser subject to creditors for the difference between the amount paid for the stock and its par value. A distinguished writer on the Law of Corporations states the law as follows:

"Rules of law forbidding the issue of shares for less than their par value, whether they be the result of judicial decisions or be laid down by the Legislature, have no application to the reissue of shares which, having been once legally issued, have by forfeiture, gift, or in any other legal mode reverted to the company; but such shares may be legally reissued or sold for whatever can be obtained for them. According to some strong American authorities, the same thing is true of shares issued by way of increase of capital by a going concern. Indeed, according to high authority, wherever a corporation has carried on business with its original authorized capital not fully subscribed, so that the shares have acquired a rating in the market, the unsubscribed shares of the original authorized capital may be issued for whatever they would bring in the market, even though less than par, and if the shares have no market value they may be issued gratuitously." 1 Machen on Corporations, § 779.

And in Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227 (1891) the Supreme Court said:

"The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which, and the purposes for which, such increase was made. It it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained. Stein v. Howard, 65 Cal. 616 [4 Pac. 662]. As the company in this case found it impossible to negotiate its bonds at par without the stock, and as the stock was issued for the purpose of enhancing the value of the bonds, and was taken by the subscribers to the bonds at a price fairly representing the value of both stock and bonds, we think the transaction should be sustained, and that the defendants cannot be called upon to respond * * * to the original stock of the company."

The question in the case involved a statute of Kentucky which provided as follows:

"Nothing herein shall exempt the stockholders of any corporation from individual liability to the amount of the unpaid installments on the stock

owned by them, or transferred by them, for the purpose of defrauding creditors; and an execution against the company may, to that extent, be levied upon the private property of such individual." Bullitt & Feland's General Statutes of Kentucky 1883, § 14, p. 549.

In Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88, (1890) the court had before it a statute of the state of Iowa which declared that:

"Nothing herein contained exempts the stockholders of any corporation from individual liability to the amount of the unpaid installments on the stock owned by them." Revision 1860, § 1172.

And the court said:

"The local statute undoubtedly proceeds upon the ground that unpaid installments of stock subscribed constitute—no other rule being prescribed by legislative enactment—a trust fund for the benefit of creditors. But it does not declare that a corporation is without power, under any circumstances whatever, to dispose of its stock at less than par, or that stock purporting to be full paid shall, in all cases, and without reference to the circumstances under which it was acquired, be deemed unpaid to the extent that the amount given for it by the owner, whether in money or in property, was less than its face value. On the contrary, the statute itself imposes no express restriction upon the disposition by a corporation of its stock except such as is imposed upon individuals, and prescribes no rule in respect to the liability of a stockholder to creditors except that, when corporate property cannot be found to pay a judgment creditor, his private property may be seized under the execution to the extent of any unpaid installments on the stock owned by him. Whether any such indebtedness really exists upon the part of a particular stockholder, and whether he in law or in fact owes any sum on the stock held by him, was left by the statutes to be determined in each case, upon its own circumstances, and in accordance with the principles of general law touching the rights and liabilities of creditors and stockholders. If the Legislature had intended that the acquisition of stock at less than its face value should be conclusive evidence in every case that the stock, as between creditors and stockholders, is 'unpaid,' it would have been easy to so declare, as has been done in some of the states. If such a rule be demanded by considerations of public policy, the remedy is with the legislative department of the government creating the corporation. A rule so explicit and unbending could be enforced without injustice to any one, for all would have notice from the statute of the will of the Legislature. It is not for the courts by mere interpretation of a statute, not justified by its language, to accomplish objects that are within the exclusive province of legislation."

This makes it necessary to consider whether the New Jersey Corporation Act, under which the stock herein involved was issued, is similar to the Kentucky and Iowa statutes, or whether the New Jersey act is so explicit that it cannot be said of it that it leaves the question whether any indebtedness exists upon the part of the stockholders to be determined upon its own circumstances. The New Jersey act reads as follows:

"Where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy such debt and obligation." P. L. 1896, p. 284, § 21.

We therefore hold that the doctrine of Handley v. Stutz and of Clark v. Bever cannot be invoked to protect Heckscher from paying

to the trustee of the bankrupt corporation the amount unpaid on his stock.

At the trial the plaintiff put on the stand an attorney and counselor at law practicing in New Jersey and asked him whether so much of the decision of Handley v. Stutz as held that under certain circumstances the stock of a corporation might be sold for less than its par value found any support in the decisions of New Jersey. He replied that in his judgment certain of them which he mentioned—See v. Heppenheimer, Easton National Bank v. American Brick & Tile Co., Hebberd v. Southwestern Land & Cattle Co., 55 N. J. Eq. 18, 36 Atl. 122, and Holcombe v. Trenton White City Co.—were inconsistent with that case and had practically determined it otherwise. He testified, too, that the case of Hebberd v. Southwestern Land & Cattle Co., supra, decided exactly the same point in a different way. He also stated that under the law of New Jersey, where there is a transfer of shares which have not been fully paid for, that the transferee is liable for the balance on his shares, unless he can show that he has acquired those shares in the ordinary course of business for full value and without notice of the fact that there was an unpaid amount or illegality about the issue of the shares.

The defendant also called a counselor at law of New Jersey, and asked him whether the courts of New Jersey had passed on this doctrine of Handley v. Stutz, and he replied that the doctrine had never been definitely passed upon by the courts of that state. We have examined the cases cited by the plaintiff's expert. They are cases relating to the issue of original stock, and do not raise the question directly involved in Handley v. Stutz. It is a delicate and not always satisfactory task for the courts of another jurisdiction to declare the law of a state. But the courts of New Jersey do not seem to have expressly decided whether the doctrine of Handley v. Stutz is or is not applicable to the Corporation Act of that state. We do not rest our decision upon the testimony of the experts but upon what seems to us to be the meaning of the legislative act.

[17] This brings us to consider the question of interest. The trial judge instructed the jury that, if they determined that there was overvaluation, the trustee would be entitled to recover interest on the amount remaining unpaid from the time Heckscher received the stock, "because from that time he would have been entitled to draw dividends, if any had been earned and declared." This would make interest begin to run from November 8, 1905. The general rule seems to be that interest runs on an unpaid stock subscription, not from the time a stockholder receives his stock, and is entitled to draw dividends, but from the time payment for the stock is due. Where there is no express promise to pay interest it is recoverable upon the theory that it is damages for the retention of money due and unpaid. The time when interest begins to run in a case of this kind is settled for us by the rule adopted in New Jersey. In See v. Heppenheimer, supra, interest was allowed from the time the stock was acquired. The District Judge did that and there is no error.

Judgment affirmed.

## TITUS et al. v. UNITED STATES SMELTING, REFINING & MINING EXPLORATION CO. et al.

(Circuit Court of Appeals, Second Circuit. March 13, 1917.)

No. 175.

1. CORPORATIONS ⟸574—USURY ⟸18—CONTRACTS—LOANS.

A majority of the bondholders of a corporation, whose assets consisted of the capital stock of mining companies, deposited their bonds with a committee to be used in carrying out any reorganization plan they might approve. The committee entered into a contract with defendant mining corporation, by which the latter agreed to advance money for reorganization purposes and to expend not exceeding $200,000 in exploration of the mining property. Defendant, which was to be the judge of the manner and extent of the appropriation, was to be secured by a pledge of all the the property of the corporation being reorganized, which the committee agreed to buy in at foreclosure sale. The bondholders, who were not notified of the contract with defendant, approved a plan submitted to them authorizing the committee to organize a new corporation and to create prior liens, not to exceed $300,000, for any purpose which the committee in its uncontrolled discretion should deem wise or necessary for the protection or development of the property. Defendant was not engaged in the business of lending money, and refused to make a loan to the committee for exploration purposes, but consented to make explorations on condition that it should receive a percentage of the stock in the company to be formed, and also agreed to discharge certain liens on the property. *Held*, that the contract with defendant, though it provided for issuance to defendant of stock to a par value greatly in excess of the advances, was not usurious, there being no loan on which any were primarily liable, defendant being entitled to look to the property alone for reimbursement, and hence, though the contract was invalid, defendant's lien cannot be attacked on the ground of usury.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2297–2303; Usury, Cent. Dig. §§ 31–34, 36–38, 40.]

2. CORPORATIONS ⟸574—REORGANIZATION—LIEN.

In such case, defendant cannot be denied a lien for expenditures made in satisfying the claims of counsel, who conducted litigation on behalf of the corporation; such counsel fees being declared by the court in receivership proceedings to be an underlying lien on the corporate property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2297–2303.]

3. CORPORATIONS ⟸574—LIENS—RIGHT TO.

In such case, as the reorganization committee had the right to obligate itself for the expenditure of necessary sums to protect and develop the property, defendant, having done exploration work pursuant to the contract with the committee, is entitled to a lien, and cannot be restricted to the rights of an occupant who, under a mistaken claim of title, makes improvements in good faith, in which case he is entitled only to the enhanced value of the land occasioned by the improvements.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2297–2303.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit by Edward H. Titus and others, as executors, and others, against the United States Smelting, Refining & Mining Exploration Company and others. From the decree (231 Fed. 205), complainants appeal. Affirmed.

The United States Smelting, Refining & Mining Exploration Company is a corporation organized and existing under the laws of the state of Maine and had an office for the transaction of business in the Southern district of New York. It is hereinafter referred to as the Exploration Company. The Alaska-Ebner Gold Mines Company is a holding company organized in 1906 under the laws of the state of Maine. It is hereinafter referred to as the Alaska Company.

Otto C. Wierum, Jr., Thomas Mills Day, and Fredric W. Frost, all of New York City, for appellants.

Wing & Russell, of New York City (Philip Russell, of New York City, of counsel), for appellees.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. This is an appeal from a decree directing a sale of certain shares of stock to satisfy a lien of the defendants, previously fixed by an interlocutory decree at the sum of $438,926.98. The complainants are bondholders of the Alaska Company who had deposited their bonds under a reorganization agreement.

The suit is ancillary to a suit brought in the District Court for the Southern District of New York, in which the Guaranty Trust Company of New York and Edward M. F. Miller, as trustees, are complainants, and Alaska-Ebner Gold Mines Company and others are defendants. It is brought to enforce the complainants' equitable claims to certain personal property, shares of stock, and to remove incumbrances or liens upon the title asserted by defendants thereto. It seeks to set aside certain contracts and to compel defendant to surrender certain shares of stock, which the defendant claims to have a lien on, to a receiver to be appointed for the benefit of the complainants, and for certain other relief which will be hereafter stated. The case cannot be understood without a pretty full statement of the facts.

The Alaska Company passed into the hands of receivers appointed on April 4, 1912, on a creditors' bill in equity in the United States District Court for the Southern District of New York, and on June 29, 1912, an ancillary receiver in Alaska was appointed. A bondholders' protective and reorganization committee was formed, with one E. R. Chapman as chairman. This committee is hereinafter referred to as the committee. The position of the bondholders was not secure under the mortgage, because the property mortgaged, to wit, Ebner stock, was to a large extent in the hands of prior lienors. Those liens are referred to as the underlying liens, and cover approximately 68 per cent. of the Ebner stock.

The committee needed money to take up the underlying liens and engineers to explore and develop the Ebner property. If that property was a mine, or could be made a mine, then there was value in the stock, which was the bondholders' security. If it were not a mine, or so long as it was undeveloped, their bonds were without value. This committee held a large number of the securities of the Alaska Company, and on December 19, 1912, they issued what is known as "Circular No. 1" to the bondholders of that company. The circular stated the assets and liabilities of the Alaska Company and its negotiations with

defendant, with a view of interesting it in the properties of the company, and that the defendant under certain conditions would become interested in the development of the property. The circular said:

"If the ore deposits are found to warrant it, they will provide the capital necessary to develop the mine and install the necessary stamp mills and other facilities for a large operation. The estimated amount required for this latter purpose is from $2,000,000 to $2,500,000."

It concluded with certain recommendations, which included the formulation of a plan of reorganization, to be prepared by the committee, and it requested a deposit of bonds with the Hudson Trust Company of New York City, subject to the order of the committee, with authority to the committee to use the same in connection with any plan of reorganization the committee might decide on, and also to use the same in any foreclosure proceeding that might be commenced, and in connection with such proceedings to use the same in purchasing at foreclosure sale—

"it being intended that the committee is to have the right and authority to use bonds deposited in every way as if they were the owners of the same, accounting to depositors in par of bonds of a reorganized company, or of a new company in case of foreclosure for the face value and accrued interest on the bonds deposited."

The committee on September 11, 1913, formulated a plan and entered into an agreement with the bondholders as parties of the second part and the Hudson Trust Company as depository party of the third part. This agreement, among other things, authorized the committee—

"to bid for and purchase at private sale or at judicial or other sales the whole or any part of the property and franchise of the company, to use any or all of the bonds deposited hereunder or held by the committee in payment of all or any part of the purchase price of the property so acquired, to hold the property purchased either in their name or in the name of any individual or corporation chosen by them for the purposes thereof, and at, before, or after any sale, to arrange and agree for the resale of any portion of the properties which it may decide to sell rather than to retain, to pledge or hypothecate all or any part of the securities deposited hereunder or which may come into the hands of the committee to carry out the said plan or any modification thereof or any plan adopted in substitution therefor, and to borrow money thereon for any purpose the committee may deem necessary, including the committee's expenses."

It also provided:

"The committee may create such liens upon any or all of the property so acquired by it as may be necessary in the discretion of the committee to carry out the plan and this agreement, or any part thereof, or to protect or develop the said property or any part thereof, or for any purpose the committee may deem wise or necessary."

And the plan in its concluding paragraph provided as follows:

"Moneys and securities coming into the hands of the committee may be used by it in its discretion to purchase debts of or claims against the company, for the payment of expenses of the court and committee, or for such other purchases as the said committee in its uncontrolled discretion may determine."

And in the concluding clause of the fourth paragraph of the agreement the committee was authorized—

"to pledge or hypothecate all or any part of the securities deposited hereunder, or which may come into the hands of the committee to carry out the said plan or any modification thereof."

The agreement also provided that the committee might—

"either personally or through any agent or court process or proceeding, by means of a receiver or receivers, or otherwise, take possession of the property and affairs of the company and manage and deal therewith as fully as either said company or the representatives of any securities deposited with or which may come into the hands of the committee might or could do in such other manner as in the premises may be permissible or proper. The committee may undertake the management of any corporation, and the property thereof, whose stock is owned or controlled by the company, or is covered by the mortgage securing the deposited bonds, or in any way comes into the possession or control of the committee, and may receive, dispose of, and vote upon the shares of stock or other securities of any such corporation."

It also provided as follows:

"The committee may purchase all or any part of the property of the company at any private or public sale or sales, or at any sales held under or as the result of any judicial proceedings, and shall have full power and authority to fix the price to be paid or bid therefor, and in payment thereof may use and apply all or any part of the deposited securities, or any securities which may come into its hands, or any securities issued or to be issued by any corporation or corporations organized by or under the direction of the committee, or any moneys in the hands of the committee from whatsoever source derived."

It further provided:

"The committee may pay, settle, compromise, or purchase any debts of the company whenever and to the extent that it shall deem wise in carrying out said plan or this agreement, and for that purpose may use and apply any securities or moneys in its hands or under its control, from whatsoever source derived."

On March 21, 1908, the Alaska Company had authorized $2,500,000 par value of its first mortgage 7 per cent. convertible gold bonds, the principal of which bonds became due in December, 1912, and was unpaid. Of these bonds there have been certified by the trustee $1,615,000 par value. Approximately $766,000 par value of the bonds were sold and the proceeds turned into the treasury of the company, and about $622,000 par value of the bonds were out as collateral security in varying rations for moneys advanced.

The security and value of the bonds depended chiefly upon the value of the Ebner Gold Mining Company's property in Alaska, which value was unknown and could not be determined, except by exploration and development work estimated to require two years of time and $200,000 of money, and if value should be proven it could not be extracted, except by an expenditure of additional money for plant equipment and working capital estimated at upwards of $2,000,000. The holders of the bonds were unable or unwilling to contribute, ratably or otherwise, sufficient money to prove the said property, or to develop the same if proved, or to create any value in the security of their bonds.

In this condition of affairs the committee on June 30, 1913, entered

into a contract with the Exploration Company by which it was agreed that the Exploration Company should enter upon the property of the Ebner Company, and do thereon certain exploration work and expend large sums of money in the uncontrolled discretion of the Exploration Company. The latter was to receive from the committee either the obligations of the committee or of subsidiary companies of the Alaska Company covering the advances made or to be made by the Exploration Company. The latter was to receive not only the full amount of its advances with interest in cash, but twice the amount of such advances with interest in bonds. In addition to such cash and bonds it was to receive stock of the new company to the amount of $5,500,000 par value, being all the stock of the proposed new company not required for the conversion of bonds.

On December 30, 1913, the committee and the Exploration Company entered into a supplemental contract. It recited that the committee had been unable to procure the acceptance and approval of its plan and agreement by 90 per cent. of the $1,505,000 par value of the bonds outstanding as called for in the original contract, but had secured such acceptance and approval by $840,500 par value of the bonds. It therefore amended the original contract in certain particulars and ratified and confirmed it as so modified. A clause was added which reads as follows:

"The Exploration Company agrees that upon the foreclosure sale referred to in article 2 of the original agreement, if the committee shall be the successful bidder at such sale, the Exploration Company will make available to the committee for turning in as part of the purchase price so to be paid by the committee for the property at foreclosure sale all of the Exploration Company's claims for advances to the extent and in the amount to which and at which the same shall have been allowed by the court as a preferred claim payable out of the proceeds of sale before any distribution is made to bondholders, provided that such turning in shall not change or prejudice or in any manner whatsoever affect the respective rights and obligations of the Exploration Company and of the committee under articles 5 and 8 of the original contract, the intent hereof being that the Exploration Company's preferred claim for such advances may be used as between the Exploration Company and the committee in lieu of cash payment of the purchase price at the foreclosure sale."

To secure the payment of the bonds the Alaska Company had executed a mortgage or deed of trust bearing date of December 5, 1907, in favor of the Guaranty Trust Company of New York City and one Edward M. F. Miller, as trustees, whereby it transferred to the trustees the property therein described as security for the payment of the bonds. The property covered by this mortgage included certain mining properties together with 100,000 shares of the stock of the Ebner Gold Mining Company, hereinafter called the Ebner Company, which stock had a par value of $5 per share and 1,000 shares of the stock of the Humboldt Mining Company, hereinafter called the Humboldt Company, which had a par value of $100 a share. The property of the Ebner Company and of the Humboldt Company was owned by the Alaska Company and consisted of certain mining lands and claims, in the territory of Alaska, believed to be of very great value. The Humboldt Company was a New Jersey corporation. Of the 100,-

000 shares of the stock of the Ebner Company, 31,920 shares were in the possession of the Guaranty Trust Company and 68,080 shares were subject to liens in favor of the committee.

The Alaska Company defaulted in the performance of its covenants under the mortgage and there was due and payable to the trustees the sum of $1,716,065.50. A decree of foreclosure and sale was entered on March 23, 1914. A special master was authorized to sell at public auction the property subject to the lien of the mortgage; and it was provided in the decree that accepted bidders should be entitled to turn in and apply in making payment of the purchase money bonds and coupons issued under the mortgage, and liens upon the stock of the Ebner Company and liens upon the property of the Alaska Company, and 10 per cent. of the purchase price was to be paid in cash.

The committee, acting under the plan and agreement of September, 1913, purchased the property at the foreclosure sale. The plan contained the following:

"The mortgage securing these bonds is being foreclosed, and it is the plan of your committee to purchase all or the greater portion of the property covered by said mortgage at foreclosure sale, provided a competitive cash bid sufficient to pay off the bonds is not received. If such property is purchased by the committee, it is proposed to organize a new company and to vest in it the ownership and control of all the property of the company which your committee may acquire at foreclosure sale or otherwise, free and clear except for a prior lien of not exceeding $300,000 to be created by the committee and covering such cash as may have been expended to acquire underlying liens and for exploration work."

And on April 22, 1914, the special master sold at public auction the property embraced in the mortgage. It was purchased by the committee for the sum of $225,000, that being the highest bid submitted. The sale was closed on May 21, 1914. The special master received in cash $43,879.93 and liens to the amount of $170,072.70 were turned in to him and which he was authorized to receive under the decree of foreclosure. The committee was enabled to make this purchase because of an agreement made with the defendant whereby the latter turned over to it the underlying liens and the 68,000-odd shares of Ebner stock which secured those liens, and which the committee then turned in on account of the purchase price. The defendant also paid to the master for account of the committee the cash required to make up the balance of its bid. The entire amount of cash and liens in the purchase were furnished by the defendant. The committee forthwith turned back to defendant the shares of the Ebner Company's stock and the shares of the Humboldt Company's stock by way of security and at the same time gave its note to defendant in the sum of $230,706.32, with interest at 6 per cent. per annum. The note was to mature on November 20, 1914.

The note for $230,706.32 not having been paid at maturity the Exploration Company sold on April 7, 1915, the securities turned over to it by the committee. The sale was made, not only to satisfy that note, but other obligations which the Exploration Company claimed to be owing to it from the committee, and which it was asserted amounted to $408,921.13.

This suit was begun in April, 1915, the complainants asking the following relief:

"That said agreement of June 30, 1913, and supplemental agreement of December 30, 1913, be adjudged usurious and void and canceled. That the Exploration Company be decreed to surrender the 100,000 shares of stock of the Ebner Company and 1,000 shares of stock of the Humboldt Company to a receiver to be appointed by the court for the benefit of the complainants and such other depositing bondholders as make themselves parties to this suit. That the Exploration Company, its officers, agents, servants, and attorneys, be forever enjoined from selling or offering to sell, assigning, transferring, incumbering, or otherwise disposing of the 100,000 shares of stock of the Ebner Company and 1,000 shares of stock of the Humboldt Company received by it from the other defendants as pretended security for the obligations of said alleged contracts of June 30, 1913, and December 30, 1913, or for any advances made thereunder. That pending the suit a receiver or receivers be appointed, with the usual powers and duties of receivers in like cases, of said shares of stock. That complainants may have their costs of this suit and such other and further relief in the premises as the nature of the case may require."

On January 24, 1916, the District Court filed a carefully prepared opinion the main features of which are as follows: (1) It adjudged the contracts of June 30, 1913, and of December 30, 1913, void. (2) It adjudged the title of the stocks in controversy to be the property of the committee in their representative capacity, subject to the lien of the Exploration Company. (3) It adjudged that the stocks are subject to a valid existing lien of $170,072.70. (4) It provided for the ascertainment by the court or a master of the additional amount due, for which amount the Exploration Company will have a lien on the stocks. (5) It restrained the Exploration Company from selling or in any manner disposing of or pledging the stocks in question, until the further order of the court, and required that they be placed in the custody of the court. (6) It provided for a lien to such further amount as the Exploration Company may expend subject to to the order of the court, to protect the physical property while the provisions of the decree are being carried out. (7) It dismissed the complaint against the individual defendants, because no relief has been asked of them and no proof adduced in this suit warranting a decree against them. The individual members of the committee had been joined with the Exploration Company as parties defendant to this suit. (8) It proved for the further details indicated in its opinion.

On March 6, 1916, an interlocutory decree was entered in this suit adjudging that the contract of June 30, 1913, between the committee and the Alaska Company and the supplemental contract of December 30, 1913, were void and of no effect. The decree also adjudged that the foreclosure sale by defendant of 100,000 shares of the stock of the Ebner Company and of the 1,000 shares of the stock of the Humboldt Company on April 7, 1915, and the purchase of such shares by the defendant at such sale were without warrant or authority in law, and that the defendant did not thereby acquire any lawful title thereto, but the title remained in the committee in trust for the benefit of the complainants, subject, however, to certain liens.

The court held the sale invalid for the reason that the Exploration

Company sold the collateral to satisfy debts it alleged to be due from the committee in the sum of $408,921.13, whereas it only had a right to sell for $213,952.63; everything beyond that sum being in the opinion of the court an unliquidated demand. The note for $230,952.63 was only valid to the extent of $213,952.63, that being the amount of the liens, $170,072.70, and the cash, $43,879.93, turned in by the Exploration Company to the credit of the committee upon the latter's purchase at the time of the foreclosure of the Guaranty Trust Company's mortgage. The court held that the Exploration Company was without power to sell the collateral to satisfy a debt greater than at the time of the sale had been actually fixed and was then actually due. The difference between the $408,921.13 claimed and $213,952.63 covered by the note represented an unliquidated debt, to satisfy which the right to sell the collateral did not exist.

It was also adjudged that the aforesaid shares of stock are subject to a valid subsisting lien in favor of the defendant for the sum of $213,952.63 with interest from May 21, 1914, to April 7, 1915, and a valid subsisting additional lien on the said shares for such further sum of money as should be established to the satisfaction of the court to have been expended by defendant in addition to the aforesaid sum of $213,952.63 for expenses of exploration, protection, and development of the properties of the Ebner Company, including its water rights and its expenditures at the request and for the account of the committee in connection with foreclosure and receivership proceedings in the jurisdiction of the Southern district of New York and in the jurisdiction of Alaska down to the date of the entry of the decree.

It was also adjudged that the defendant deposit with the clerk of the District Court the shares of stock involved, which were to be held subject to the further order of the court. It was also ordered that if, on or before May 15, 1916, the complainants had not paid to the defendant the full amount then due, they might apply for an extension for a period not longer than June 30, 1916, and the defendant might at any time thereafter, on five days' notice to the complainants or their attorneys, apply for leave to sell the stock at public auction to satisfy its lien or liens, debt or debts.

Certain others matters were provided for in that decree which need not here be referred to, as they are not involved in this appeal.

On June 13, 1916, another interlocutory decree was entered, which adjudged that the amount of the defendant's lien which the shares of stock were subject to amounted to the sum of $438,926.98, with interest thereon from March 6, 1916. It also adjudged that if the shares should be sold to satisfy the lien, as provided in the former decree, they should be sold subject to a further lien in favor of the defendant for the amount which should hereafter be determined by the court to be due for expenses incurred by the defendant with the approval of the court after the entry of the decree of March 6, 1913, in protecting and preserving the properties of the Ebner Company, which expenses were not to exceed $4,000 per month.

On August 4, 1916, the complainants not having paid to the defendant the amount they were directed to pay under the prior decree,

another decree was entered directing the special master to sell the shares of stock herein involved on October 18, 1916, at public auction, and determining the conditions of sale. From this order the complainants have appealed to this court, and also brought up for review so much of the decree of March 6, 1916, as refused to adjudge that the contracts of June 30 and December 30, 1913, are void for usury, and as adjudged that the defendant is entitled to a lien.

[1] This makes it necessary to determine whether there was a loan; for, if the real transaction was a loan, it would be the imperative duty of this court to declare the agreement void as providing for a usurious return for its money. Counsel for the complainants say in their brief in this court:

"With all respect for the learned court below and for our opponents, to hold that there are not here all the elements of a loan is a legal absurdity."

In Nichols v. Fearson, 7 Pet. 103, 8 L. Ed. 623 (1833), the Supreme Court declared that there were two cardinal rules in the doctrine of usury. The first of these is one with which we are now concerned:

"The first is that to constitute usury there must be a loan in contemplation by the parties."

And in order to constitute a loan there must be a thing loaned, a lender, and a borrower. A loan involves the delivery of a thing loaned by one party, who lends, to another party, who borrows, under an agreement to return the thing so delivered, or its equivalent. The thing loaned may be with or without reward, as the parties may agree; but in all events the thing loaned, or its equivalent, is to be returned.

The record does not disclose any such agreement in this case. The Exploration Company did two things: (1) It purchased certain claims against the Alaska Company to keep the property together. (2) It undertook through its engineering corps to explore certain mining properties at its own expense. Neither of these things involved a loan. There was no borrowing and no lending.

There was a distinct refusal on the part of the Exploration Company to make a loan. The committee in the first instance sought a loan from the Exploration Company, which was refused. The representative of the Exploration Company testified that the chairman of the committee came to him and said that they wanted to borrow money to take up the liens and preserve the equity in the property for the bondholders. He also said that the bondholders' committee needed to have an exploration of the physical property in Alaska, to find out whether or not there was a mine there, that they had no available means with which to prosecute the investigation, and that they would like to borrow from the Exploration Company enough money to find that thing out. The reply to this application was as follows:

"I told him that was not an attractive lay out; that the Smelting Company or the Exploration Company was not lending money; what he was talking about was a banking proposition; that the Exploration Company did know the property, the Ebner property, in Alaska by report, and had a notion that it might be a gold mine; and that it would be entirely willing to spend up to a couple of hundred thousand dollars to find out whether or not there was a

gold mine there, provided he could find anybody in existence anywhere with whom we might contract, so that, if the exploration developed value, we might be assured of getting the property on such terms as we might arrange. * * * Chapman said what he wanted was to borrow the estimated cost price of this exploration work for the Chapman committee, and go ahead and do the work, and when they got through, if they found value there, they would offer it to the Exploration Company, or to the Smelting Company, on some fair terms, and then it would be arranged. I told him that would be absolutely unsatisfactory; that the result of that would be that for a mere loan and repayment of it our money would develop perhaps a very great value in the equity of the property, which we had no hold on, and which the bondholders would take and run off with for their own benefit, and we would get nothing, except on terms dictated by them; but that, if he would tie up the disposition of the final equity in that property, so that we could have it on terms that we were willing to set down right there and dicker with him on, we would like to go ahead, and would put up the money for the exploration, and we would make that and other necessary disbursements, and when we got through, if we found value, we would organize a new company on the basis that we might then agree with him on. I told him that the only trade we would consider would be that, if our exploration developed value worth going on with, we should get all of our disbursements back, everything we had spent on the property, and we should get also the entire property, lock, stock, and barrel, giving a good bond for a bad bond to the old Ebner bondholders. That was rather grumblingly conceded after a while. * * * I prepared the contract, which later was signed as the contract of June 30th, and sent it over to Mr. Chapman."

It is impossible to read the contract these parties entered into and spell out of it a loan. The Exploration Company had no intention of loaning money. The money now said to have been loaned was not turned over to the committee, but was expended by the Exploration Company itself, and in its own interest, and not for the bondholders. The money expended was at the hazard of the undertaking; there being no liability on the part of any one to reimburse the Exploration Company for the money expended by it. If the property is sufficient to satisfy the Exploration Company's lien for principal and interest, well and good; and, if it is not, no one is primarily liable for repayment.

[2] We come now to the second question which this appeal presents, that relating to the liens. The complainants insist that the defendant should be required to restore to them the shares of stock in both the Ebner and the Humboldt companies, free from any lien or claim whatever. The committee had authority under the plan and agreement of September, 1913, to create such liens as in its discretion it thought necessary to carry out "the plan and this agreement," and "to protect or develop" the property, or any part thereof. The provisions giving it authority to create the liens have been set forth in an earlier portion of this opinion. In the face of these provisions we are at a loss to understand how it can be seriously claimed that the committee was without power to create the liens. That it had the power to create them, and that it rightly exercised that power, is evident. It was authorized to procure the purchase of the underlying liens.

The committee was also authorized to use or expend moneys "in operating, completing, improving, or otherwise, the plant of the company, or making the business thereof effective prior" to the proposed reorganization. It had authority to contract for the expenditure of such

sums as might be necessary and proper to explore, protect, or develop the property. Expenditures incurred to determine the presence or nonpresence of ore in paying quantities in a given mining area is necessary and proper work and within the express authority conferred upon the committee. And in doing this it had authority to give a lien for the expenses thus incurred.

The defendant's statement of its expenditures as originally presented amounted to $537,931.65. But the court disallowed $99,004.67 and allowed $438,926.98. The amount thus allowed is made up as follows: (1) Liens owned by the Exploration Company on May 21, 1914, when the foreclosure sale was consummated and the property turned over to the Chapman committee, and the liens were turned over as part payment of the purchase price to the amount of $170,072.70, together with $43,879.93, which the Exploration Company turned over as cash to be also applied on the purchase price. This aggregated $213,952.63. The interest on this amount from May 21, 1914, to the entry of the interlocutory decree amounted to $11,303.82. This made a total of $225,-256.45. (2) The expense of exploration and development work done for the Chapman committee after it took title at foreclosure sale, May 21, 1914, and which amounted to $184,069.14. (3) The money advanced by the Exploration Company to defray the expenses incurred by the committee in the settlement of the ancillary receivership in Alaska, in the payment of counsel in charge of litigation in Alaska where a number of cases were pending including the important case of Alaska-Juneau v. Alaska-Ebner, Mackey et al., which involved the water rights on the Ebner mines. The amount of these expenses as allowed aggregated $29,601.39.

It does not appear that any errors were committed by the District Court in determining the amount of the liens. The only item among those allowed which the complainants' counsel specifically attack is the allowance of the liens of H. W. Martin. It is said the committee had no power to incur any obligations as to him. It is true the committee did not employ Martin to do any work on the mining properties. The contract with him was made by the receivers, acting under the orders of the District Judge. That contract provided as follows:

"The receivers agree * * * that they will deliver and pledge to said Martin forthwith, upon the surrender thereof, as hereinbefore provided, all of the preferred, or underlying claims, stock, and securities of every kind which he now holds as security for his said advances, which said claims, stock, and securities are to be security for the said receivers' certificates pursuant to the order of the United States District Court for the Southern District of New York, dated May 21, 1913; and of such stock, the stock in the Ebner Gold Mining Company to be transferred, so soon as practicable, into the name of the receivers, who shall indorse in blank the certificates therefor, or powers for the transfer thereof, but shall retain the voting power thereon, as provided in said order."

The existence of the Martin liens was established by the decree of foreclosure and sale of the mortgage to the Guaranty Trust Company, entered March 23, 1914. That decree mentions certain liens in favor of Martin in certain specified amounts and then adds:

"All amounts of money, with interest, paid out and advanced by said H. W. Martin or on his account pursuant to said contract of May 27, 1913, on

or after November 1, 1913, and up to and including the date of sale herein, which amounts were undetermined at the time of filing said special master's report, but which were therein declared to be prior and superior to the lien of the said mortgage."

The Martin liens being superior to the lien of the mortgage, the committee, in acquiring title at the sale, acquired it subject to those liens, and the objection raised is without merit.

[3] Counsel for complainants urged upon this court that the most favorable view which can be taken of the defendant's position is that it should be assimilated to that of an occupant of land, who, under a mistaken claim of title, has made improvements in good faith at his own cost. In such a case the rightful owner, who comes into equity for relief, must as a condition of his relief do equity by reimbursing to the defendant such sums as were expended in improvements so far as they had increased the value of the land. Applying that doctrine to the facts of this case, they would have this court decide that the bondholders who bring this suit can only be asked to reimburse the Exploration Company to the extent that it has added to the permanent value of this property by the expenditures which it has made. While counsel claim that this is the most favorable view which can possibly be taken of the defendant's position, they are far from conceding that the defendant is entitled even to so much consideration as that would involve; for they deny defendant's good faith and point out that it was fully cognizant of the powers of the committee with whom it dealt. It is sufficient to say that the principle invoked is inapplicable to the facts of this case. The committee, as we have pointed out, had the right to obligate itself for the expenditure of such sums as might be necessary and proper to explore, protect, or develop the property.

We see no reason to believe that the Exploration Company did not act in entire good faith. We fail to find evidence in this record that it made reckless or ill-advised expenditures.

Decree affirmed.

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STRINGER v. STEVENSON. In re LEWIS (two cases). In re H. J. LEWIS OYSTER CO.

(Circuit Court of Appeals, Second Circuit. February 14, 1917.)

Nos. 162–164.

1. BANKRUPTCY ⟸340—PAYMENT OF CLAIMS—EVIDENCE—INDIVIDUAL DEBT.
In bankruptcy proceedings against a partnership and the surviving partner, evidence *held* to show that loans by the claimant were made to the partner individually, not to the firm, so that the claim could not be allowed against the firm assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527.]

2. PARTNERSHIP ⟸239(1)—DISSOLUTION—ASSUMPTION OF FIRM DEBTS.
Where, on the retirement of one of three partners from the firm, the assets were transferred to one of the remaining partners, who assumed the firm debts, and thereafter the two remaining partners formed a new firm, all the capital of which was contributed by the partner to whom

the assets had been transferred, the debts of the former firm did not become debts of the new firm, but remained individual debts of the partner who assumed them.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 495.]

3. PARTNERSHIP ⊂⊃125—REPRESENTATION BY PARTNER—ACTING FOR FIRM.
In order that a firm may be bound by the acts of a partner, the partner must have performed the acts in his character as agent for the firm, and not as principal, and whether he made an agreement as agent or as principal is a question of fact, dependent on the intent and agreement of the parties.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 190.]

4. PARTNERSHIP ⊂⊃155—REPRESENTATION BY PARTNER—INDIVIDUAL ACT—BENEFIT TO FIRM.
When a partner does an act on his own behalf, the firm does not, as a general rule, become bound thereby merely because it obtained the benefit of the act.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 278–280.]

5. PARTNERSHIP ⊂⊃181—LOANS TO PARTNER—PAYMENT OF FIRM DEBTS—RIGHTS OF LENDER.
To the extent that loans made to an individual partner were applied to the payment of firm debts, the lender had a right in equity against the firm assets; but that right came to an end when those assets ceased to be partnership assets.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 310, 316, 317.]

6. PARTNERSHIP ⊂⊃237—FORMATION OF NEW FIRM—DEBTS OF OLD FIRM.
When, upon the retirement of one partner, the others form a new firm, the new firm is not liable for the old firm's debts, unless it assumes them.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 489, 490, 493, 494.]

7. PARTNERSHIP ⊂⊃77—DISPOSITION OF FIRM PROPERTY—RIGHTS OF PARTNER.
Partners may by agreement make any disposition of firm assets that an individual can make of his property; their right of disposition, like an individual's, being subject to the prohibition against transfers to defraud creditors.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 125, 145.]

8. BANKRUPTCY ⊂⊃351—PRIORITY OF FIRM CREDITORS—PARTNERSHIP LIEN.
The priority of firm creditors depends on the existence of the partner's lien, and if the partners consent that the firm assets shall become the individual property of one partner the priority of firm creditors is gone.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564.]

9. PARTNERSHIP ⊂⊃242(5)—RETIREMENT OF PARTNER—FIRM ASSETS—ASSUMPTION OF DEBTS—EVIDENCE.
Where the evidence showed that, on the retirement of one of three partners, the firm debts were assumed by one of the remaining partners, not by the new firm, the fact that one of those debts was carried on the books of the new firm, but in red ink, to indicate that it was one of the debts of the old firm, does not, when considered with the evidence, show an assumption of that debt by the new firm, but is merely an entry on the books for the convenience of the partner who had assumed to pay the debts.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 506.]

10. PARTNERSHIP ⊂⊃242(5)—RETIREMENT OF PARTNER—ASSUMPTION OF FIRM DEBTS—EVIDENCE—TRANSFER OF BANK ACCOUNT.
The fact that the bank account of an old firm was transferred to the new firm, composed of the remaining partners, after the retirement of a

partner, is not controlling that the new firm assumed the debts of the old, where the testimony showed that one of the partners assumed such debts and agreed to furnish all the capital for the new firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 506.]

Hough, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the Southern District of New York.

In the matter of G. Franklin Stringer, individually and as sole surviving partner of Stringer & Co., bankrupt. From decrees allowing the claims of the H. J. Lewis Oyster Company and of H. Leroy Lewis as claims against the firm assets, the trustee, J. Gardner Stevenson, appeals; and from a decree allowing the claim of Mary E. Lewis in part only as a claim against the firm assets, both the claimant and the trustee appeal. Decrees (234 Fed. 454) modified, and claims allowed only against individual assets.

See, also, 230 Fed. 177; 233 Fed. 799.

A. Gordon Murray, of New York City, for trustee.

Henry M. Stevenson, of New York City, for claimants.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The trustee of the bankrupt's estate has brought here appeals from three separate decrees allowing certain claims against that estate. These claims are:

(1) A claim of Mrs. Mary E. Lewis. Proof of debt was filed in the office of the referee in bankruptcy on November 22, 1915, in the sum of $64,314.71. This was reduced by stipulation to the sum of $62,033.04. The referee allowed the claim in that amount against the estate of the bankrupt, as sole surviving partner of Stringer & Co., and the said firm of Stringer & Co. The trustee thereupon objected on various grounds, and among others on the ground that the referee erred in holding that the amount constituted a provable claim against the firm assets. When the matter came up in the District Court, the allowance was reversed as to a part. The District Judge allowed $15,000 of this claim as against the firm assets, and the balance, $47,033.05, as a claim only against the individual estate of the bankrupt; and a decree modifying the order of the referee as above indicated has been entered. From that decree both the claimant and the trustee have appealed.

(2) A claim of the H. J. Lewis Oyster Company. Proof of debt was filed in the office of the referee on January 26, 1915, in the sum of $25,000; and on November 22, 1915, an amended proof of claim was filed in the sum of $25,091.69. This claim was allowed against the firm assets of Stringer & Co. by the referee, and that finding has been sustained by the District Judge, who has entered a decree to that effect. The trustee has appealed from that decree.

(3) A claim of H. Leroy Lewis. Proof of debt was filed in the office of the referee on April 26, 1915, in the sum of $6,771.96. Thereafter an amended proof of debt was filed, which fixed the amount of the indebtedness in the sum of $6,706.65. The referee allowed this as a claim against the firm assets of Stringer & Co. and entered a decree to that effect. The trustee has appealed from that decree.

The appeals from these three decrees were argued and submitted at the same time. They will be disposed of in one opinion. In considering these various claims it will be necessary to keep distinctly in mind the partnership relations of the bankrupt:

First in time is the firm of Jewell, Stringer & Co. That firm was composed of Edward H. Jewell, G. Franklin Stringer, and W. C. Tegethoff. This firm continued in existence until February, 1911, when Tegethoff withdrew. Second. Then at once followed the firm of Jewell & Stringer, composed of Edward H. Jewell and G. Franklin Stringer. In October, 1911, G. Franklin Stringer, Jr., was admitted to the firm; the firm name remaining as before. Third. On May 23, 1912, Jewell retired from the firm of Jewell & Stringer, and the firm of Stringer & Co. was formed, composed of the two Stringers, father and son. It continued in existence until January, 1915, when G. Franklin Stringer, Jr., died. The partnership was based on an oral agreement, there being no written partnership articles. Stringer, Sr., was to furnish all the money; the son contributing merely his services, and sharing in the profits or losses to the extent of 25 per cent.

As we understand it, these various firms of Jewell, Stringer & Co., Jewell & Stringer, and Stringer & Co., were engaged in a stockbrokerage business in the city of New York. The testimony shows that on the retirement of Jewell there was transferred to Stringer, Sr., all the partnership assets and he assumed all the partnership liabilities. Mr. Jewell's testimony is that upon his withdrawal all the assets and obligations of the firm of Jewell & Stringer were assumed by Stringer, meaning Stringer, Sr., the bankrupt; and that that was the reason why he (Jewell) transferred to him the seat on the Stock Exchange. The seat stood on the books at $80,000, and it was transferred at $72,000. This was a paper loss of $8,000, half of which was charged to Jewell and half to Stringer.

There is no testimony in the record which contradicts the testimony that, on the dissolution of the firm of Jewell & Stringer, the assets and obligations of the firm were assumed by Stringer, Sr. There are no allegations in any of the proof of claims that this transfer of the assets to Stringer, Sr., was not made in entire good faith. There is no intimation anywhere in the testimony that it was made to hinder, delay, or defraud creditors.

There is no allegation and no proof that at the time this transfer was made the firm of Jewell & Stringer was insolvent or likely to become such; and there is no allegation and no proof that at that time either partner was individually insolvent. At the time Jewell withdrew, he gave to Stringer a demand note for $46,735.93. It appears that in April, 1915, when Jewell gave his testimony in this case, three years after the dissolution of the firm, that the note had not been paid, and that he was at the time of giving his testimony unable to pay it. But this does not prove insolvency in May, 1912, and the District Judge in his opinion declares that "the firm of Jewell & Stringer was not insolvent."

[1] We come now to examine the facts relating to the claim of Mrs. Lewis. This lady is the sister of G. Franklin Stringer, the bankrupt.

At various times she has been in the habit of advancing him large sums of money; he at the time of the failure being indebted to her in the sum of $300,000. The particular claim herein involved, in the sum of $62,033.04, is based upon cash loaned to the bankrupt at divers times and upon bonds and stocks which she at different times let him have and which he sold.

The claimant testified that in giving her brother these properties she took back no writing, but that all the transactions were verbal, and that there was never any particular agreement between her brother and herself respecting the matter. "It was simply understood," she testified, "that he would repay the money." Asked as to the securities she let him have, and as to whether there was any understanding or agreement as to them, she said:

"The idea of it was that I loaned him until he could make some return; we didn't discuss any time he should have them, or anything about it."

Then she was asked:

"Did he state to you at that time what he was going to do with these securities?"

And she answered:

"No; I didn't question him anything about what he was going to do with them. Q. But after you handed them or gave them to him, using your own phrase, he could do with them as he wished? A. It was for his judgment as to how he used them; I never discussed that at all."

Stringer's understanding of these transactions is shown by the fact that this claim now made against the firm assets for $62,033.04 was included by him in his personal schedule of liabilities. At the hearing before the referee he was asked to state how it was that that amount which had been made as a claim against the firm was included in the $300,000 personal liability to Mrs. Lewis. His answer was:

"Simply because it was always my understanding that any moneys that she loaned to me were loaned to me personally and became my personal liability. * * * I have always considered it so in all the transactions we have had, and that is the reason I put it in my personal schedules."

He was asked whether this understanding was the result of any conversation he had with Mrs. Lewis, and he answered in the negative. He said he had never had any conversations with her, regarding any loans she had ever made, as to whether or not the loans were to him personally or to his firm.

"We had no particular conversation about it. I needed the money, and she let me have it, the same as she had let me have the sums of money before I went into the brokerage business."

It also appears that no firm obligations of Jewell & Stringer, or of Stringer & Co., were ever given to Mrs. Lewis, and that he never promised on behalf of the firms that they would be liable to Mrs. Lewis for any of the money; and he testifies that it was his intention, not that the firms should pay her, but that he would personally pay her, as to all the transactions he had with her. It farther appears that the books of Stringer & Co. show no entries of firm indebtedness to Mary E.

Lewis in the sum of $64,000. The books show no loans by Mary E. Lewis to Jewell & Stringer.

We are compelled to conclude that these loans were made to G. Franklin Stringer, Sr., individually, and not to the firm. It appears that certain bonds and a check for $5,000 payable to Jewell & Stringer were delivered in November, 1911, to G. Franklin Stringer, Jr. But Mrs. Lewis testified, as to that, that that accommodation was advanced under the same general understanding as the others had been and that "it was for the same use as the rest was." That this was the understanding of all parties is shown by the fact that these bonds were charged on the books to G. Franklin Stringer's special account, and Stringer, Sr., testified that he considered all transactions entered in that account as his personal transactions.

The referee concluded that the advances made by Mrs. Lewis became liabilities of the firm in existence at the times when they were made respectively; that some of the advances were made while the firm of Jewell & Stringer was in existence, and became a claim to that extent against that firm; that other advances, having been made during the existence of the firm of Stringer & Co., became the liabilities of that firm; and that, as the obligations of Jewell & Stringer were assumed by Stringer & Co., all the claims became claims against the latter. This conclusion seems to have been reached as follows:

"Where one copartnership transfers all its assets to another, intended to take its place, nothing being said about debts, such transfer is necessarily subject to the payment of the debts of the old firm."

But in our opinion these loans were not loans to Jewell & Stringer or to Stringer & Co.; and if any of them had been loans to Jewell & Stringer, they were never assumed by Stringer & Co., but by Stringer, Sr., and the assets of Jewell & Stringer were not transferred to Stringer & Co., but to Stringer, Sr. The disallowance by the District Judge of $47,033.05 in the claim of Mrs. Lewis against the assets of the firm of Stringer & Co. was correct.

[2] It remains to consider whether his allowance of $15,000 of the claim against the firm assets was also correct. In this amount the District Judge seems to have included a check given on November 10, 1911, for $5,000. That check was made payable to the order of Jewell & Stringer, and given to Franklin Stringer, Jr., during the absence of his father. We have above referred to the testimony of Mrs. Lewis concerning that transaction, and that it was made upon the same basis as all the rest of the loans. But if her testimony in that particular is to be disregarded, and the loan is to be held as a loan to Jewell & Stringer, it is still not a claim against the firm of Stringer & Co., which never assumed the liabilities of Jewell & Stringer.

Then the District Judge in his $15,000 allowance seems to have counted in certain International Silver Company bonds, which were delivered to Franklin Stringer, Jr., at the time he obtained the $5,000 check. The District Judge seems to have thought that these bonds found their way into the possession of Stringer & Co. The proof of debt is that they were disposed of by Jewell & Stringer, and in the assignment of errors by the claimant they are described as having been disposed of on

May 8, 1912, which was prior to the formation of the firm of Stringer & Co. We know of nothing in the record to the contrary; and if these bonds are assumed to have been loaned to Jewell & Stringer, and not to Franklin Stringer, Sr., through the agency of his son, the loan would create a liability which was assumed by Stringer individually on the dissolution of the firm, and so constitutes no claim against the firm assets of Stringer & Co.; and the entire claim of Mary E. Lewis for $62,033.04 against the firm assets of Stringer & Co. should have been disallowed, and not merely the $47,033.05 as directed by the District Judge.

The District Judge, in stating his reason for allowing proof to be made for this $15,000 against the firm assets, says:

"The firm of Jewell & Stringer was liable, therefore, to Mrs. Lewis, and upon the transfer of this obligation with the assets of the firm of Jewell & Stringer to G. Franklin Stringer as surviving partner, and with the immediate transfer by him of these assets to the firm of Stringer & Co., this item became a debt against the firm of Stringer & Co., and the allowance of the claim by the referee is correct."

In this respect the District Judge fell into error. The law applicable to the claim made by Mrs. Lewis is not doubtful.

[3] 1. In order that a firm may be bound by the acts of a partner acting within his authority, the person whose acts it is sought to impute to the firm must have acted in his character of agent for the firm, and not as principal. If he acted as principal, he alone is liable. National Bank v. Cringan, 91 Va. 347, 21 S. E. 820; Bannister v. Miller, 54 N. J. Eq. 121, 32 Atl. 1066; Ferson v. Monroe, 21 N. H. 462; Holmes v. Burton, 9 Vt. 252, 31 Am. Dec. 621. And whether he entered into the agreement as agent or as principal is a question of fact, dependent upon the intent, understanding, and agreement of the parties. The intent, understanding, and agreement of both Mrs. Lewis and Stringer is shown by the evidence to be that her loans were to him and not to his firm. This is entirely clear as to all the loans, except those made to Stringer, Jr., on November 10, 1911; and if it be assumed that those particular transactions were with the firm of Jewell & Stringer, they subsequently became the individual indebtedness of Stringer by his assumption of the liabilities of that firm on its dissolution.

[4] 2. When a partner does an act on his own behalf, the general rule is that the firm will not be bound merely by reason of having obtained the benefit of that act. So that if a partner, without authority from the firm, borrows money, the lender cannot recover from the firm, although the money may have been applied for its benefit. Smith v. Craven, 1 Cromp. & J. 500; Hawtayne v. Bourne, 7 M. & W. 595; National Bank v. Thomas, 47 N. Y. 15. But if money so borrowed has been expended in paying the legitimate debts of the firm, the lender is entitled in equity to the repayment out of the firm assets of money shown to have been so applied. 22 Am. & Eng. Encyc. of Law, p. 164; Blackburn Building Society v. Cunliffe, 22 Ch. Div. 61.

[5] To the extent that the loans made by Mrs. Lewis to Stringer could be shown to have been applied to the payment of the debts of Jewell & Stringer, she had a right in equity to come upon the assets of

Jewell & Stringer. But she never asserted that right; and when the property ceased to be partnership property her right to be subrogated as against it to the rights of the partnership creditors whose debts had been paid by her money came to an end.

[6] 3. When, upon the retirement of one partner, the others constitute a new firm, such firm is not liable for the old firm's debts, unless it assumes them. 30 Cyc. 614; Weil v. Jaeger, 174 Ill. 133, 51 N. E. 196. In the instant case the express agreement was that the firm debts of Jewell & Stringer were assumed by Stringer, Sr. So that the liabilities of Jewell & Stringer never became the liabilities of Stringer & Co.

[7] 4. Partners may by agreement make any disposition of the firm assets that an individual can make of his property. Allen v. Center Valley Co., 21 Conn. 130, 54 Am. Dec. 333; Guild v. Leonard, 18 Pick. (Mass.) 511; Fitzgerald v. Christl, 20 N. J. Eq. 90; Haskin v. James, 96 Cal. 258, 31 Pac. 36. This is, of course, subject to the principle that the transfer is not made to defraud creditors. Huiskamp v. Moline Wagon Co., 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971. Whether this principle is also subject to the condition that the firm must have been solvent at the time is a question upon which the courts have differed. We do not need to consider that phase of the subject, for it is not claimed that the firm of Jewell & Stringer was insolvent when its assets were transferred to Stringer. By the agreement between Jewell & Stringer, upon the dissolution of that firm, the firm assets became the individual property of Stringer, Sr. Where the assets are transferred to one partner in consideration of his promise to pay the liabilities, the validity of the transaction turns upon the law of fraudulent conveyances. If no intent to hinder, delay, or defraud creditors appears, the firm creditors cannot impeach the transaction.

[8] 5. The priority of firm creditors depends upon the existence of the partner's lien, and if a partner consents that the firm assets shall become the individual property of one of the partners, the priority of the firm creditors is gone. Case v. Beauregard, 99 U. S. 119, 25 L. Ed. 370. As stated in Fitzpatrick v. Flannagan, 106 U. S. 648, 654, 1 Sup. Ct. 369, 27 L. Ed. 211, the right of a partnership creditor to subject the partnership property to the payment of his debt in equity in preference to creditors of an individual partner is derived through the other partner, and it subsists only so long as that of the partner through which it is derived remains. And in Lindley on Partnership, volume 2 (2d Am. Ed.) p. 698, it is said that:

"The creditors of the firm have no lien on its property which can prevent the partners from bona fide changing its character and converting it into the separate estate of one of them."

The transfer of the firm assets of Jewell & Stringer to Stringer, therefore, deprived the creditors of Jewell & Stringer of their priority. So that, if Mrs. Lewis were to be regarded as a creditor of Jewell & Stringer, rather than of Stringer individually, she lost her priority by that transfer.

The case of La Montagne v. Bank of New York National Banking Association, 183 N. Y. 173, 76 N. E. 33, is relied upon by counsel for

Mrs. Lewis. That case, however, is not applicable to the facts which this record presents. That case relates to a written transfer by one firm to another of all its assets, without any agreement as to the payment of the firm debts; and it was held that the firm taking the assets would take them subject to the payment of the firm debts, as otherwise the transfer would be fraudulent, as there would be nothing left to pay creditors. In the case at bar there was an agreement that Stringer was to pay the debts, and there was no transfer of the assets of the old firm to the new.

The case of Frederick v. Citizens' National Bank, 231 Fed. 667, 145 C. C. A. 553, decided in the Circuit Court of Appeals for the Third Circuit, simply holds that where money is borrowed by individual members of a firm, but is in fact borrowed and used for the benefit of the firm, and it is the understanding of both borrower and lender that the notes given for the money are firm obligations such notes may be proved against the estate of the partnership. We have no disposition to question that principle. The case is simply not applicable, for it is not shown that borrower and lender, or even either of them, understood at the time that the transactions here involved were intended to create firm obligations.

[9] We now come to the claim of the H. J. Lewis Oyster Company for the sum of $25,000. The facts as to this claim are as follows: On March 22, 1910, the Oyster Company loaned the sum of $25,000 to Jewell, Stringer & Co. Several renewal notes were given successively for this indebtedness; the last one being dated on March 21, 1911, by Jewell & Stringer. That this was a liability of the firm of Jewell & Stringer at the time Jewell withdrew is evident. Was this liability assumed by Stringer & Co.? The books of Stringer & Co. show an entry in red ink of an indebtedness of $25,000 to the H. J. Lewis Oyster Company. The entry is made under "Bills Payable." The testimony is that an entry in red ink shows an outstanding liability carried over from Jewell & Stringer. The books fail to show any corresponding entry of a consideration to Stringer & Co. therefor. They do show that every three months a check was sent to the Oyster Company and credited to "Special Interest Account."

The question, therefore, is whether the testimony given by Jewell that Stringer, Sr., assumed the debts of Jewell & Stringer, shall be disregarded, or whether this entry shall be accepted in the light of that testimony and treated accordingly. We think the latter course should be adopted respecting it. The fact that firm checks were used to pay the interest is not important, for it is matter of common knowledge that firm checks are every day used to pay individual liabilities. It is more important that the entry shows this indebtedness among "bills payable." But the testimony shows that red ink was used to indicate that it was not a debt incurred by the firm of Stringer & Co., but one incurred by Jewell & Stringer. That it had a status of its own, different from the regular debts of the firm, is indicated by that fact. In the absence of evidence that Stringer, Sr., had assumed all the liabilities of the old firm and furnished all the capital of the new, the presence of such an entry on the books would be of the greatest importance. But

in the light of that evidence, and we think the entry is to be read in the light of that evidence, it means nothing more than that, for convenience of the senior partner, who had agreed to pay them, there were entered on the books of the new firm the liabilities of the old.

[10] The fact that the bank account of the old firm of Jewell & Stringer was transferred to Stringer & Co. without any withdrawal of the funds is not a controlling circumstance. It is consistent with the fact that the two members of the firm of Jewell & Stringer had agreed that Stringer should take the assets, having agreed to pay the debts, and that the transfer from the one bank account to the other should be made, as Stringer had agreed to furnish all the capital of the new firm of Stringer & Co. Unless we are prepared to hold that Jewell testified to a falsehood when he said that it was agreed that Stringer took the assets and assumed the liabilities, we must hold that the claim of the H. J. Lewis Oyster Company was a claim against Stringer, Sr., individually, and not against the firm of Stringer & Co. The evidence is not convincing that the new firm assumed that liability; and there is no evidence whatever that the proceeds of these bonds were ever used to pay debts of Stringer & Co. We therefore hold that the claim of the H. J. Lewis Oyster Company is not a claim against the assets of Stringer & Co.

We come now to the claim of H. Leroy Lewis. It appears that the claim is for $6,706.65 against the firm assets of Stringer & Co. The referee reported that he was of the opinion "that the loan was made under the same circumstances and understanding as those of Mary E. Lewis." In his opinion it was an indebtedness of Jewell & Stringer, and became an indebtedness of Stringer & Co., and should be allowed as against the assets of that firm. In this conclusion the District Judge concurred.

The facts are that the claimant H. Leroy Lewis is the son of Mary E. Lewis. The mother had agreed to loan 15 bonds of the International Silver Company and of the par value of $1,000 each. Her securities were contained in a safe deposit box, and she telephoned her son to go to the Safe Deposit Company and get the 15 bonds from her box and deliver them to her nephew, Stringer, Jr. Lewis had a key to her box, and on opening it found there were only 9 of the bonds; but, as he had some of the same bonds in his own deposit box, he took from it 6 similar bonds and delivered the 15 to Stringer, Jr., at the Belmont Hotel in New York. The 6 bonds obtained from his box belonged to Lewis himself, and not to his mother. There is no evidence that, when Lewis delivered the 15 bonds, he informed Stringer that 6 were his own. Under the circumstances it might be a fair inference to hold that Lewis delivered all the bonds to Stringer as the bonds which his mother had promised and was loaning. That that was the mother's understanding of the transaction is shown by her testimony, and that that was Stringer's is shown by the fact that these 15 bonds were included in the memorandum of securities which he sent her as having been loaned by her and charged in the G. Franklin Stringer Special Account. Mrs. Lewis testified that she loaned all the securities included in that memorandum. And Lewis admits that at the time he delivered the bonds he did not

inform Stringer that 6 of them belonged to him personally and were loaned by him and not by his mother. The firm books show that the firm of Jewell & Stringer had no account with H. Leroy Lewis. They also show that Jewell & Stringer received the bonds from G. Franklin Stringer in his special account. And the books of Stringer & Co. show no indebtedness to H. Leroy Lewis. In this respect this claim differs from that made by the H. J. Lewis Oyster Company. The books of Stringer & Co. show that certain payments were made by firm checks to H. L. Lewis and that such payments were charged to G. Franklin Stringer Special Account.

This loan was made on November 10, 1911. The allegation of the claim is that it was made to the firm of Jewell & Stringer. The evidence is very unsatisfactory. There appears to have been no receipt given by the firm or by any one. A memorandum was sent to Mrs. Lewis, in which the bonds and stocks received at other times from Mrs. Lewis are entered; but they are all entered under the head of "G. F. Stringer Special Account," which seems to indicate that they were regarded as loans to Stringer, rather than to Jewell & Stringer. And this appears to be the only written evidence as to the loan. Mrs. Lewis testified that she just agreed to hand over the bonds when Stringer, Jr., told her the money was needed and that there was no agreement whatever about them.

For the purposes of the case it may be assumed that the loan of these 6 bonds was made by Lewis for himself, and not as the agent of his mother and on her account. It may also be assumed that the loan was made to the firm of Jewell & Stringer, and not to Stringer, Jr., as agent for Stringer, Sr., individually—notwithstanding the testimony of the mother that the transaction was on the same basis as the other transactions with Stringer, Sr. If those facts be assumed, we have a liability in favor of Lewis against the firm of Jewell & Stringer. That liability became the personal liability of Stringer, Sr., on the dissolution of the firm of Jewell & Stringer. Under the authorities before cited it never became a liability of Stringer & Co., for it never was assumed by them, neither were the proceeds of that loan ever used to pay any of the liabilities of that firm. We therefore hold that the claim of H. Leroy Lewis cannot be allowed as against the assets of the firm of Stringer & Co.

The decree disallowing the claim of Mary E. Lewis in the sum of $47,033.04, and allowing it in the sum of $15,000, is modified, and the entire claim is disallowed as against the firm assets of Stringer & Co., and is allowed as a claim only against the individual estate of G. Franklin Stringer.

The decree allowing the claim of the H. J. Lewis Oyster Company in the sum of $25,091.69 is modified, and the entire claim is disallowed as against the firm assets of Stringer & Co., and is allowed as a claim only against the individual estate of G. Franklin Stringer.

The decree allowing the claim of H. Leroy Lewis in the sum of $6,706.65 is modified, and the entire claim is disallowed as against the firm assets of Stringer & Co., and is allowed as a claim only against the individual estate of G. Franklin Stringer.

HOUGH, Circuit Judge (dissenting). The legal principles stated in the majority opinion undeniably exist; their application to the case in hand depends on the facts. The facts, as stated by the court, rest only on the assertions made by the bankrupt; a dishonest man, who, by relegating his sister to a nonexistent individual estate, now succeeds in (substantially) preferring his later creditors, with whom he could have done business only on the financial foundation furnished by that sister.

I prefer the evidence found in the course of trade, the books of the bankrupt's firms, the payment of interest, and the testimony of his cashier. From these sources it is plain that Jewell & Stringer, or Stringer & Co., got and used, and in accordance with original intent increased their own resources with, Mrs. Lewis' property; that is enough in equity, and bankruptcy is equity. It is equally clear that Stringer & Co. assumed the liabilities of Jewell & Stringer; indeed, no one denies this as matter of fact. The bankrupt never thought of it; his trustee has contributed a theory of law (the Case v. Beauregard doctrine), inapplicable because it has not even the poor support of the bankrupt's testimony on which to rest.

Dissent is based on the foregoing view of the facts.

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## CHESAPEAKE & DELAWARE CANAL CO. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. March 31, 1917.)

No. 2118.

1. EVIDENCE ⊜333(7)—ADMISSIBILITY—DOCUMENTARY EVIDENCE.
In an action by the United States to recover dividends on corporate stock owned by it, where in the natural course the dividends would, if paid, have been received in the treasury, books prepared by treasury officials pursuant to statute, showing receipts and disbursements, though not books of original entry, are admissible as public records to show that no payments were received.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1256.]

2. PAYMENT ⊜66(5)—PRESUMPTIONS—PAYMENT.
A delay of over 20 years raises a presumption of the payment of dividends declared on corporate stock, where action is not barred by limitations, and plaintiff, whether the state or an individual, has the burden of rebutting the presumption, which can be done either by evidence of nonpayment or explanation for the delay.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 188.]

3. PAYMENT ⊜66(5)—DIVIDENDS—ACTIONS TO RECOVER.
In an action by the United States to recover dividends on corporate stock owned by it, declared more than 20 years before action, evidence *held* sufficient to rebut the presumption of payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 188.]

In Error to the District Court of the United States for the District of Delaware; Edward G. Bradford, Judge.

Action by the United States against the Chesapeake & Delaware Canal Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 223 Fed. 926, — C. C. A. —, 206 Fed. 964.

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Charles Biddle and John G. Johnson, both of Philadelphia, Pa., and Andrew C. Gray, of Wilmington, Del. (Biddle, Paul & Jayne, of Philadelphia, Pa., of counsel), for plaintiff in error.

Charles F. Curley, U. S. Atty., of Wilmington, Del.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This suit was brought in March, 1912, to recover the amount of 3 dividends asserted by the government to be still unpaid. Upon the first trial the government proved its ownership of stock in the company, the declaration of dividends thereon in 1873, 1875, and 1876, and the fact that payment had been demanded in November, 1911; this in effect comprising all the evidence then offered. A verdict for the plaintiff was directed on the ground that the presumption of payment after 20 years should not be applied against the United States. The judgment was reversed (223 Fed. 926, 139 C. C. A. 406, L. R. A. 1916B, 734), this court holding that in such a suit the presumption did apply even against the sovereign; but, as the presumption was rebuttable, a new venire was awarded. On the second trial, the government offered additional evidence to the following effect:

That 14 dividends had been declared before 1873, and had been paid to the United States; that the company had given due notice of these dividends, the notices themselves and copies of the government's replies being produced by the Treasury, and that no notices of the dividends in question were on file in the department:

That, after the beginning of the suit, a government agent had examined the company's books and papers, and had discovered on its files forged vouchers for these 3 dividends purporting to be signed by an officer of the United States, and had discovered also forged receipts therefor on the dividend receipt books, these facts being explained by a witness, formerly in the company's service, who testified that he had been a party to these forgeries, and that he and the company's treasurer had embezzled a large sum of money during the years in question; the same witness testifying that no notices of these dividends had been sent to the United States, and that no payment thereof had been made by the company before he left the company's service in 1886.

It was also testified by witnesses employed in the Treasury that certain books (produced at the trial) were kept officially in the department, and contained entries relating to public moneys during the period from 1872 to 1914; that in the usual course these books would, or at least should, contain entries relating to money paid into the Treasury from any source whatever, but that no entry of the dividends in question appeared therein. These books were 9 in number (Exhibits 78 to 86), and were labeled "Receipts and Expenditures of the United States" for such and such a year. The volumes contain separate annual statements, printed by the Public Printer, each entitled "Combined Statement of the Receipts and Disbursements (Apparent and Actual) of the United States for the Fiscal Year Ended June 30," etc.; and each is preceded by a letter to the Secretary of the Treasury from

the Chief of the Warrant Division, which declares that the statement contains "* * * the receipts and disbursements of the government by appropriations, exclusive of the principal of the public debt, for the fiscal year ended June 30, * * * exhibiting the various sources of the revenues, the apparent expense of each branch of the service under the several departments, and of each department on account of 'Salaries,' 'Ordinary Expenses,' 'Public Works,' 'Miscellaneous,' and 'Unusual and Extraordinary'; and the actual expenses of the same and the *actual* revenues, by deduction from them of those items which appear in both accounts by requirements of law, but which are not *actual revenues* or *true expenditures,* and other items on account of branches of the service intended to be self-supporting, the expenses and revenues of which must by law enter to the account of the Treasury"—these statements being officially forwarded by the secretary to the chairman of the appropriations committee of the House of Representatives.

Four other books were offered (Exhibits 87–90), each labeled:

"Register of Revenue Covering Warrants
"Miscellaneous
"Secretary of the Treasury
"Warrant Division"

—and these were identified as the original registers for 1872 to 1878, inclusive.

One other volume (Exhibit 91), labeled:

"Receipts of the United States
"1791–
"Register's Office, Treasury Department"

—was identified as containing a record of all the government's miscellaneous receipts from 1791 to date, this being the class of receipts in which dividends on stock owned by the United States would appear.

Of these 14 volumes, Nos. 87–90 are originals, and the other 10 are compilations of receipts and expenditures, but all of them are official books kept in the department, and purport to contain records of all the money from every source that had been covered into the Treasury. They contain entries of the 14 dividends paid by the Canal Company before 1873, but contain no entry of the dividends in dispute.

The defendant offered no evidence, and the court submitted the question whether on the plaintiff's showing the presumption of payment had been rebutted, and whether the company had in fact paid the sums sued for. The verdict was in favor of the government, and the company assigns for error the admission of certain evidence, and the giving of certain instructions. The evidence complained of is the 10 books already referred to, and in order to understand the situation clearly it will be desirable to state more fully the method by which the dividends in question should have reached the Treasury in the usual course of events.

[1] Normally, this would have happened: After a dividend had been declared, a notice thereof would have been sent to the Treasury by the

company, stating that the amount due was subject to the government's order, either by draft, or otherwise. The Secretary would then have drawn at sight upon the company's treasurer, and the draft would have been sent for collection to the Assistant Treasurer of the United States in Philadelphia, the company probably being notified that the draft had been forwarded. Thereupon the draft would have been presented, and would have been paid either in cash or by check. The Assistant Treasurer would then have issued two certificates of deposit, specifying that he had received this particular payment from the company, and would have transmitted these certificates to the Treasury, at the same time charging himself therewith in his own daily account of receipts. The other party to this account is the Treasurer of the United States, all public moneys being subject to his draft, and for this reason the dividend would have been deposited to the Treasurer's credit, and the Assistant Treasurer would have reported it to Washington as money received by him in account with the Treasurer. After the certificates of deposit and the Assistant Treasurer's daily transcript of account had reached Washington, they would have been examined and checked to see that they agreed, and the certificates would then have been made the basis of a deposit list, the list being prepared by the Division of Public Moneys and passed to the division then known as the Division of Warrants, Estimates, and Appropriations—afterwards, the Division of Bookkeeping and Warrants. After this division had received the list containing the items fully set out in the certificates, a warrant would have been prepared formally covering the money into the Treasury, thereby charging the Treasurer of the United States, and fixing his accountability therefor. This covering warrant would have been registered in the Division of Warrants, Estimates, and Appropriations, and would have been passed over to the Division of Public Moneys so that the number and date of the warrant might there be noted. Moreover, the covering warrant (signed by the Secretary of the Treasury) would have been passed to the Comptroller of the Treasury, who is required by law to keep a duplicate set of books in reference to these matters. The Comptroller would have countersigned the warrant, and passed it in turn to the Treasurer of the United States, who would have acknowledged thereon the receipt of the particular money described therein. At the end of the quarter the Treasurer would have submitted to the Auditor of the Treasury an account of the moneys received by him during the quarter, and of his disbursements during the same period. These accounts of the Treasurer are in book form, and are examined and settled by the Auditor, who certifies the balance due by the Treasurer to the United States, charging him with the covering warrants issued by the Secretary of the Treasury, and crediting him with all payments made upon warrants drawn on him by the Secretary. The books of the Department show that drafts were drawn for 13 of the 14 dividends referred to, and were paid to the Assistant Treasurer at Philadelphia, reaching the Treasury in the manner described. No draft was drawn for the 14th (the dividend of 1866), but this was deposited directly with the Assistant Treasurer in Philadelphia by the company's treasurer.

The course of accounting just described is commanded by the federal statutes. Exhibit 91 was compiled from Exhibits 78 to 86, which, as already stated, are combined statements of receipts and disbursements by the Treasurer of the United States, made up in the Division of Bookkeeping and Warrants and sent to the Secretary of the Treasury. The 14 dividends referred to were all paid in Philadelphia and were entered on the books of the Subtreasury in that city. The 10 exhibits now under consideration are not books of original entry in the ordinary sense of that phrase; except in part, they had not been prepared by the witnesses that testified about them, and they were not certified as copies of original documents. It was further testified that all the exhibits had been thoroughly examined, but that no entry had been found therein of any of the dividends in question, although such dividends should have appeared if they had been paid.

This is the evidence that was offered to rebut the presumption of payment, the government relying on the testimony of the company's guilty employé, on the absence of entries in the Treasury's books, and on the evidence concerning the earlier dividends.

1. We shall not discuss at length the question whether the 10 exhibits complained of were admissible evidence. They did not need to be certified; they were not copies, but were themselves the records kept in the Treasury, and their authenticity is not denied. In our opinion, they were competent evidence. We understand the general rule to be that when a public officer is required, either by statute or by the nature of his duty, to keep records of transactions occurring in the course of his public service, the records thus made, either by the officer himself or under his supervision, are ordinarily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross-examination. As such records are usually made by persons having no motive to suppress or distort the truth or to manufacture evidence, and, moreover, are made in the discharge of a public duty, and almost always under the sanction of an official oath, they form a well-established exception to the rule excluding hearsay, and, while not conclusive, are prima facie evidence of relevant facts. The exception rests in part on the presumption that a public officer charged with a particular duty has performed it properly. As the records concern public affairs, and do not affect the private interest of the officer, they are not tainted by the suspicion of private advantage. There are many decisions in which the general subject is discussed, and some of them may be found in the note to section 332, on page 1125, of 10 Ruling Case Law, and in the notes to paragraph 5a on page 306 of 17 Cyc. See, also, Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 306; White v. U. S., 164 U. S. 102, 17 Sup. Ct. 38, 41 L. Ed. 365; 5 Chamberlayne, Evid. § 3424 et seq.; 3 Wigmore, Evid. § 1630 et seq.; and 17 Cyc. 306, § 5; Bank v. Brown, 53 L. R. A. 523, note.

And the reasons just stated make such official records competent evidence to prove also the absence of entries that in the usual course should appear therein. U. S. v. Teschmaker, 63 U. S. (22 How.)

405, 16 L. Ed. 353; Amer. Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644; 3 Wig. § 1633 (6) p. 1982; 3 Chamberlayne, § 1757.

[2, 3] 2. The more important question raised on this writ is whether the government's evidence was sufficient to rebut the presumption of payment arising from the lapse of time. In effect, the defendant contends that a verdict in its favor should have been directed, and it will be sufficient to consider the question from that point of view. What then was the government's situation? For more than 30 years no demand had been made for the dividends in suit, and therefore the government was met by the well-established rule that presumptively payment had been made, and was obliged to prove that this presumption, or inference of fact, was not true. In other words, the burden of proof had shifted, and the government could no longer content itself with proving its right of action—that is, the mere declaration of a dividend—and with leaving the defendant to prove that payment had been made. The government was now compelled to prove a negative—that is, that payment had not been made—its less favorable position being due to the well-settled and excellent rule of public policy that punishes a plaintiff for excessive delay in asserting his right.

But such a delay is not necessarily fatal; it only makes a plaintiff's task more difficult. If he can produce sufficient evidence of nonpayment, he fulfills the requirements of the law, for this exactly meets the challenge of the presumption and overthrows it. We do not agree that before the government could be allowed to prove the fact of nonpayment it was bound, as a separate obligation, to explain or excuse the delay. It is possible that the language used in some discussions of the subject will bear this construction; but, even if this be true, we do not find the point squarely decided, and in any event we are unable to see that the reason of the rule puts such an obligation on a delinquent creditor. And, even if we assume that a private suitor might be obliged to explain or excuse his prolonged failure to sue, this merely requires him to account for his laches or negligence, and, as the sovereign is not bound by the laches of his agents, he cannot be compelled to explain a neglect that he may wholly disregard. But in the case of a private suitor also we think the defendant's contention is not sound. Loose expressions may have been sometimes used on this subject; but, if the presumption and the reasons of policy that sustain it be closely considered, we think it will appear that after 20 years the issue between the parties continues to be what it was before, namely, Has the particular debt been paid? When the statute of limitations is interposed as a defense, the question of payment becomes of no importance; the plaintiff cannot recover, although it may be certain that he has not been paid; but where the statute does not apply—and it does not in the present case—the issue of payment is the vital matter. Ordinarily a plaintiff need do no more than prove the existence of his claim, whereupon the defendant must prove payment. But, if it appears from the evidence that the debt is of long standing, the plaintiff's task becomes progressively difficult, for the inference of payment may then be readily drawn from other circumstances; and, if the delay has lasted for 20 years, a definite presumption arises that

is often the practical equivalent of the statute. Legally, however, it is not the equivalent; if he can, the plaintiff may always prove that he has not been paid, but his delay has somewhat changed the character of his task, and forces him to show reasons why the failure to sue should not be a bar. These reasons may appear to be merely explanations or excuses, and may be so described without inaccuracy, but we think it equally accurate to say that they are really part of the evidence that tends by inference to show nonpayment. For example, a dilatory plaintiff often proves the defendant's insolvency; this may be correctly spoken of as an excuse for delay, but just as truly it is a fact tending to show that the debtor has not paid because he could not pay. So, the absence of the debtor from the jurisdiction; this tends to show that he has not paid because he could not have been sued, and thus compelled to pay. So, also, the near relationship between the parties; this tends to show nonpayment, because it furnishes a reason why the plaintiff did not ask for the debt, or did not urge its payment. As it seems to us, such matters as these become part of the plaintiff's task, but they are not conditions precedent to success. In the end, all he is bound to prove is nonpayment, and in fulfilling that obligation explanations or excuses are merely steps in the proof.

The defendant cites the following cases in support of its contention: Bowman v. Wathen, 42 U. S. (1 How.) 189, 11 L. Ed. 97; Wagner v. Baird, 48 U. S. (7 How.) 234, 12 L. Ed. 681; Philippi v. Philippe, 115 U. S. 151, 5 Sup. Ct. 1181, 29 L. Ed. 336; Hillary v. Waller, 12 Vesey, Jr., 239; Cope v. Humphreys, 14 Serg. & R. (Pa.) 15; Foulk v. Brown, 2 Watts (Pa.) 215; Sellers v. Holman, 20 Pa. 321; Miller v. Overseers, 17 Pa. Super. Ct. 159; Holway v. Sanborn, 145 Wis. 151, 130 N. W. 95; Stover v. Duren, 3 Strob. (S. C.) 448, 51 Am. Dec. 634. Among these we quote from Sellers v. Holman what is probably a typical statement of the rule:

"Those rules which give repose to society and forbid the assertion of stale claims, after the evidence of their discharge has been lost, are everywhere much more highly appreciated by the courts now than they were once. It has, however, not been decided in any case, ancient or modern, that a mere demand, without more, is enough to repel the presumption, and in one, at least (1 Ves. & Be, 536), the contrary was held. * * *

"That a specialty or debt of record is paid after 20 years from the time it became due is a presumption of law which the courts must enforce without inquiring whether it be according to the truth or not. The law has given to this lapse of time a fictitious value, equal to direct proof of payment. But the evidence of nonpayment, by which the presumption is to be repelled, has no force, except what it derives from its intrinsic power to produce conviction on the mind. A circumstance, therefore, which does not actually disprove the payment, nor satisfactorily account for the delay, is entitled to no weight. The presumption of payment is raised by an artificial rule. It cannot be rebutted, except by evidence which will create a natural presumption, at least equally strong."

In Coleman v. Erie Trust Co., 255 Pa. 63, 99 Atl. 217, the most recent case decided by the same court, it is said:

"The presumption of payment arising from lapse of time is not conclusive, but is merely a presumption of fact which is rebuttable. 'The presumption is rebutted, or, to speak more accurately, does not arise, when there is affirmative proof * * * that the debt has not been paid, or where there are cir-

cumstances that sufficiently account for the delay of the creditor.' Reed v. Reed, 46 Pa. 239, 242. Further on in the same opinion Mr. Justice Strong said that presumption from lapse of time 'is only an inference that the debtor has done something to discharge the debt, to wit, that he has made payment. Hence it is rebutted by simple proof that payment has not been made. And, the facts being established, whether they are sufficient to rebut it is a question for the court, and not for the jury.' In this instance there was affirmative proof that the judgment had not been paid, in the positive testimony of the plaintiff to that effect. The facts were not in dispute, and it was therefore for the court to say whether or not the judgment was a valid claim. In addition to the affirmative proof that the debt had not been paid, the circumstances shown were such as to reasonably account for the delay. It appeared that the debtor was for years in straitened financial circumstances, and had but a small income, which would have been seriously disturbed had payment of the judgment been pressed. The relationship of father and son between the defendant and plaintiff was also a sufficient and natural reason for the delay of the latter in enforcing payment."

The company concedes, as it must, that the presumption is rebuttable, and we do not see how it can be repelled except by such evidence as is, no doubt, sometimes called "explanations for delay." And in this connection we think it should be remembered that the rule grew up and took shape while parties themselves were not permitted to testify. Direct evidence, therefore, either of payment or of nonpayment, was not easy to obtain, and the parties were driven to such indirect evidence as would support the inference of one fact or the other. Even now, when parties are, in general, competent witnesses, a living party, if his antagonist be dead, cannot testify to facts that occurred in the decedent's lifetime. So that the result is this: If both parties be alive, and if oath be opposed to oath, the case can hardly be decided except by the indirect evidence, whatever name this may bear; if only one party be living, the indirect evidence is usually all that can be offered.

Of course a mere demand by the creditor after 20 years adds no strength to his case, and the courts have not attempted to lay down with precision how much evidence is necessary before the question of payment should be submitted to a jury. In this respect every case must stand on its own footing, and concerning the present record we shall say nothing more except that a careful study has satisfied us, not only that the trial judge could not properly have directed a verdict for the company, but also that the evidence carries clear conviction that the dividends in question have never been paid. That the money was stolen by the company's trusted servants is its grievous misfortune, but this is undoubtedly the fact, and the loss must rest where it has fallen.

We see no need to discuss the assignments of error in detail; no reversible error was committed in the conduct of the trial, and the judgment must therefore be affirmed.

## HART et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 20, 1917.)

No. 113.

1. CRIMINAL LAW ⊂⊃1163(3)—APPEAL—PREJUDICIAL ERROR—EVIDENCE UNDER SEPARATE COUNTS.

Where the indictment charged, under Criminal Code (Act March 4, 1909, c. 321), § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), a conspiracy to use the mails in furtherance of a scheme to defraud, and also contained numerous counts charging the offense of using the mails to defraud, contrary to section 215 (section 10385), and after a great deal of evidence had been admitted under the conspiracy charge, which would have been inadmissible under the other counts, the jury acquitted defendants of the conspiracy, but convicted them of some of the other charges, the record must be closely scanned to determine whether that evidence may not have been prejudicial to defendants in the jury's consideration of the charges on which defendants were convicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3094, 3095.]

2. INDICTMENT AND INFORMATION ⊂⊃117—CONSTRUCTION OF INDICTMENT—TECHNICAL FRAUD.

Though the owners of the stock of a corporation may technically commit a fraud on the corporation, such an offense would be so technical and so contrary to ordinary understanding that an indictment will not be construed to charge it, if such construction may be avoided.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 310.]

3. POST OFFICE ⊂⊃49—USE OF MAILS TO DEFRAUD—EVIDENCE—REFERENCES.

Where an indictment charged the use of the mails to defraud, and the evidence showed that defendants had offered for discount certain notes on which insolvent corporations controlled by them were either makers or indorsers, it was error to exclude evidence that defendants gave as references other banks, and that the bank asked to make the discount made inquiries from some of the banks given as references, since a broad description of that offense is that it is a violation of the right to open and fair dealing, and evidence to show exactly what the dealing was is always admissible.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86.]

4. CRIMINAL LAW ⊂⊃663—EVIDENCE—DECLARATIONS OF THIRD PERSONS—STATEMENTS TO DEFENDANT.

In a prosecution for using the mails in the execution of a scheme to defraud by the floating of notes exchanged between two corporations, it was error to permit the letter of an attorney for one of those corporations, to one defendant, charging him with numerous crimes and falsehoods, who had thereafter interviewed that defendant, to be read to the jury as a statement made to the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1602.]

5. POST OFFICE ⊂⊃50—OFFENSES—INSTRUCTION—MAILING PARTICULAR LETTER.

In a prosecution for using mails to defraud by floating worthless paper, where there was no evidence as to the mailing of the particular letter charged in some of the counts, it was error to refuse requested charges that, in order to convict, the jury must believe beyond a reasonable doubt that the particular letter mentioned and described in each count was mailed or received by mail; there being nothing in the general

charge to point out the necessity of proving the mailing or receipt of those particular letters.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87-89.]

6. CRIMINAL LAW ⊂=655(4)—TRIAL—MISCONDUCT OF JUDGE—CHARGES AGAINST DEFENDANT.

Where the judge, on being informed that certain persons claiming to be detectives had interviewed the jurors summoned for the term, directed an examination of those jurors, which disclosed only that the detectives had falsely made certain investigations as to the panel, but did not disclose any attempt to tamper with the jury, it was error for the court, in the presence of that panel from which the jurors who tried defendants were subsequently selected, to use the word "tampering" in connection with the acts of the detectives, and subsequently to charge defendants with having endeavored to do something wrong to the jury, which charge there was no evidence to support.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1521.]

In Error to the District Court of the United States for the Northern District of New York.

Max M. Hart and another were convicted of using mails in furtherance of a scheme to defraud, contrary to Criminal Code, § 215 (Comp. St. 1913, § 10385), and they bring error. Reversed.

See, also, 214 Fed. 655; 215 Fed. 135; 216 Fed. 374.

Hart and Wupperman were jointly indicted with Andrew S. Work and Frank W. Fowler for a conspiracy under Criminal Code, § 37, to commit an offense against the United States, viz. to devise a "scheme to defraud," etc., under section 215, and for actual violation of section 215. The alleged conspiracy was charged in count 1, and the substantive offenses in counts 2 to 10. All the defendants were tried on all the counts, and the jury acquitted them all of the conspiracy charge, found Hart guilty on counts 2, 3, and 4 only, and Wupperman, Work, and Fowler guilty on all the substantive counts, viz. 2 to 10, inclusive. Work and Fowler, who had testified as witnesses for the prosecution, had not been sentenced, when Wupperman and Hart took these writs.

Henry A. Wise, of New York City, for plaintiff in error Hart.

Arthur Furber, of New York City, for plaintiff in error Wupperman.

Thomas H. Dowd, Sp. U. S. Atty., of Cortland, N. Y.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The scheme complained of is charged in the same way in the conspiracy and substantive counts, and is as follows: Prior to August 15, 1913 (the date of conspiracy), the four defendants had devised a scheme to obtain money by false pretenses, representations, etc., from a long list of persons and corporations (banks for the most part), by inducing said persons, etc., to part with their money in the discount or purchase of the promissory paper of, especially, the Oneida Milling Corporation (hereinafter called Oneida Company) and the Anger Baking Company (hereinafter called Anger Company); the money so obtained to be diverted to the use of defendants. It was also a part of the scheme to obtain said promissory paper from Oneida Company and Anger Company et al. by fraud, and to sell the same by means of false rep-

resentations to the effect that the notes so sold had been executed and delivered for a lawful consideration and in the due course of business, and also by representing that the makers and indorsers of said notes were solvent and able to pay at maturity.

It is not easily ascertainable from this indictment whether the pleader asserts that the scheme consisted in defrauding the persons issuing the notes or the person discounting or buying the same. The indictment may be read as asserting that the scheme consisted in doing both these things. Without delaying to inquire what effect upon the sufficiency of the indictment this uncertainty may have, we shall accept, for purposes of review, the interpretation of the pleading given at bar on behalf of the prosecution, viz. that the unlawful scheme was "to use the mails to defraud various banks, persons, etc., in the discount and purchase of the promissory notes of the Oneida Company and other business concerns," a process further described as "the corrupt exploitation of the Oneida Company."

The overt acts stated in the conspiracy count are to a considerable extent covered by the nine substantive counts, of which the second and third (on which Hart was convicted) rest on the handling of certain Oneida Company and Anger Company notes issued in exchange for each other; the fourth count (on which Hart was also convicted) relates to the negotiation through Oneida Company of the promissory note of one Hindley. The remaining five counts (on which Hart was acquitted) rest upon various transactions legally similar to either the Anger or Hindley occurrence, and all pleaded as part of the same fraud or device; the necessity for counts (as to the substantive charge) growing solely out of the several separate uses of the mail.

The plan of prosecution or exposition of this scheme was to show that nearly a year and a half before the formation of the alleged conspiracy the defendant Work had purchased Oneida Company's property and engaged in the milling business. Thereafter in his search for financial assistance, or for some one to whom he could sell his recent purchase, he met Wupperman (who was obviously a speculator), Hart (who was a note broker dealing at high rates with needy borrowers), and Fowler, who had no very well-defined business, but was willing to take up that of milling if some one financed him.

The method of financing was always to borrow money. Such borrowing was usually by exchange of paper, so that each borrower would have two-name paper to discount wherever it could be marketed. Wupperman (for his firm) agreed to do this with Oneida Company as early as May 22, 1913, to the extent of $40,000, the object of which was to enable Fowler to get control of Oneida Company and ultimately convert most of Work's ownership interest into a mortgage debt. This plan was not fully carried out, apparently because Work distrusted Hart, and refused Hart's co-operation in the Wupperman-Fowler plan. As the result of this difference, if not quarrel, Work was, at the date of forming the alleged conspiracy, bought out of Oneida Company (largely with paper), and the control of that corporation fell to Wupperman and Fowler. Thereupon Work left the neighborhood, went to Chicago, and did not apparently return until

February, 1914, when he filed a petition in bankruptcy against Oneida Company. This was long after all the occurrences alleged in the indictment. It was the effort of the prosecution to convince the jury that this buying out of Work was either a prelude to or part of the scheme, to use Oneida Company's name and credit for swindling purposes.

Shortly after Work's retirement, Hart was approached by the president of Anger Company, a bakery business much in need of cash. Hart suggested an exchange of notes, to the amount of $25,000, between Oneida Company and Anger Company. As one concern made flour and the other bread, the joint borrowing was suggested as appropriate. This procedure was adopted, the Oneida Company notes being sent by mail to Wupperman's office (second count), and one of the Anger Company notes also sent by mail to a bank in Buffalo for purposes of discount (third count).

Within about a month after the formation of the alleged conspiracy, Fowler and Wupperman being in control of Oneida Company, Hart asked Fowler whether he could not procure the discount of the note of one Hindley, who had no connection at all with the business of any of the defendants, or of Oneida Company. Fowler did so through Oneida Company, and by means of its indorsement, and forwarded by mail to Hindley, through Hart, about one-quarter of the proceeds of discount (fourth count); the rest remained to the credit of Oneida Company so far as Hindley was concerned. The remaining counts (except the tenth, which is so general in terms as to be negligible here) relate to transactions generically like the Anger or Hindley "deals," but all sought to be shown by evidence, as parts of one connected fraudulent plan, whereby, having procured Oneida Company, mostly with paper made or indorsed by itself, that company was used to float other paper, to the injury of its ultimate holders, and some of its indorsers, and the profit of defendants, who were to get cash or credit on said paper, before the crash, of which the inevitable arrival must have been plain to every defendant.

As the result of transactions extending over some months after August 15, 1913, and many months before that date, there became outstanding a considerable amount of paper, widely distributed, on which, either as maker or indorser, Wupperman's firm, Oneida Company, or Anger Company were liable, and each one of these concerns, before indictment found, had become insolvent, or bankrupt, or both. It is entirely obvious that in a very true sense this prosecution has grown out of these insolvencies. However badly managed these several businesses were, however ill-advised, unattractive, and even dishonorable the method of raising money by exchange of paper may be, it remains necessary, if the criminal law is invoked, to show beyond reasonable doubt, not only bad management, negligence, and dishonorable conduct, but guilt of the particular crimes alleged, which (in this instance) depended wholly on proof of defendants' agreement to commit a fraud and use the mail therefor in the case of conspiracy, and the actual use of the mail in the execution or attempted execution of said fraud in the case of the substantive charges.

[1] It is notoriously true that, in prosecutions such as this, the conspiracy count is tacked upon the principal charge, for the purpose (well known, if not avowed) of widening the field of evidence, and introducing testimony of a large number of occurrences wholly unrelated to the actual fraud of which the defendants are accused, in order to show co-ordination of effort on the part of the alleged conspirators, from which the agreement or consent of minds (the gist of conspiracy) may be inferred. This was done in this case. The whole history of Work's efforts to sell Oneida Company, and Fowler's desire to purchase what he was confessedly unable to pay for, Wupperman's willingness to contribute some money against a larger amount of paper which he could negotiate for his own purposes, while lending his firm's name to Fowler's enterprise, and Hart's willingness (at a heavy price) to assist the efforts of the others, were all shown to the jury without any visible legal basis therefor, other than the conspiracy charge. All of this testimony formed part of a connected story, not charged to be criminal, except as it tended to show confederation; yet it could not but create serious prejudice against those persons who (whether they had conspired or not) had taken a larger or smaller part in the negotiation and sale of promissory paper issued and received in a manner repugnant to the mind of any prudent and scrupulous business man.

Thus the action of the jury in acquitting all the defendants of the conspiracy charge has (under the circumstances of this case) laid a heavy burden on the prosecution to uphold the conviction for substantive offenses. The verdict of not guilty of conspiracy left for the jury's inevitable consideration a mass of testimony immaterial to the issues passed upon adversely to these plaintiffs in error and their codefendants, yet extremely prejudicial to them. The possibility of this illogical and injurious result inevitably flows from the settled habit of prosecutors (in this circuit at least) of hitching on a conspiracy charge to a substantive count. We do not, of course, impugn the legality of the practice. Usually the same evidence proves the conspiracy and the substance; sometimes the substance is never reached, the criminal effort does not get so far, and conspiracy alone is proved; but to acquit of conspiracy, and convict of substance, produces a condition requiring a scanning of the record to ascertain whether, under cover of the unsuccessful charge, the successful one (over due objection) has been bolstered up.

The situation just adverted to is acute in this case, because the defendant Work was the first, and a very prominent, witness for the prosecution. As he was never sentenced, he has nothing to appeal from. But all the defendants were acquitted of conspiracy, and we are unable to perceive that Work had anything to do with the "scheme" of the indictment. His own story was, in substance, that he had been victimized by the other defendants; that is, that he had been induced to part with the Oneida Company and had never been paid for it. It may have been admissible (in the main) under the conspiracy charge; but for any other purpose it is fairly described as permitting a disappointed investor to state his opinion of the persons who had disap-

pointed him. When matters subsequent to August 15, 1913, are considered, the gravamen of the charges in the substantive counts is that some or all of the defendants made, directly or otherwise, false representations whereby they floated, discounted, or exchanged the worthless paper of Oneida Company.

[2, 3] We adopt this view of the counts, not only because it is that of the prosecution as announced in argument, but because to speak of defrauding Oneida Company, after Work had retired from its ownership or management and become a creditor, is so technical as to border upon the absurd. Wupperman and Fowler were (in common parlance) the Oneida Company, and while one who "owns" a corporation may technically commit a fraud upon it, such a reading of any indictment should be avoided, if possible. Since, therefore, disposing of Oneida Company's paper by means of false statement or suggestion is the gist of the offense charged, it follows that defendants were entitled to have in evidence and considered by the jury every statement, written or oral, made, suggested by, or emanating from them, and brought to the attention of the persons alleged to have been defrauded in respect of the notes negotiated with or through the person or corporation said to have been injured.

We have pointed out (Wilson v. United States, 190 Fed. 434, 111 C. C. A. 231) that a violation of the "right of open and fair dealing" is a broad but justifiable description of the offense proscribed by the statute now in question. It is a corollary from this that evidence must always be admissible to show exactly what the dealing was, which the prosecution claims to have been neither open nor fair. We select one illustrative instance (out of several), where the rights of these defendants were, in this regard, denied. Some of the defendants had become interested in the Crawford County Gas Company, an enterprise doing business and having property not far from Franklin, Pa. They offered for discount at the Franklin Trust Company certain notes of Oneida Company, payable to and indorsed by Wupperman's firm and also by said Crawford County Gas Company. In order to induce this discount, references were given by these plaintiffs in error to sundry banks and bankers in and near New York City. Three of the parties referred to answered inquiries made by Franklin Trust Company, and gave their views of the reliability of Wupperman or Hart. The very matter at issue being whether, in the negotiation of these notes with the Franklin Trust Company, the scheme to defraud was being executed, these references (by which the Franklin Trust Company had admittedly been influenced) were refused admission in evidence. This was error and upon a vital point.

[4] One of the transactions most discussed before the jury, and the one having probably the widest ramifications, was the exchange of notes between Oneida Company and Anger Company. There was ample proof that this exchange had been suggested by Hart, and also that such "pooling of issues" between the two companies for floating an aggregate of $50,000 of notes, on each of which both companies would be liable either as maker or indorser, was to be profitable for Hart. On February 2, 1914, when matters had gone very wrong with

both Oneida Company and Anger Company, the attorney for Anger Company wrote Hart a letter, in which he accused Hart of a considerable number of crimes and falsehoods, and threatened that he would lay the matter before the prosecutor of New York county. Subsequently this attorney had an interview with Hart, at which there was discussion as to the accuracy of the statements of the letter. On this trial, this attorney testified as to his talk with Hart, and the letter aforesaid was admitted in evidence against Hart, as "a statement made to him." The reason is a novelty, and the action amounted to permitting a reputable member of the bar, a man of vigorous personality, substantially to make a speech, stating his very low opinion of one or more of the defendants. There is no pretense that what was said in the letter could have been repeated viva voce by the witness to the jury; yet such was its practical effect when read to the jury, the writer sitting by in the witness chair. This was grave error.

[5] In Kellogg v. United States, 126 Fed. 323, 61 C. C. A. 229, we pointed out that the use of the mails might be established by testimony showing that the success of a given scheme depended on such a wholesale use of the post that an intelligent man could reach no other conclusion from the evidence as to the nature of the business. The case cited was one of a fraudulent enterprise which only hoped for success through or by means of a flood of circulars. No such case is here presented. The scheme here charged bears no other or closer relation to the postal monopoly than does any minor legitimate business. Congress has seen fit to make a national offense out of any fraudulent scheme, if "for the purpose of executing" the same any letter, etc., shall be sent by post. An indictment that did not charge mailing or receiving and in the proper district would be demurrable. The point is jurisdictional, and cannot be slurred over in proof. It is not necessary to descend into particulars, but as to some of these counts there was no proof at all of any mailing of the "indictment letter." The defendants requested specifically an instruction that, in order to convict, the jury must believe beyond a reasonable doubt that the particular letter mentioned and described in each count was mailed or received by mail, as the case might be, which request was refused.

Such refusal might be immaterial if the matter had been covered in the general charge, but we find nothing in the charge pointing out in words or substance the absolute necessity of somehow proving, not the mailing or receipt of letters generally, but such action in respect of the particular letter named in each count of the indictment and vital to the jurisdiction of the court. The refusal to charge substantially as above indicated was error. The errors above pointed out would require reversal of these judgments; but the nature of this record imposes a duty of comment upon a proceeding occupying considerable space, even in this bulky record, and which should have no place therein.

[6] This case was set for trial a reasonable time before the opening of a term of court at Watertown, N. Y., and the jury panel was drawn in advance of the opening of court. Defendants, of course, had notice of the panel's existence, and were entitled to a list of the

jurors. Thereafter two men, who called themselves "private detectives," appeared in the neighborhood of Watertown and interviewed a number of citizens summoned upon the panel, asking questions as to whether they knew any of the parties or had heard of the nature of the impending trial, etc. Apparently before court convened some of the jurors had told the county judge of the presence and actions of these investigators, and this gentleman communicated his information to the District Judge and United States Attorney. As soon as this case was called, jurors were examined separately, on their voir dire, and those to whom the "private detectives" had spoken told their story.

Before the examination of the first juror was completed the court stated publicly that he had heard the juror's story before the opening of court, and "thereupon I told the United States Attorney that there might be something bad about it, that somebody had either taken it upon themselves, or that something had been done to tamper with the jury, and that I thought he ought to know it and look into the matter, if there was anything to find out." Thereupon objection was made by defendants to this method of investigation; it was overruled, and the matter proceeded. After a hundred pages of evidence and discussion, during which no improper conduct was shown in respect of investigating the jury panel, a motion was made to discharge the panel on the ground that the investigation was prejudicial to defendants. This application was denied, the court stating that the inquiry was "to find out whether these jurymen are competent to sit in this case. The man who set this proceeding on foot will be dealt with later"—to which remark an exception was taken. The matter then proceeded, and counsel for Hart objected specifically on behalf of his own client, stating that, while he did not undertake to justify the conduct of the so-called "detectives," "I had nothing to do with it, and I do not need the court or anybody else to exculpate me from it, for I know I had nothing to do with it, neither had my client; my client had nothing to do with it, and I know nothing about it"—whereupon the court remarked, "You certainly cannot prove it," while adding later that he was completely satisfied that counsel personally was not concerned.

Immediately after this incident the United States Attorney moved (for the second time) that Hart be committed to the custody of the marshal during the trial, whereupon the court remarked:

"I declined to do it (i. e., make the commitment) at that time (i. e., when first moved for), and then again to-day the assistant of the United States Attorney has made the same motion; and I said I would not pass upon it then, and I would not act upon it; and now not until this interference with this panel of jurors was made the basis by the defendants guilty of the wrong—may be they are not wrong—was attempted to be made the basis here to delay this trial and to discharge this panel of jurors now here three weeks, not until then did I feel called upon to exercise the strong hand and protect the jurors from any further interference. And the court as to other parties connected with this trial will exercise the same power just as soon as the facts appear, as they inevitably will and must. Now you can take an exception to that."

Exception was duly taken, and Hart was committed to custody. Examination of the panel was continued, and at a subsequent stage

of the trial proceedings before the jury were interrupted, in order to ask further questions about the conduct of these so-called detectives or their employer. The record discloses no reason for making this further investigation a proceeding in the trial; yet it may be said that nothing was ever shown that was criminal or corrupt, though the "detectives" seem to have been very foolish men. The important point is that, publicly and before the very persons who were to pass on the liberty of the defendants, the trial court, without any excuse appearing upon the record, applied the word "tampering" to what, so far as appeared then or thereafter, was a lawful (though somewhat silly) investigation into the personnel of the panel, and finally distinctly and publicly charged the defendants with having endeavored to do something (what, never appeared) wrong or improper in respect of the panel. For this charge we perceive no justification in the record; if there was justification, the panel should have been discharged. Defendants were entitled to have a jury impartial in a legal sense. It would be unreasonable to expect such a jury from a panel that defendants had tried to corrupt or "tamper with." But when a public examination of the prospective jurors themselves showed nothing but foolishness on the part of irresponsible "detectives," the quoted language of the court amounted to a public condemnation of certain untried defendants, before their very triers, for doing something else of which there was no evidence whatever. This we regard as very complicated error, vitiating the trial, irrespective of any of the other matters heretofore considered.

The judgments are reversed.

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## D. H. WATJEN & CO. v. LOUISVILLE TOBACCO WAREHOUSE CO.

(Circuit Court of Appeals, Sixth Circuit. November 17, 1916. Rehearing Denied May 8, 1917.)

No. 2745.

1. EXCHANGES ⟸9—CONTRACTS—CONSTRUCTION.
   Though the parties to a sale of tobacco were members of a tobacco exchange prescribing regulations for the sale of tobacco at public auction, they may, if they desire, despite such regulations, make the sale the subject of a special contract.
   [Ed. Note.—For other cases, see Exchanges, Cent. Dig. §§ 12, 13; Dec. Dig. ⟸9.]

2. SALES ⟸271—SALE BY SAMPLE—IMPLIED WARRANTIES.
   Where a sale is by sample, the law implies a warranty that the bulk of the goods is equal in quality to the sample.
   [Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 769–771; Dec. Dig. ⟸271.]

3. SALES ⟸445(2)—JURY QUESTION—DIRECTED VERDICT.
   Where a seller of tobacco contended that a sale, though made by sample, was without warranty, because under the rules of a tobacco exchange, and the buyer claimed that the sale was made with warranty, the question whether it was made with or without warranty was for the jury, and

an instruction that as matter of law the sale was governed by the rules of the exchange was error.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1304; Dec. Dig. ⊂⊃445(2).]

4. EXCHANGES ⊂⊃9—WARRANTIES—RULES OF EXCHANGE.

Where the rules of a tobacco exchange, of which the ostensible parties to a private sale of tobacco were members, applied only to public sales, and there was no showing of a custom of applying the rules to private sales, it is improper to direct a verdict for the seller on the grounds that, as the rules of the exchange applied, there was no warranty.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. §§ 12, 13; Dec. Dig. ⊂⊃9.]

5. SALES ⊂⊃437(1)—VARIANCE—EVIDENCE.

In an action by a buyer of tobacco, sold by sample, for damages on the ground that the tobacco was not equal to the sample, breach of warranty was not pleaded in the petition, but an express warranty was set up in the reply to the answer. *Held* that, in the absence of objections, evidence of the express warranty was admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1248–1250; Dec. Dig. ⊂⊃437(1).]

6. SALES ⊂⊃440(2)—ACTIONS—EVIDENCE.

In an action by a buyer of tobacco, who contended that there was an express warranty by the seller, evidence that the seller's representative who effected the sale was a part owner of the tobacco is admissible on the questions of the probability of his giving an express warranty, of whether the parties understood the rules of a tobacco exchange, of which the seller was a member, to govern, and of whether the representative knew of the quality of the packing.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1262–1265; Dec. Dig. ⊂⊃440(2).]

7. WITNESSES ⊂⊃367(1)—INTEREST—EVIDENCE.

In such case, evidence of the representative's ownership was admissible on the question of his interest as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1184; Dec. Dig. ⊂⊃367(1).]

In Error to the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Action by D. H. Watjen & Co. against the Louisville Tobacco Warehouse Company. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

The purpose of plaintiffs, aliens and subjects of the Empire of Germany, is to obtain, if possible, a reversal of the adverse judgment rendered below against them on a directed verdict.

The defendant, a Kentucky corporation, is a member of the Louisville Leaf Tobacco Exchange, now known as the Louisville Tobacco Board of Trade, which is empowered by its charter to conduct the business of regulating the storing, warehousing, sampling, selling, and buying of tobacco by its members, the conduct and government of such business and the members of the corporation. One of its declared principal objects is "to protect its members in their dealings with each other, and to defeat the practice of discriminating between customers for charges for selling tobacco, whether by means of any rebate, division of commissions, reduction of fees to the seller of tobacco, or any other device whatsoever; and to effect those objects the said corporation shall have full power by its by-laws to prescribe all the fees and charges for the storage, sale, sampling, or weighing of tobacco; and may in like manner provide for the collection or payment of said fees." A warehouseman who is

a member of the defendant is prohibited from selling tobacco in Louisville to any person who is not a member of the corporation, unless compelled by law to do so; but he may seek purchasers for his tobacco elsewhere by shipment of samples. Warehousemen are prohibited from selling or offering to sell in Louisville or elsewhere any tobacco sampled in Louisville, except on the samples drawn by inspectors elected by the defendant; and no buyer is permitted to sell or offer to sell on the Louisville market any tobacco sampled on that market upon any other samples than those drawn by the defendant's inspectors, unless it be tobacco of such buyers' own packing—the last-named provision as to warehousemen and buyers not being applicable, however, under certain circumstances, as to certain kinds of wrappers. Membership is limited to warehousemen and buyers (tobacco brokers). The by-laws, in so far as need be here noted, provide as follows: If a quorum of the executive committee cannot be obtained at the regular meeting to be held on the first Monday of each month, the meeting shall be held on the succeeding day or days at the hour appointed for commencing sales. The committee on sales shall, when directed by the executive committee, apportion to each warehouseman such a percentage of the total offerings as he may be entitled to offer on any one day. The committee on quotations is required to furnish for publication weekly quotations of the different grades of tobacco sold in the Louisville market. Four inspectors of tobacco are chosen, each of whom is required to give a $1,000 bond for the faithful discharge of his duties and the prompt payment of reclamations. The committee on reclamations may allow claims on tobacco shipped and for which the inspectors shall be liable and shall decide according to sufficiency of proof of damage, the inspectors and their sureties to be jointly liable for reclamations. If damages are awarded to a claimant, the inspectors and owners of tobacco are required to pay, in addition thereto, $1.00 for each hogshead of tobacco placed on reclamation. The inspectors are required to attend daily each warehouse a sufficient time before the sale of tobacco commences to inspect each hogshead and to take fair and true samples therefrom. No hogshead can be sampled by other than the regular inspectors, their assistants or alternates. In sales made by warehousemen, members of the exchange, on samples drawn by its inspectors, it is understood that the inspectors, and not the warehousemen, are responsible for the correctness of the samples. The by-law thus providing is required to be posted in a conspicuous place in the salesroom of every warehouseman who is a member of the defendant corporation. Sales of tobacco are to begin promptly at 9 o'clock a. m. The time consumed in selling tobacco shall not exceed one minute to a hogshead, and the time between each house from the end of one sale to the beginning of the next shall not exceed five minutes. The minimum bid on tobacco is specified, and by-bidding is not allowed under penalty of expulsion. If the owner rejects one hogshead or more of several bought of the same buyer, the buyer is given the right, to be exercised within two hours after receiving notice of rejection, to reject an equal number, unless the owner accepts or rejects each hogshead at the time it is knocked down. When a hogshead is rejected, the purchaser is to be notified in two hours from the close of the sale at which the hogshead was purchased, or the right of rejection is forfeited. Every firm of warehousemen, members of the defendant exchange, has the privilege of holding daily sales at their warehouse or warehouses, provided they designate one place of business where they intend to hold such daily sales; and no firm of warehousemen enjoys the privilege of selling in regular rotation at any other place than the one so designated by them, unless the other locality adjoins the place designated by them without the intervention of any other warehouse belonging to or rented by another firm of warehousemen, and where daily sales in regular rotation may be allowed to be held under the rules. Any sales held at other places than the one designated for regular rotation sales are considered as extra sales and must take place after the regular rotation sales of the day are exhausted, beginning after the sale at the last warehouse selling that day in regular rotation and then following the same circle as the rotation sale.

Plaintiffs, through their agents, De Ridder & Griffith, who were experienced tobacco buyers or brokers and who had long been members of the defendant corporation, and as such familiar with its charter and by-laws, bought 322

hogsheads of French tobacco of defendant through its manager, samples of which, according to defendant's representation, had been previously taken from such hogsheads by inspectors, as understood both by the brokers and defendant; one sample being drawn from each hogshead. Payment in full was made for the tobacco. On the inspection of the tobacco in New York, to which place it was shipped, 77 hogsheads were rejected as worthless and returned to the defendant on the ground that the tobacco in them was so inferior in condition, quality, kind, and nature, to the samples by which the hogsheads were respectively sold, as to be unfit for use. The remaining 245 hogsheads, although inferior, as claimed by plaintiffs, to the samples taken from them, were retained and used, but at a loss. The plaintiffs sought to recover the purchase price of and the freight paid on the tobacco returned, and also the damage sustained on that which was retained and used. The 77 hogsheads which were returned to defendant were resampled at Louisville before the trial by six experienced tobacco men. Plaintiffs gave evidence that their agents at the time of the purchase did not see the hogsheads purchased, but samples only; that the samples taken in plaintiffs' behalf in New York and Louisville from the 77 rejected hogsheads were in appearance and quality greatly different from and inferior to those with reference to which such hogsheads were purchased, so much so that the last-named samples could not have come from such hogsheads; that the samples taken at the plaintiffs' instance from the remaining 245 packages showed the tobacco in them to be greatly and materially different in quality from that indicated by the selling samples exhibited by defendant's manager, one witness, however, stating that the tobacco in 9 of such packages, although differing in kind, was not inferior to that shown by the samples; that, at the time of the purchase, a price was separately affixed to each sample; that the defendant represented the samples and packing to be good and the tobacco in the hogsheads to be according to the samples purported to have been drawn from them respectively, and further guaranteed the tobacco to be well packed and as good as the samples; and that the plaintiffs' agents bought the tobacco, supposing the hogsheads were absolutely as represented by such samples. The defendant offered evidence to show that it acted in the transaction merely as a commission merchant; that its representative stated to plaintiffs' agents that he thought the packing was all right, although he says he did not of his own knowledge know such to be the fact; that he did not say that the samples represented or fairly represented the tobacco contained in the hogsheads, or guarantee the tobacco; that the tobacco was bought at private sale and was all sold by samples; that each sample was separately examined and the price was agreed upon before the sale was consummated; and that it had no authority to sell tobacco except under the rules of the exchange. The defendant's only witness on the comparison of samples examined only about 25 or 30 of those taken by the plaintiffs. Some of them indicated to him no difference in value from those shown at the time of the sale; others indicated a difference of from 50 cents to $1.00 per hundred. The inspectors were not able to give an independent recollection of their sampling the 322 hogsheads, but the usual required daily record kept by them shows each of such hogsheads to have been sampled. They testified as to their mode of sampling and that their endeavor was to get a fair sample from each package.

At the conclusion of the evidence the court directed a verdict for the defendant.

Wm. Marshall Bullitt, of Louisville, Ky., for plaintiff in error.

E. P. Humphrey, of Louisville, Ky., for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge (after stating the facts as above). The trial court, in denying plaintiffs' right to relief, held that the transaction in question is governed by the by-laws of the defendant. The view was expressed that De Ridder & Griffith, plaintiffs' agents, being members of the defendant, and having had a voice in the selection of

inspectors for settling by samples the condition and quality of the hogsheads of tobacco, are bound by the acts of such inspectors as regards the inspection and sampling of such hogsheads, and that plaintiffs, as undisclosed principals, are in no better position than their agents; that the defendant cannot be said to have sold the tobacco by samples in the ordinary sense of that phrase, but to have sold it by samples to which De Ridder & Griffith had consented as between themselves and the defendant; that the samples were guaranteed by the inspectors only, although De Ridder & Griffith might be regarded in a way as buying by sample as between themselves and the inspectors; and that the defendant did not guarantee or intend to guarantee the samples, and that De Ridder & Griffith so understood.

[1-4] The sale made to plaintiffs was private and not at public auction. If the rules of the defendant are applicable to private sales, the parties could, nevertheless, conduct their transaction, if they so desired, in disregard of them, and make the sale the subject of a special contract. The plaintiffs' evidence tends to show that they did this. The uncontradicted evidence is that the sale was by samples, and, being so, the law implied a warranty that the bulk of the goods were equal in quality to such samples. Dickinson v. Gay, 7 Allen, 29, 31, 83 Am. Dec. 656; The Monte Allegre, 9 Wheat. 616, 644, 6 L. Ed. 174; 35 Cyc. 405. The contention of the defendant, which was adopted by the trial court, is that the sale was made under its rules (which were put in evidence), and that the warranty was by the inspectors only, the defendant's manager denying that he warranted either the samples or the tobacco. There is, however, substantial evidence that plaintiffs did not contract with reference to the defendant's rules or rely on the samples as indicating the kind and quality of the tobacco in the packages from which it is alleged they were respectively drawn, but solicited and relied on the express warranty by defendant's agent of both the samples and the correspondence of the tobacco sold with such samples. But a warranty by the seller is inconsistent with defendant's rules. If such rules are applicable to private sales, then, in view of the defendant's evidence that it acted under them, there was presented a question of fact as to whether it gave a warranty and as to whether its rules controlled the transaction under consideration, and, as the evidence was conflicting, the determination of both those questions was for the jury. The court's instruction, therefore, that the defendant gave no warranty to the plaintiffs and that, as a matter of law, the sale was governed by defendant's rules, was error. A more cogent reason for holding such instruction erroneous rests on the obvious fact that defendant's rules are restricted in their operation to sales at public auction and have no application to those privately conducted. The importance of the evidence touching a warranty by the defendant thus becomes apparent. The record, it may be noted, does not show the prevalence, among defendant's members, of a custom of applying its rules to private sales, or of submitting, in the making of them, to the judgment of defendant's inspectors, as regards samples, or that the plaintiffs had knowledge of such special or local custom, if it existed. Had proof of such a custom been offered, questions not presented would be for consideration.

[5] The evidence as to an express warranty is made competent by the concluding sentence of the second paragraph of the reply, which is in avoidance of the defense made in the answer. Technically, the breach of warranty should have been affirmatively pleaded in the petition, but no attack was made on the plaintiffs' pleading. There was, moreover, no objection made to the introduction of such evidence. If the question of variance should be raised at a rehearing, an amendment to meet the proofs would doubtless be permitted.

[6, 7] The evidence offered by the plaintiffs to show that the defendant's representative, who effected the sale of the tobacco, was, as part owner, personally interested in a portion of the tobacco sold, is competent and should have been admitted. It reflects on his interest as a witness, on the probabilities of his giving a guaranty, on the question of whether the parties understood the defendant's rules to govern, and as to whether he actually knew about the quality of the packing.

Other questions presented by the record need not now be decided. It is, of course, understood that the present opinion is based on the record admitted. Should a rehearing develop new evidence, the court and counsel, it is believed, will be able to meet the new situation thus arising.

The judgment is reversed, and the cause remanded for further action by the trial court.

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## HAMMOND LUMBER CO. v. UNITED STATES DISTRICT COURT FOR DISTRICT OF OREGON et al.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1917.)

No. 2874.

1. PROHIBITION ⊜3(1), 10(1)—AUTHORITY TO ISSUE—EXISTENCE OF OTHER REMEDY.

A writ of prohibition to an inferior court will not issue, unless it is clearly shown that such court is about to exceed its jurisdiction and that petitioner is without other remedy; and such condition is not shown where, although petitioner has filed exceptions to the jurisdiction, they have not been presented to the court for its action.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4, 37–42.]

2. COURTS ⊜404—JURISDICTION OF CIRCUIT COURTS OF APPEALS—MANDAMUS AND PROHIBITION.

The Circuit Courts of Appeals have no power to issue writs of mandamus or prohibition by virtue of the fact alone that they have appellate jurisdiction to review judgments and decrees of the District Courts; but the exercise of that jurisdiction rests upon the fact that the issuance thereof is auxiliary to and is necessary for the protection of the appellate jurisdiction of the court issuing the same, which might otherwise be defeated by the unauthorized action of the court below.

3. COURTS ⊜404—JURISDICTION OF CIRCUIT COURTS OF APPEALS—PROHIBITION.

A Circuit Court of Appeals is without power to issue a writ of prohibition to a District Court, where the alleged want of jurisdiction of the latter is over the subject-matter alone, upon which question the Circuit Court of Appeals would have no appellate jurisdiction.

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⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Petition of Hammond Lumber Company for writ of prohibition to the United States District Court for the District of Oregon and Charles E. Wolverton and Robert S. Bean, Judges thereof. Writ denied.

The Hammond Lumber Company filed in this court its petition for a writ of prohibition to the judges of the District Court of the United States for the District of Oregon, and thereon an order was made to show cause. The facts alleged in the petition are in substance the following: That on November 9, 1911, the Hammond Lumber Company commenced an action in the circuit court of Clatsop county, Or., against the Shipowners' & Merchants' Tugboat Company, for the recovery of $71,249.90, for breach of a contract of towage which occurred on September 9, 1911. Issue was joined in that action. Thereafter, on February 27, 1912, the Tugboat Company filed in the District Court for the Northern District of California a petition for limitation of liability, and on March 30, 1912, after appraisement, it gave bonds in the sum of $115,000, the value of the two tugs, which it surrendered, which bonds bore interest from September 9, 1911. The bonds were approved. On July 30, 1912, the Hammond Lumber Company filed in the limitation proceeding its claim in the sum of $71,249.90 and interest. Default was taken in that proceeding as to all other claimants, and later a decree was entered dismissing the petition as to the Lumber Company, on the ground that but a single claim had been presented, and the amount thereof was less than the fund. The decree contained the following: "It is further ordered, adjudged and decreed that the above order and decree shall in no way affect the rights of the petitioner here acquired, if any there be, against any other persons entitled to file claims herein, if any there be." The court said in its opinion: "The court, however, will retain jurisdiction of the proceedings for the protection of petitioner against any other possible claims." The Dauntless (D. C.) 212 Fed. 455. No final decree was taken in the proceeding. The Tugboat Company took an appeal, and this court thereupon affirmed the decree of the court below, holding that since there was but a single claim, and that claim was for less than the fund, the proceeding was properly dismissed as to that claimant. Shipowners' Tugboat Co. v. Hammond Lumber Co., 218 Fed. 161, 134 C. C. A. 575. The Tugboat Company petitioned for a rehearing, and thereafter petitioned the Supreme Court for certiorari, which was denied. These steps delayed the trial in the state court, so that it was not had until November 18, 1915. On that trial a jury was waived. The complaint was permitted to be amended, so as to show that the plaintiff's loss was $110,983.13. On July 21, 1916, while the cause was still under advisement, the Tugboat Company filed in the District Court for the District of Oregon a second petition for limitation of liability. In that petition it recited the pendency of the former proceeding, and alleged that the same had been dismissed only as to the Lumber Company. The District Court for Oregon appraised the tugs ex parte, and upon filing of the bond made an ex parte order for the issuance of process, and by the filing of a bond further proceeding of the action in the state court was stayed. Thereafter the Tugboat Company dismissed the first proceeding in the District Court for the Northern District of California.

The petition for the writ of prohibition further alleged that the Tugboat Company's petition in the second limitation proceeding sets forth that the value of the two vessels, constituting the fund, was $115,000, as at the termination of the voyage, and that the claim of the Lumber Company at that date was $111,153.92, so that the amount of the fund exceeds the amount of the claim, and that therefore no jurisdiction appears on the face of that petition. A writ of prohibition was prayed for, to issue to the judges of the District Court for the District of Oregon, to prohibit them and said court from proceeding further in said second limitation proceeding.

William Denman and W. S. Burnett, both of San Francisco, Cal., for petitioner.

Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, Cal., and Wallace McCamant and Snow, McCamant & Bronaugh, all of Portland, Or., for respondents.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] We are inclined to the view that the allegations of the petition are insufficient to show ground for the writ of prohibition, for it does not appear therefrom that the District Court of Oregon has ruled upon, or has had the opportunity to rule upon, the question of its own jurisdiction. While the Hammond Lumber Company has filed in that court its exceptions to the jurisdiction, the exceptions have not been brought on for hearing. In Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601, it was said:

"A writ of prohibition is never to be issued, unless it clearly appears that the inferior court is about to exceed its jurisdiction."

And elsewhere in the same opinion it was said that where the inferior court—

"has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as a matter of right."

That rule has been reaffirmed. In re Rice, 155 U. S. 396, 15 Sup. Ct. 149, 39 L. Ed. 198; In re New York, etc., Steamship Co., 155 U. S. 523, 15 Sup. Ct. 183, 39 L. Ed. 246; In re Huguley Mfg. Co., 184 U. S. 297, 22 Sup. Ct. 455, 46 L. Ed. 549; Ex parte Oklahoma, 220 U. S. 191, 31 Sup. Ct. 426, 55 L. Ed. 431. It does not appear, therefore, that the petitioner has no other remedy than prohibition. For aught that the petition shows to the contrary, the District Court for Oregon will, when its attention is directed to the exceptions, deny its jurisdiction and dismiss the proceeding.

[2] But we are of the opinion that, if the petition for the writ alleged facts sufficient to show that the petitioner had no other remedy, this court would have no jurisdiction to issue the writ. The question whether and under what circumstances a Circuit Court of Appeals has jurisdiction to issue writs such as mandamus and prohibition in aid of its appellate jurisdiction, in cases where it has not actually obtained jurisdiction by appeal or writ of error, was finally determined in McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762, in which the court said:

"There are not wanting decisions in the federal courts, holding different views as to the right to issue such writs as are involved in this case, before the appellate court has actually obtained jurisdiction of the case. There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. But we think it the true rule that, where a case is within the appellate jurisdiction of the higher court, a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."

The court in that case cited Barber Asphalt Co. v. Morris, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761, in which it had been held that the test of appellate jurisdiction, in the exercise and aid of which the courts of appeal may issue writs of mandamus, is the existence of that jurisdiction, not its prior invocation. That was a case of a petition for mandamus to a District Judge, directing him to proceed to the trial and determination of an action at law which had been stayed by

an order of the court until the final determination of certain appeals then pending in a state court. The rule of McClellan v. Carland is not modified by United States v. Mayer, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. Ed. 129, in which the court said that the jurisdiction of the Circuit Courts of Appeals is exclusively appellate, and their authority to issue writs is only that which may properly be deemed to be auxiliary to their appellate power, for to that proposition the court cited McClellan v. Carland, and it must be taken that the language so quoted from the opinion in the Mayer Case means that, while the Circuit Courts of Appeals may issue such writs in cases where jurisdiction has not actually been acquired by appeal or writ of error, their authority is limited to cases in which the purpose of the writ is to make the appellate jurisdiction effectual. The Circuit Court of Appeals for the First Circuit (In re Robert Gair Co., 196 Fed. 492, 116 C. C. A. 57) applied the doctrine of McClellan v. Carland to a case where the purpose of the writ was to compel answers by a witness who was being examined in the District Court. So in Re Beckwith, 203 Fed. 45, 121 C. C. A. 381, the Circuit Court of Appeals for the Seventh Circuit entertained jurisdiction of a writ of mandamus to the District Court to enforce proceedings for an accounting pursuant to the mandate of the Circuit Court of Appeals. In re Dennett, 215 Fed. 673, 131 C. C. A. 607, this court issued mandamus to a District Court and the judge thereof, to review the action of that court in attempting to modify a prior decree on a motion made after the term at which such decree was entered; and in Re Watts, 214 Fed. 80, 130 C. C. A. 520, the Circuit Court of Appeals for the Second Circuit issued a writ of mandamus to compel a District Court to enter judgment in order that the defeated party might have review by writ of error. And in the Barber Asphalt Paving Co. Case, above cited, the court distinguished the case there under consideration from cases in which the courts to which the applications for mandamus were made—

"had no present or prospective right to review the cases to which the applications related, and in which the applications for the writs of mandamus were accordingly denied."

The decision of this court in Ex parte Equitable Trust Co., 231 Fed. 571, 145 C. C. A. 457, cited by the petitioner, is not inconsistent with the doctrine of the foregoing decisions. That case was before this court on appeal from an interlocutory order and on petitions for prohibition and mandamus. Prohibition was allowed as to an order of the District Court, which we held was in excess of its jurisdiction, which would have brought into the pending suit for the foreclosure of a railroad mortgage certain other parties to interplead, and thus would have indefinitely delayed the foreclosure decree. Prohibition in that case was in aid of the appellate jurisdiction of this court. It is the doctrine of the foregoing cases that the Circuit Courts of Appeals have no power to issue the writ by virtue of the fact alone that they have appellate jurisdiction to review judgments and decrees of the District Courts, but that the exercise of that jurisdiction rests upon the fact that the issuance thereof is auxiliary to and is necessary for the protection of the appellate jurisdiction of the court which issues

the same. In the case at bar the writ is not sought for any such purpose. It is sought for the purpose of prohibiting the court below from proceeding further with a cause. If prohibition is allowed, the appellate jurisdiction of this court will never be invoked over the case against which the writ is directed. In short, the writ is not sought in aid of appellate jurisdiction of this court, "which might otherwise be defeated by the unauthorized action of the court below."

[3] Again, the only ground alleged for prohibition is the lack of jurisdiction of the court below, not jurisdiction of the parties, but jurisdiction of the subject-matter. On that question of the jurisdiction alone there would be no appeal to this court. The appeal would necessarily be to the Supreme Court. In United States v. Sessions, 205 Fed. 502, 123 C. C. A. 570, the Circuit Court of Appeals for the Sixth Circuit said:

"This court has no power, even on error or appeal, to review a decision of the District Court which involves only a question of the jurisdiction of that court. The remedy lies exclusively in the Supreme Court."

That was a case in which mandamus was sought to require a District Judge to dismiss a certain cause from the District Court and remand it to the state court. The Circuit Court of Appeals, in denying its jurisdiction, said:

"The right in this court to issue writs of mandamus is incidental to other powers expressly conferred; and it need not be said that, since the power to review simply a question of jurisdiction in the court below does not reside in this court, there is nothing to which the right to issue such a writ can be said to be an incident."

In Re Garrosi, 229 Fed. 363, 143 C. C. A. 483, Judge Bingham, in a concurring opinion, in view of the fact that the question raised as to the jurisdiction of the District Court was one which related to its jurisdiction over the subject-matter of the suit, said:

"We think that the question is reviewable by writ of error or appeal to the Supreme Court under section 5 of the act of 1891 [Comp. St. 1913, § 1215], and not to this court, and, such being the case, that this court is without jurisdiction to issue the writ of mandamus."

In United States v. Severens, 71 Fed. 768, 18 C. C. A. 314, Judge Taft, for the court, said:

"The right to issue writs of mandamus, of course, is incidental to the other powers expressly conferred upon this court, and does not arise, except where it is thus incidental. As we could not consider a case on error presenting alone the issue of jurisdiction of the court below, we cannot exercise an appellate jurisdiction over the same subject-matter by mandamus."

In Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 Fed. 524, 84 C. C. A. 38, it was held that a Circuit Court of Appeals has no power to interfere by mandamus with the action of a Circuit Court, where the question involved relates to its jurisdiction as a Circuit Court of the United States, but the application in such case must be made to the Supreme Court.

The petition will be dismissed.

## THE CESTRIAN.

(Circuit Court of Appeals, Fifth Circuit. February 24, 1917. Rehearing Denied March 30, 1917.)

No. 2922.

1. COMMERCE ⟸10—POWERS—EXACTION AND REGULATION OF WHARFAGE.
In the absence of inconsistent congressional legislation, it is competent for local authorities to impose reasonable charges for the use by vessels of wharves and other facilities furnished and the mode of rating such charges, whether according to the size or capacity of the vessel or otherwise, is a matter for the determination of the local authorities. It is not a valid ground of objection to such charges that they are computed on the vessel's gross tonnage, and not upon its net tonnage, which is made the basis of the United States tonnage duties.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8.]

2. MUNICIPAL CORPORATIONS ⟸719(3)—IMPOSITION OF WHARFAGE CHARGES —COMPUTATION OF TONNAGE.
That the customs officials of the United States, in ascertaining the net tonnage of a vessel for the computation of tonnage duties, under Comp. St. 1913, § 7730, subd. "h," excluded from the gross tonnage the shelter deck, which was not so inclosed as to make it available for the carriage of all kinds of cargo requiring protection from the weather, did not constitute a ruling binding upon the board of port commissioners of New Orleans, nor preclude them from including such space in computing the gross tonnage of the vessel for the purpose of imposing wharfage charges under Act La. No. 36 of 1900, when such space was available and was in fact used for the stowage of cotton on the outbound voyage.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1531.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by the Board of Commissioners of the Port of New Orleans against Frederick Leyland & Co., Limited, claimant of the steamship Cestrian, and others. Decree for respondents, and libelant appeals. Reversed.

James Wilkinson, of New Orleans, La., for appellant.

Henry P. Dart, Jr., of New Orleans, La. (Dart, Kernan & Dart, of New Orleans, La., on the brief), for appellees.

Before WALKER, Circuit Judge, and GRUBB, District Judge.

WALKER, Circuit Judge. On September 28, 1910, the board of commissioners of the port of New Orleans, a body organized under an act of the Legislature of Louisiana, filed its libel against the steam ship Cestrian, claiming $1,089.47 as due for harbor fees, wharfage, and shed charges against that ship, based, as provided in the act mentioned, upon what the libelant claimed was the vessel's gross tonnage. Acts of Louisiana 1900, p. 44, Act 36. The claimant tendered $941.42, asserting that only that amount was due, which tender was refused. The contention of the claimant was sustained by the decree appealed from.

The controversy between the parties turns upon the question whether what is known as the shelter deck space of the vessel is or is not to be computed in determining the vessel's gross tonnage. The amount of gross tonnage, upon the basis of which the sum claimed was assessed, was that shown by a measurement made by the United States customs authorities to ascertain the net tonnage of the vessel subject to the United States tonnage tax (U. S. Comp. St. 1913, § 7727 et seq.), which measurement for several years prior to 1910 was followed by those authorities and also by the libelant, and, as to gross tonnage, corresponded with the amount of such tonnage of the vessel shown in a statement of it made to the libelant by the vessel's agents. In 1910, and prior to the filing of the libel, the customs officials made another measurement of the vessel, a result of which was to show that the vessel's gross tonnage was less than that shown by the former measurement, which the libelant continued to follow. The evidence makes it sufficiently plain that the difference in the matter of the vessel's gross tonnage between the earlier and the later measurements made by the customs officials is due to the fact that in the former the vessel's shelter deck space was included in the computation, while in the latter that space was excluded. If the later conclusion of the customs authorities that the shelter deck space should be excluded in computing the vessel's gross tonnage was not binding on the libelant (the appellant here), the sufficiency of the data upon which its assessment of the amount claimed in the libel was based is not fairly open to question.

[1] It is not here open to question, and it is not questioned, that, in the absence of inconsistent congressional action on the subject, it is competent for the local authorities to impose reasonable charges for the use by vessels of wharves and other facilities furnished. Transportation Co. v. Parkersburg, 107 U. S. 691, 699, 2 Sup. Ct. 732, 27 L. Ed. 584. And, as is clearly intimated by what is said in the opinion in the case just cited, the mode of rating such charges made, whether according to the size or capacity of the vessel, or otherwise, is a matter for the determination of the local authorities. It is not a valid ground of objection to such charges that they are to be computed with reference to the vessel's gross tonnage, and not upon its net tonnage, which is made the subject of the United States tonnage duties. The Thomas Melville, 62 Fed. 749, 10 C. C. A. 619; 3 U. S. Comp. Stat. 1913, §§ 7727 et seq., and 7811 et seq.

[2] The provision of the act of Congress for ascertaining a vessel's net tonnage by making specified deductions from its gross tonnage, the method of ascertaining which is prescribed, contains the following:

"If there be a break, a poop, or any other permanent closed-in space on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew, the tonnage of that space shall be ascertained and added to the gross tonnage: Provided, that nothing shall be added to the gross tonnage for any sheltered space above the upper deck which is under cover and open to the weather; that is, not inclosed." 3 U. S. Comp. Stat. 1913, § 7730, subd. "h," p. 3445.

The shelter deck of the steamship Cestrian is the space above the upper deck which is permanently inclosed by a steel structure and

not open to the weather, except that there are several openings extending from one side of the vessel to the other, for which openings iron doors or coverings are provided, and when these openings are closed with the means provided for this purpose, the entire space is protected from the weather, except that the closing of the doors or openings does not make the inclosure as a whole air and water tight. But the evidence satisfactorily shows that by the use of tarpaulins and other means available practically the entire space within the shelter deck could be used for storing cargo, and was habitually used for that purpose on the vessel's voyages out of New Orleans; it generally leaving that port with a full cargo of cotton stored on the shelter deck, in which 4,500 or 5,000 bales can be carried. The evidence fails satisfactorily to show what the situation as to the use or nonuse for cargo of the shelter deck at the time and place of the making of the examination of the vessel by the customs officials, which was the basis of their conclusion that the space embraced within the shelter deck was to be excluded in ascertaining the vessel's gross tonnage. The libelant was not represented in those proceedings and had no notice of them. But it is made to appear that in the examinations made by the customs authorities to determine the space in a vessel available for cargo attention is principally, if not exclusively, directed to the question of availability for import or inbound cargo; this being a result of the consideration that a principal purpose of their examination is to arrive at a basis for the assessment of the United States tonnage duty imposed at each entry of a vessel. 3 U. S. Comp. St. 1913, § 7811 et seq.

It seems that there is no necessary inconsistency between a finding by the customs officials that a given space in a vessel is unavailable for cargo which it could bring into the port at which the tonnage duty is payable, and a finding that the same space is available, and in fact is habitually availed of, for the storage of outward-bound cargo from the same or another port. It is further made to appear that there is a lack of uniformity in the rulings of the customs officials on the question of including or excluding the space within such a shelter deck as that of the Cestrian in computing a vessel's gross tonnage, the conclusion in a given case depending upon whether the space is or is not found to be so covered and inclosed that cargo needing protection from the weather may be, and in fact is, stored and carried there with reasonable safety. It seems obvious that the space above the upper deck of a vessel which is so covered and inclosed during a voyage as to be available, and habitually availed of, for the storage of export or outbound cargo needing protection from the weather, cannot properly be excluded in computing its gross tonnage for the purpose of ascertaining the basis upon which the vessel is subjected to the payment of charges, measured by the vessel's carrying capacity, for the use by it of public utilities of the port at which the cargo is taken on; that use being incident, not merely to the vessel's entry at the port, but also to its stay there while taking on, as well as while unloading, cargo.

The Louisiana statute above referred to imposes the charges for a vessel's use of the public wharves, etc., of the port of New Orleans,

and provides for the rating or measurement of the compensation to be paid by the vessel's gross tonnage or total actual carrying capacity. Nothing in that statute indicates that the officials intrusted with the duty of assessing and collecting those charges were to be bound by any ruling of the United States customs authorities on the question of what is included in the vessel's gross tonnage. It is made to appear by the evidence that such rulings of the United States customs officials as the one relied upon by the claimant in this case probably are attributable, in part at least, to their failure to take into consideration facts certainly pertinent for consideration in computing a vessel's total actual carrying capacity to ascertain the basis for measuring the compensation chargeable against the vessel for its use of public wharves, etc., while in port. In view of this fact, we think the libelant was well warranted in refusing to follow a ruling of the customs officials, the effect of which was to deduct from the vessel's gross tonnage, previously ascertained and acted on for years by the officials making the ruling, that of a sheltered space above the upper deck so inclosed during a voyage as to be suitable for the storage of cargo needing protection from the weather, and which in fact is habitually so used on voyages out of New Orleans. The Thomas Melville, supra. A result of the appellant's changing its practice in the matter to make it conform to the changed attitude of the customs officials would be to enable the vessel to escape the payment of part of the compensation chargeable against it for a use made by it of public utilities furnished at the port of New Orleans.

The decree of the District Court is reversed, and a decree will be here entered in favor of the appellant for the amount claimed in the libel, interest thereon, and the costs of the suit.

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## LOOKER v. UNITED STATES.*

(Circuit Court of Appeals, Second Circuit. March 13, 1917.)

No. 15.

1. CRIMINAL LAW ⟸1159(2)—REVIEW ON ERROR—SUFFICIENCY OF EVIDENCE.
It is not necessary, in order to uphold a jury's verdict of guilty upon an indictment, that the appellate court should be satisfied beyond a reasonable doubt of the guilt of the accused; but, where there is substantial evidence pointing to guilt, it is the reasonable doubt of the jury, and not that of the court, which is to be considered.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075.]

2. POST OFFICE ⟸49—USE OF MAILS TO DEFRAUD—CRIMINAL PROSECUTION—DEFENSES.
A conviction for using the mails to defraud in selling stock of a corporation is not necessarily unsupported by evidence because the corporation was legally organized and for a legitimate purpose.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86.]

3. CRIMINAL LAW ⟸1169(5)—REVIEW ON ERROR—ADMISSION OF EVIDENCE—CURING ERROR BY STRIKING OUT.
It is only when evidence erroneously admitted in a criminal case is of such apparent weight and so prejudicial in effect that the judicial

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied.

warning against it seems light and unavailing by comparison that the error remains uncured by striking it out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141.]

In Error to the District Court of the United States for the Southern District of New York.

Criminal prosecution by the United States against Pierre M. Looker. From a judgment of conviction, defendant brings error. Affirmed.

Looker was found guilty of a "scheme to defraud," toward the execution of which the mail was used; the indictment being under section 215 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1103 [Comp. St. 1913, § 10385]).

William J. Kearns, of Newark, N. J., and James A. Hamill, of Jersey City, N. J., for plaintiff in error.

H. Snowden Marshall, U. S. Atty., and John C. Knox, Asst. U. S. Atty., both of New York City.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. Although the indictment contained seven counts upon which the jury found Looker guilty, the variations between the counts being only in respect of the persons defrauded, and the letters mailed, a summary of one charge is sufficient for the purposes of this writ.

The charge was that Looker, with one McLaughlin (who died before trial), devised a scheme for obtaining money by false pretenses from divers persons, by means of selling the stock and debenture certificates of a corporation, hereinafter called the Monaton Company, and thereupon in furtherance thereof sent by mail copies of a resolution of the directors of the Monaton Company and circular letters to divers persons, naming them in the several counts.

The assignments of error are reducible to two heads: (1) That the evidence did not lawfully warrant conviction; (2) that the error in admitting certain evidence was not cured by subsequently striking it out.

[1] 1. While we are far from thinking that this case is near the line of doubt, it must be remembered that it is not necessary, in order to uphold a jury's verdict upon indictment, that the appellate or other court should be satisfied beyond a reasonable doubt of the guilt of the accused. Courts pass on the competency, relevancy, and materiality of the evidence, and are not required to leave to juries speculation on points of accusation, plainly opposed to the weight of unimpeached testimony. But, where there is substantial evidence pointing to guilt, it is the reasonable doubt of the jury, and not that of the court, which is to be considered. Matthews v. United States, 192 Fed. 490, 113 C. C. A. 96; Crumpton v. United States, 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 958; Humes v. United States, 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011.

[2] The evidence below fully showed that Monaton Company was a duly incorporated concern, having for its chartered purpose the acquisition of real property and the management thereof in such manner that from its gains it might pay dividends on preferred stock, 4 per

cent. on "profit-sharing premium certificates," and 6 per cent. on other "certificates," apparently of several kinds. The exact nature of the documents issued is not material, further than to point out that whatever value they possessed rested wholly on the Monaton's ability to get, keep, and profitably manage realty in New York City. So far as shown it operated nowhere else.

Generically this is a familiar business, and entirely lawful. But these assumptions do not render it impossible, nor even difficult, so falsely to represent the condition of an actual and lawful business as to render it a mere vehicle and excuse for fraud. Indeed, the most dangerous and reprehensible swindles usually consist in building a scheme of deception upon a foundation lawful per se. McConkey v. United States, 171 Fed. 829, 96 C. C. A. 501, and cases cited.

Monaton Company was organized in 1907, and Looker had nothing to do with it until some time later, when he left the employ of another realty enterprise, entered that of Monaton Company, and before the end of 1912 was its president. It is strongly urged upon us that defendant below left one lawful occupation to enter another, did so with a good reputation, got nothing out of the Monaton Company but a salary, larger to be sure than any theretofore received by him, but fully earned, and therefore (it is said) he could not be guilty of anything more heinous than hoping against hope that business would improve, and should not be condemned, even if continued hard times resulted in losses and foreclosures which finally swept away practically every vestige of Monaton Company's assets. Such arguments are most legitimate for the jury; our duty is but to ascertain whether evidence was submitted that would permit reasonable jurors to find, beyond reasonable doubt, that at the times complained of no sane and honest man could have believed to be true what (in effect) Looker said to the public about the worth of Monaton securities.

Many a man embarks with hope, if not confidence, upon a business voyage that goes awry; in the beginning he is honest and has no thought of wrongdoing; when trouble arises, temptation comes, and falsehoods often seem the only way to defer collapse. Just when the sanguine man becomes reckless, and the reckless one criminal, cannot be laid down as matter of law; if facts justify the inquiry, the answer is solely for the jury.

The facts in this case required the inquiry. The statement of assets and liabilities of Monaton Company, sent out as true on December 31, 1912, contained assertions as to value of its realty and other assets which would severely tax the kindest critic. Heavily incumbered real estate was published as worth 50 per cent. more than it had recently cost, and one piece of land, which alone represented 10 per cent. of the inflated total, had actually been conveyed (by deed absolute on its face) to a mortgagee, or party in his interest, nearly two months before date of statement, while several other lots were in process of foreclosure. It is noteworthy that Looker was no novice in New York realty dealing, and it was a fair question for the jury whether such a man did not violate that "right of open and fair dealing" which every customer for Monaton securities possessed (Wilson v. United States, 190 Fed. at

434, 111 C. C. A. 231), when he solicited them to invest in a company owning "judiciously selected income-producing real estate" "yielding a good income constantly." The foregoing is illustrative, not exhaustive; there is much of such evidence, and it required submission to the jury, and justified the verdict.

[3] 2. The second heading of error we notice, only to point out that what is complained of is often a question of degree. The objectionable nature of testimony is not always easily seen, and its admission is oftentimes sought to be justified by "promises to connect" and other excuses. It would be a serious misfortune if, when reflection perceives a mistake, it could not be corrected by "striking out," with proper instructions to the jury. This the law permits. Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708. It is only when evidence unlawfully admitted is of such apparent weight, and so prejudicial in effect, that the judicial warning against it seems light and unavailing by comparison, that the error remains uncured. Throckmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663; Armour & Co. v. Kollmeyer, 161 Fed. 78, 88 C. C. A. 242, 16 L. R. A. (N. S.) 1110.

In the present instance an expert accountant testified to his opinion, formed from the Monaton Company's books, that the corporation was, at a certain time, insolvent. This evidence the court subsequently struck out. Whether there was error in the original admission we do not decide; but that the evidence as given was of such serious character as to render it impossible, or even difficult, for the court to eradicate its influence, we do not believe, and think the contrary self-evident.

Let the judgment and sentence be affirmed.

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## COZART et al. v. BARNES et al.

(Circuit Court of Appeals, Fourth Circuit. March 7, 1917.)

No. 1482.

1. CHATTEL MORTGAGES ⟸8—FORM OF INSTRUMENT—NOTE PLEDGING SECURITY.

An instrument in the form of a note, containing a clause that there was deposited as collateral security certain tobacco, and that the payees were empowered to sell the tobacco on failure to pay the debt, amounts to a "chattel mortgage" under the laws of South Carolina.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 20–22.

For other definitions, see Words and Phrases, First and Second Series, Chattel Mortgage.]

2. CHATTEL MORTGAGES ⟸172(1)—RIGHTS OF MORTGAGEE—ACTION FOR POSSESSION.

The payees under that note can maintain an action for possession of the property without an equitable suit to foreclose the mortgage, since the power to sell the property necessarily implied the power to take possession of it for that purpose.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 306, 310.]

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. CHATTEL MORTGAGES ⇐197(1)—FAILURE TO RECORD—ANTECEDENT CREDITORS—OPEN ACCOUNT—"DEBTOR"—"CREDITOR."

An open account creditor of a chattel mortgagor is a prior and not a subsequent creditor, so that the unrecorded mortgage is valid against him, where all the charges against the debtor were made before the mortgage was given, though some payments were made by the debtor, and the balance of the account struck after the mortgage, since any one liable on a claim, whether due or to become due, is a debtor, and any one giving credit is a creditor.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 430–432.

For other definitions, see Words and Phrases, First and Second Series. Creditor; Debtor.]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Florence; Henry A. Middleton Smith, Judge.

Action by C. H. Cozart and another, partners under the firm name and style of the Cozart & Meadows Company, against J. W. Barnes and another, to recover possession of personal property. Judgment for defendants, and plaintiffs bring error. Reversed.

W. F. Stackhouse and L. D. Lide, both of Marion, S. C., for plaintiffs in error.

R. E. Whiting, of Florence, S. C. (Whiting & Baker, of Florence, S. C., on the brief), for defendants in error.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. On September 23, 1914, J. C. Moore and W. H. Cross executed to Cozart & Meadows Company, the plaintiffs, an instrument in the form of a promissory note for $3,028.04 containing a clause stating that there was deposited as collateral security for the note 75,501 pounds of leaf scrap tobacco, the property of J. C. Moore stored in the Banner Warehouse, at Hemmingway, S. C., and that the payees of the note were given the power to sell the tobacco upon failure to pay the debt. No possession of the tobacco, actual or constructive, was given the plaintiffs, and the instrument was not recorded. On December 9, 1914, the tobacco was taken by George J. Graham, sheriff of Williamsburg county, S. C., under an attachment issued at the instance of J. W. Barnes upon a claim arising on a mutual, open, and current account between the defendant and Moore Bros., which defendant claims became due as to the total amount on November 12, 1914, the date when the balance was agreed upon between the parties. The account was made up of charges made for the purchase money of tobacco bought on the floor of the warehouse by Moore Bros. and paid for by the defendant, and credits of payments made. The charges for the money advanced for the purchase of tobacco were all made before the date of the note held by the plaintiffs, but the payments were both prior and subsequent to that date.

This action was brought by plaintiffs as mortgagees to recover possession of the attached property. The District Court held: (1) That

the paper executed to the Cozart & Meadows Company was an instrument in the nature of a mortgage, and although unrecorded it was good as a mortgage of the property against all creditors whose debts were incurred prior to the date of the execution of the mortgage; (2) that the account of Moore Bros. with Barnes was a mutual, open, and current account, and that although all of the debits appearing thereon against Moore Bros. were made prior to the execution of the mortgage, nevertheless, since the account did not become due until November 12, 1914, after the date of the mortgage, the balance was to be regarded as a subsequent debt, and therefore as to the debt the mortgage was void. No distinction was drawn in the trial of the cause below or in the argument here between the rights of J. C. Moore, the owner of the tobacco, and Moore Bros., by whom the account with the defendant was contracted, and hence it will be disregarded here.

The questions presented are: (1) Is the instrument in the form of a note held by the plaintiffs a chattel mortgage superior to the rights of antecedent creditors? (2) Does the fact that the defendant's claim upon which the attachment is based did not become due until the date the balance of the accounts was struck and agreed upon after the execution of the mortgage make the defendant a subsequent creditor, although all the charges to Moore Bros. were made before the mortgage was executed?

[1, 2] The instrument in the form of a note given by Moore and Cross to the plaintiffs stated that the tobacco was deposited as collateral security. Whatever may be the law in other states, the Supreme Court of South Carolina in Creech v. Long, 72 S. C. 25, 51 S. E. 614, has held in accordance with the view of the District Court that an agreement that certain property shall stand as security for a debt amounts to a chattel mortgage. The point is made that such an instrument is only an equitable mortgage of the property and that foreclosure would have been more appropriate to enforce the mortgage. The paper not only provides that the tobacco shall stand as collateral security, but it gives "authority to the payees to sell the same at public or private sale, or otherwise, without notice, at their option, on the nonperformance of this promise." The power thus conferred to sell the property necessarily implied the power to take possession of it for that purpose. The case, therefore, comes expressly under the decision of the court in Moore v. Byrum, 10 S. C. 452, 30 Am. Rep. 58. There the language was:

"I * * * do hereby give to Joseph Byrum, Jr., a mortgage on all my cotton, corn, and wheat that I may raise during the year 1876, to secure the payment of the above note this day given by me; and in default of payment by the 1st of November next, then I authorize the said Byrum to take all the crops raised by me, or any other person he may select so to do."

It will be observed that there were no express terms of conveyance, and yet the instrument was held to be a legal mortgage entitling the mortgagee to possession, one of the reasons for the decision being that the paper contained authority to take possession of the property mortgaged upon default in payment.

[3] We are unable to agree with the District Court that the debt of Barnes was subsequent to the execution of the mortgage. It seems clear that the date the balance was struck is not necessarily the date the relation of debtor and creditor arose, though it be the date upon which the total indebtedness became due and payable. The liability for the charges entered on the books of Barnes was created at the time the money was advanced and the charges were entered. Any one liable on a claim, whether due or to become due, is a debtor, and any one giving credit is a creditor. King v. Fraser, 23 S. C. 543; McGhee v. Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567; Stewart v. Walterboro, etc., Ry. Co., 64 S. C. 92, 41 S. E. 827; Stanly v. Ogden, 2 Root (Conn.) 259. Barnes extended no credit and parted with nothing of value after the date of the mortgage. It follows, therefore, that Barnes was a prior and not a subsequent creditor, and that the chattel mortgage was valid and superior to the lien of the attachment obtained by Barnes.

The judgment of the District Court is reversed.

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## ABBOTT v. WAUCHULA MFG. & TIMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 26, 1917.)

No. 3026.

1. BANKRUPTCY ⊂⊃100(2)—ADJUDICATION—PETITION TO VACATE.
Where a subpœna was issued after the filing of an involuntary petition in bankruptcy, but not served, so there was no return day, and there was an adjudication of bankruptcy by consent after the bankrupt had withdrawn its first answer denying the act of bankruptcy, the adjudication was binding on all parties interested, and a purchaser from the bankrupt cannot as a matter of law have it set aside and be permitted to come in and defend.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 131, 144.]

2. BANKRUPTCY ⊂⊃100(2)—ADJUDICATION—PETITION TO VACATE—SHOWING.
A purchaser from a bankrupt, who filed a petition addressed to the court's discretion to have the adjudication vacated, should show that the vacation would be of value to him, by showing that the bankrupt was not insolvent, or had not committed the acts of bankruptcy alleged.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 131, 144.]

3. BANKRUPTCY ⊂⊃100(2)—ADJUDICATION—PETITION TO VACATE—EVIDENCE.
At the hearing on a petition by a purchaser to vacate an adjudication in bankruptcy, the records in the bankrupcy proceeding, showing a confession by the bankrupt of insolvency and of the act of bankruptcy, are admissible against the purchaser, since he is bound by them as much as if he had been a party to those proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 131, 144.]

4. BANKRUPTCY ⊂⊃100(2)—ADJUDICATION—PETITION TO VACATE—OBJECTIONS.
The objections filed by a creditor to the petition of a purchaser of a bankrupt property sold under execution to have set aside the adjudication, all of which objections could be considered in deciding the issues made by the petition and the answer of the bankrupt and the trustee, should be stricken.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 131, 144.]

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5. BANKRUPTCY ⊂⊃100(2)—ADJUDICATION—SETTING ASIDE—EFFECT OF FORMER DECISION.

A previous decision that the purchaser of a bankrupt's property sold under execution could not be compelled to submit to personal examination before his petition to vacate an adjudication would be heard does not require the adjudication to be vacated before it is necessary for petitioner to prove that the bankrupt was insolvent and did not commit the act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 131, 144.]

Petition to Superintend and Revise Proceedings of the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

In the matter of the Wauchula Manufacturing & Timber Company, bankrupt. Petition by William T. Abbott to revise an order of the District Court denying petitioner's motion to set aside the adjudication and to permit him to come in and defend. Petition to revise denied.

The following is the judgment of the court below:

This cause comes on to be heard upon the petition or motion of William T. Abbott to set aside the adjudication of bankruptcy, and to be allowed to come in and defend. The facts may be stated as follows:

In September, 1914, an involuntary petition in bankruptcy was filed by certain creditors against the bankrupt, and a subpœna duly issued, but not served by the marshal, at the request of petitioners' attorneys. An appearance was duly entered by the bankrupt, and within due time an answer was filed, denying the act of bankruptcy charged and insolvency. Subsequently an amendment was made to the petition, setting up other acts of bankruptcy. In January following the board of directors of the bankrupt corporation met and by resolutions withdrew the answer theretofore filed, acknowledged the inability of the corporation to pay its debts, and consented to be adjudicated a bankrupt. Upon this being brought to the attention of the court an adjudication was on the 18th of January, 1915, made. On January 21, 1915, the petitioner filed his motion or petition, wherein he shows that a judgment had been recovered against the bankrupt for $148.19 in August 1914, that this judgment had been purchased by one Odlin, and levy of execution made upon lands of bankrupt, advertisement of sale under said execution made and land bought at said sale by Odlin on November 2d, and deed made to him by the sheriff, and that said lands were subsequently conveyed to the petitioner on November 5th. The petition or motion then sets up the proceedings in bankruptcy, the withdrawal of the answer, and admission of insolvency and the acts of bankruptcy alleged in the amended petition, and adjudication thereon, and prays that the adjudication be vacated, and he be allowed to come in and defend. The petition alleges on information and belief that the corporation had not committed the acts of bankruptcy alleged and was not insolvent.

The trustee in bankruptcy and the bankrupt filed answer to the petition of Abbott, admitting the entry of the judgment, the purchase of same by Odlin, and the proceedings under same, resulting in the deed being made to Abbott, setting up the action of the board of directors, authorizing the withdrawal of the answer, the consent to be adjudged a bankrupt, and acknowledging the inability of the corporation to pay its debts; and averring that the corporation was insolvent and unable to pay its debts, and that it did commit the act of bankruptcy alleged against it, and other matters not necessary to notice. Upon this hearing testimony was taken by the court which, on behalf of the petitioner, showed the entry of the judgment, purchase of same, and proceedings culminating in the deed to Abbott. The files and records in the bankruptcy proceedings were offered by the trustee and others showing the indebtedness of the corporation, its assets, etc.; this last evidence being objected to by peti-

tioner on various grounds noted by the stenographer. On the day of and just before the hearing the Wauchula Development Company, whose contract with the bankrupt has been recognized in the bankruptcy proceedings, filed certain objections to granting the petition of Abbott, and the petitioner moved to strike said objections on several grounds, among them being that the objector had never been made a party, and because the defenses had been theretofore interposed, and because it was guilty of laches, etc.

[1, 2] The petitioner claims, as I understand it, that, the subpœna not having been served, there was no return day, and therefore he was not required to enter his appearance and make answers within five days, and therefore as a matter of right he could have the adjudication vacated and be allowed to come in and defend. This position I do not think well taken. The case of In re Billing (D. C.) 145 Fed. 395, is a well-reasoned case, and I think states the law correctly on motions or petitions seeking to vacate adjudications in bankruptcy. Proceedings in bankruptcy are in rem, binding all parties interested in the bankrupt's property. It seems to me that if a creditor desires to vacate an adjudication, and his motion is addressed to the sound discretion —that is, the judicial discretion—of the judge, it is incumbent upon him to show that the vacation of the adjudication would result in benefit to him; i. e., that on trial of the issue tendered the result would probably be favorable to his contention.

[3] The petition or motion in the instant case alleges that the bankrupt was not insolvent and had not committed the acts of bankruptcy alleged. The answer of the trustee and the bankrupt took issue on these allegations. Upon the hearing no testimony on these issues was offered, by the petitioner. His testimony was confined to the matters admitted in the answer. The only testimony bearing upon the issues tendered by the petition and the answer were the records in the bankruptcy proceedings, which were objected to by petitioner. The petitioner being as much bound by these proceedings as though he was an actual party, he is bound by the proceedings, and they are proper for the judge to consider in deciding whether the adjudication shall be vacated. I am of opinion, therefore, that the objections of the petitioner to the evidence are not well taken, and each of said objections is overruled.

[4] The petitioner moved to strike the objections filed by Wauchula Development Company, filed on the day the hearing commenced. I think this motion should be granted, not because the objector did not have an interest, but because every objection urged therein would be considered by the court in reaching a decision upon issues made by the petition and the answer of the bankrupt and trustee, and such objections were unnecessary.

Petitioner relies upon In re Wauchula, 229 Fed. 677, — C. C. A. —, to sustain his right to have the adjudication vacated. The one and only question involved in that case is: Could the court require the petitioner to present himself for examination? The Circuit Court of Appeals decided that this court could not require the petitioner to come and submit himself to such examination. I do not understand that the court passed upon or attempted to lay down any rules to govern in applications of this kind. Now could that court properly do so upon the record before it?

It is my judgment that the motion or petition should be denied. It will be so ordered.

Howard P. Macfarlane, of Tampa, Fla., for petitioner.

Herbert S. Phillips, W. F. Himes, and Jos. W. Frazier, all of Tampa, Fla., for respondents.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PER CURIAM. The opinion of Judge Call, found in the record, fully covers the facts and conclusions in the judgment sought to be revised, and we concur with him both as to facts and conclusions.

[5] The contention that the heretofore decision of this court on a former petition to revise (229 Fed. 677, 144 C. C. A. 87) required that

the adjudication of bankruptcy theretofore rendered should be annulled and vacated before petitioner Abbott should be required to produce his evidence as to the insolvency and acts of bankruptcy of the said Wauchula Manufacturing & Timber Company is without merit, as the opinion in the case will fully show.

The petition to revise is denied.

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## DELAWARE, L. & W. R. CO. v. HUGHES.

(Circuit Court of Appeals, Second Circuit. February 27, 1917.)

No. 185.

1. MASTER AND SERVANT ⊂=278(18)—INJURIES TO SERVANT—EVIDENCE—NEGLIGENCE OF MASTER.

In an action under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657-8665), for the death of a railroad switchman, evidence *held* to warrant the jury in finding that the defendant was negligent in failing to give sufficient warning to the switchman of the approach of the car which killed him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 971.]

2. MASTER AND SERVANT ⊂=265(6)—INJURIES TO SERVANT—PRESUMPTIONS—NEGLIGENCE.

The fact that a switchman, who had been employed in the same railroad yard for 25 years, and who must have been thoroughly familiar with the movement of trains therein, and with all the customs of the yard, was run down and killed in the yards by a car, raises the presumption that some abnormal and unexpected condition prevailed, since it is contrary to ordinary intelligence that such a man would have remained on the track, if adequate warning had been given.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 898, 955.]

3. MASTER AND SERVANT ⊂=137(4)—INJURIES TO SERVANT—DUTY OF MASTER—WARNING.

It is the duty of a railroad company to give adequate warning to a switchman on the track in its yards of the approach of a car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 274, 277, 278.]

4. DEATH ⊂=84—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—FUNERAL EXPENSES.

The federal Employers' Liability Act, providing that damages in case of death are for the benefit of the next of kin dependent on the employé, does not authorize a recovery, in an action for such death, of the funeral expenses.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 110.]

In Error to the District Court of the United States for the Northern District of New York.

Action by Esther A. Hughes, as administratrix, against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant's motion for new trial denied (233 Fed. 118), and defendant brings error. Modified and affirmed.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Charles V. Byrne, of Syracuse, N. Y., for plaintiff in error.

Edward W. Cregg, and Gregg Bros. & Rulison, all of Syracuse, N. Y., for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

COXE, Circuit Judge. This action was brought by Esther A. Hughes, as administratrix of the estate of Thomas Hughes, deceased, to recover damages of the Railroad Company for its alleged negligence in causing the death of her husband. The action was brought under the federal Employers' Liability Act. The jury found a verdict for the plaintiff in the sum of $3,715.

[1] Thomas Hughes was killed on a track of the defendant's road at Syracuse at about 4 o'clock on the morning of August 10, 1916, while it was yet dark. He was a man of experience and long service in the defendant's employ and was thoroughly acquainted with the premises in question. He was killed by being run down by a freight car which the plaintiff insists was improperly managed in that there was no watchman at or near its end with a signal lantern to warn those who had a right to be on the track of an approaching car. It appears that there were trains passing on the main tracks and the noise so produced rendered it impossible for Hughes to hear the approach of the car and it is argued that he could not see the red light on the car for the reason that the man with the lantern was not where he should have been, near the forward end of the car. On the contrary, it is contended that he was on the roof of the car about the middle, where he could not see the track and a person on the track could not see the red lantern unless he were a long distance away. The jury might, therefore, have found that Hughes, while discharging his duties on the branch track, was killed by a car striking him without sufficient signal or warning of any kind. True, they might have found the reverse of this proposition but such a concession does not alter the force of the plaintiff's contention that there was a clear question of fact to be decided and that there was sufficient testimony to sustain the verdict for the plaintiff.

[2] We are convinced that there was a question of fact for the jury and their verdict is sufficiently supported by the testimony. Thomas Hughes was employed as switchman by the defendant in its Syracuse yard for 25 years. He must have been thoroughly acquainted with the situation and familiar with the location of the tracks, the movement of trains and all the customs of the yard. That such a man should be run down and killed at a place where he knew every detail of the premises and of the methods employed raises a presumption that some abnormal condition prevailed which was not to be expected, which he could not have foreseen and which he was not required to guard against by taking extraordinary precautions. That such a man would have remained on the track if an adequate warning had been given is contrary to all the impulses which govern the conduct of men of ordinary intelligence.

[3] It was the duty of the defendant to give adequate warning of the approach of the car. If this could have been done only by having

a man with a lantern on the ladder at the end of the car, that precaution should have been adopted. If a man on the roof of the car could give timely warning his position there would suffice, provided he was near enough to the end to see the track a sufficient distance in front of the advancing car to give the man on the track time enough to escape. The space within which such a light could be seen would depend upon its distance from the end of the car and its height above the car roof. In Southern Railway Co. v. Smith, 205 Fed. 360, 123 C. C. A. 488, the court said:

"While it is primarily the duty of a switchman in railroad yards to be on the lookout and keep out of the way of moving engines, there is a concurrent or secondary duty, independent of statute or rule, on the part of those in charge of such moving engines to keep such lookout as is reasonably necessary to avoid injury to an employé who may neglect to protect himself, and the extent of such duty is measured by the peculiar circumstances of the case."

[4] The federal Employers' Liability Act of April 22, 1908, makes no provision for funeral expenses in such a case as this. 35 Stat. p. 65 (Comp. St. 1913, §§ 8657–8665). In Collins v. Penna. R. R. Co., 163 App. Div. 452, 148 N. Y. Supp. 777, the court said:

"The federal Employers' Liability Act provides that the damages in case of death of an employé are for the benefit of the next of kin *dependent* upon such employé, for such injury or death. No provision seems to be included or intended by the federal act to compensate for the expenses of burial, and, therefore, the testimony received by the trial court under defendant's objection as to such funeral charges was erroneous."

We are of the opinion, therefore, that the allowance of $215 for funeral expenses was erroneous and that the judgment should be reduced to that extent.

As so amended the judgment is affirmed with costs.

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## WM. R. MOORE DRY GOODS CO., Inc., v. BROOKS et al.*

(Circuit Court of Appeals, Eighth Circuit. February 28, 1917.)

No. 178.

1. BANKRUPTCY ⊜446—REVIEW—DECISION OF COURT BELOW.

A creditor excepted to the report of the trustee setting aside to a bankrupt real estate as a homestead exemption, on the ground that two or three days before filing his voluntary petition the bankrupt purchased the real estate with the proceeds of nonexempt personal property which had been obtained by the bankrupt from the creditor and others under false pretenses. The referee heard the evidence and overruled the exception, and, his order being affirmed by the District Court, the creditor petitioned to revise. *Held* that, as the reviewing court considers what the District Court did, and not its reasons therefor, and as the evidence as to whether the nonexempt property had been obtained under false pretenses was in conflict, the question cannot be reviewed because on petition to revise, the reviewing court cannot consider the evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929.]

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⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied April 23, 1917.

2. BANKRUPTCY ⊂=446—PETITION TO REVISE—QUESTIONS OF FACT.
On petition to revise, the reviewing court cannot consider the evidence.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929.]

Petition to Revise Order of the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

In the matter of the bankruptcy of Eli Brooks. Petition by the Wm. R. Moore Dry Goods Company, Incorporated, to revise an order of the District Court, affirming an order of the referee overruling exceptions to the setting apart to the bankrupt by J. M. Jarman, trustee, of real estate as a homestead. Petition denied.

Fred C. Mullinix, of Jonesboro, Ark., for petitioners.

W. L. Pope and T. W. Campbell, both of Pocahontas, Ark., for respondents.

Before CARLAND, Circuit Judge, and RINER and MUNGER, District Judges.

CARLAND, Circuit Judge. This is a petition filed by the William R. Moore Dry Goods Company to revise an order of the United States District Court for the Eastern District of Arkansas, which affirmed an order of the referee in bankruptcy overruling exceptions to the setting apart by the trustee in bankruptcy of the estate of Eli Brooks, a bankrupt, certain real estate as a homestead exemption.

The petition shows that the petitioner excepted to the report of the trustee setting aside the real estate as a homestead exemption upon the ground, briefly stated, that the purchase price of the real estate was the proceeds of nonexempt personal property which had been obtained by the bankrupt from the petitioner and other creditors under false pretenses; the land being purchased two or three days before the bankrupt filed his voluntary petition to be adjudicated a bankrupt.

The referee heard the evidence as to the truth of the exceptions, said evidence constituting about 87 pages of the printed record now before us and overruled the exception. On review, the District Court affirmed the decision of the referee, without stating the reasons therefor.

[1, 2] Counsel for petitioner assumes that the District Court adopted the reasons given by the referee for his decision. The referee stated in his opinion that the fact that the bankrupt purchased the real estate with the proceeds of property obtained from petitioner or his other creditors was immaterial. The reasons, however, of the court or referee for their decisions, do not determine the question which is to be decided by this court. The District Court and referee decided that the real estate was lawfully set apart as a homestead exemption, and the correctness of this decision is the question before us. To decide it we must, of course, resort to the testimony, the same as the District Court and referee. The petitioner alleges in his petition that there is no disputed question of fact involved, and then proceeds to state that the question of law sought to be reviewed by the petition is whether, conceding that a bankrupt can turn nonexempt

property into exempt property, can he do so if he obtained the non-exempt property by false pretenses. Counsel for respondents vigorously contend, however:

"There is absolutely not a scintilla of proof to show that a dollar's worth of the goods bought on the strength of any financial statement ever made by the bankrupt or his bookkeeper was ever sold by the bankrupt, or that any proceeds from any sale of any of said goods was used in the purchase of the land claimed and allowed as bankrupt's homestead."

Counsel for respondents also contend that there is no evidence to show that there was any fraudulent intent on the part of the bankrupt in purchasing the goods, which counsel for petitioner claims was purchased under false pretenses. What we have thus far stated has been for the purpose of showing that this court cannot review the lawfulness of the order of the District Court without considering the testimony, and this we are neither required nor permitted to do on a petition to revise. This has been the uniform holding of the courts. In re Richards, 96 Fed. 935, 37 C. C. A. 634; In re Boston Dry Goods Co., 125 Fed. 226, 60 C. C. A. 118; In re Taft, 133 Fed. 511, 66 C. C. A. 385; In re Pettingill & Co., 137 Fed. 840, 70 C. C. A. 338; Steiner v. Marshall, 140 Fed. 710, 72 C. C. A. 103; In re Roadarmour, 177 Fed. 379, 100 C. C. A. 611; Hall v. Reynolds, 224 Fed. 103, 139 C. C. A. 659 (8th Cir.); Olmsted-Stevenson Co. v. Miller, 231 Fed. 69, 145 C. C. A. 257.

The petition to revise, therefore, will be denied; and it is so ordered.

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## JEWEL TEA CO. v. PLAUT.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1917.)

No. 4765.

INJUNCTION ⊂=175—RELIEF AWARDED—DISMISSAL—LIABILITY ON BOND.

Where, in an action to restrain defendant from transacting certain business during a period of one year, in which no damages were claimed, a temporary injunction had been granted on complainant's executing a bond conditioned on indemnifying defendant for all costs and damages, if it should be finally determined that complainant was not entitled to the relief demanded, it was error for the court, on defendant's motion, after the expiration of the year, to dismiss the suit, without determining whether complainant had been entitled to the temporary injunction, since complainant should not be exposed to liability on his bond, in case the doubtful question whether the dismissal of the suit was res judicata as to his liability in an action on the bond was decided against him.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 388.]

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by the Jewel Tea Company, a corporation, against Joseph E. Plaut. From a decree dismissing the suit on motion of defendant, complainant appeals. Reversed and remanded, with instructions.

Frederick H. Stinchfield, of Minneapolis, Minn., for appellant.

R. E. Plankerton and Charles B. Elliott, both of Minneapolis, Minn., for appellee.

Before CARLAND, Circuit Judge, and RINER and MUNGER, District Judges.

CARLAND, Circuit Judge. Appellant filed its complaint in the court below on March 12, 1915, praying for a temporary injunction restraining appellee from transacting certain business specified therein, and that upon final hearing said injunction be extended to cover a period of 12 months from February 6, 1915. March 13, 1915, an order to show cause why a temporary writ of injunction should not issue as prayed was granted with a restraining clause operative until the decision of the court on said order. May 7, 1915, a temporary writ was granted as prayed upon condition that appellant give a bond in the sum of $3,000 indemnifying the appellee for all costs and damages which might be suffered by him in case it should be finally determined that the appellant was not entitled to the relief demanded in its complaint. This bond was duly given. The appellee answered the complaint and the cause having been moved for trial on May 12, 1916, the court upon motion of counsel for appellee dismissed the action upon the ground that the period of one year during which a permanent injunction had been asked had expired. The decree of dismissal stated that in so doing the court did not pass upon the question as to whether the temporary injunction had been properly granted or not. Appellant has appealed from this decree, claiming that the trial court erred in not hearing evidence and deciding whether the appellant would have been entitled to a permanent injunction had the case been heard before the expiration of the period during which an injunction was asked.

We think that upon the record as presented to us there is much force in appellant's position. It is true the complaint prayed for no damages, but the appellant had given a bond in the sum of $3,000, conditioned that it would pay all costs and damages which appellee might suffer by reason of the temporary injunction in case it should be finally determined that appellant was not entitled to the relief demanded in the complaint. It will be observed that there is no limitation or restriction in the condition of the bond as to the grounds upon which relief should be denied. The decree that was entered determined that the appellant was not entitled to the relief prayed for. On the face of the record a liability on the bond arose for such damages as could be proven. We do not think that appellant ought to be compelled to take the chance of showing in an action at law on the bond that the decree of dismissal was not res judicata upon the question of whether or not appellant was entitled to the relief demanded by it in its complaint. The liability of appellant on the bond presented a substantial controversy which would have clearly authorized the trial court to have proceeded to dispose of the case on its merits. Click v. Sample, 73 Ark. 194, 83 S. W. 932; Joyce on Injunctions, § 432; Duff v. Russell, 133 N. Y. 678, 31 N. E. 622; Langmaid v. Reed, 159 Mass. 409, 34 N. E. 593. Both sides to this controversy have cited the case of Lewis Pub. Co. v. Wyman et al.,

182 Fed. 13, 104 C. C. A. 453, and 228 U. S. 610, 33 Sup. Ct. 599, 57 L. Ed. 989.

Counsel, however, are mistaken in assuming that the bond referred to in the opinion of the court in the Lewis Case was an injunction bond given in the same equitable proceeding. The bonds referred to in that case were indemnity bonds given to a postmaster at St. Louis, Mo., to secure the payment of excess postage. There was no temporary injunction granted. The Supreme Court of the United States in an action seeking to restrain the enforcement of an order of the Interstate Commerce Commission has proceeded to determine the validity of the order of the Commission after the expiration of the period of two years during which the order was to remain in force and did so upon the ground that the order might be the basis of further proceedings. Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310.

It is urged by counsel for appellee that there has been no suit commenced or threatened on the injunction bond; but the appellant ought not to be left subject to the option of appellee as to whether he will bring an action on the bond or not. What we decide in this case is that the appellant was entitled to protect its liability on the bond by showing in the present action that he would have been entitled to the relief prayed for in its complaint if the delay in the trial of the cause had not been carried beyond the year during which it was asked that appellee be restrained. In an action at law on the bond the decree of dismissal in this case would present a very troublesome question as affecting appellant's liability. We think the more equitable course in a case of this kind is for the trial court to hear the merits of the controversy, so that the question of whether appellant was entitled to the relief demanded in its complaint might be determined.

The decree below is reversed, and the case remanded, with instructions to the trial court to proceed therein in conformity to the views herein expressed.

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## In re LOUIS NEUBURGER, Inc.

## In re MILKMAN.

(Circuit Court of Appeals, Second Circuit. February 27, 1917.)

No. 182.

1. BANKRUPTCY ⟸20(1)—PROCEEDINGS—POWER OF BANKRUPTCY COURT.

A general assignment having been made, a petition in bankruptcy was filed, upon which the assignor was adjudicated a bankrupt. After adjudication, the assignee filed his accounts in the state court, and they were approved. *Held* that, as the jurisdiction of the court of bankruptcy is paramount, and cannot be defeated by proceedings under the state law, the assignee was properly required to account to the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 1331.]

2. BANKRUPTCY ⟸60—ACTS OF BANKRUPTCY—ASSIGNMENTS.

An assignment for the benefit of creditors is itself an act of bankruptcy, though the assignment remains valid until an adjudication in

bankruptcy is made; it being regarded as potentially a fraud upon the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) and the creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy of Louis Neuburger, Incorporated. Petition by Walter B. Milkman, as assignee of the bankrupt, to revise an order of the District Court (233 Fed. 701), affirming an order of the referee directing the assignee to account to the District Court. Order affirmed.

On January 11, 1916, Louis Neuburger, Incorporated, a corporation residing in Bronx county, state of New York, made an assignment for the benefit of creditors to one Walter B. Milkman who accepted and at once entered on the performance of his duties. On January 21, 1916, a petition in bankruptcy was filed against the assignor and on February 14, 1916, it was duly adjudicated a bankrupt. The assignee for the benefit of creditors filed his report and accounts with the clerk of Bronx county, and on April 3, 1916, the County Court of Bronx County entered an order passing and approving the assignee's accounts. The assignee thereupon served upon the trustee in bankruptcy a copy of the order of the Bronx County Court, together with a check for the moneys payable to the trustee pursuant to the said order. Upon the application of the trustee the referee entered an order on April 5th directing the assignee to file his report and accounts as assignee in the United States District Court on or before April 7, 1916. The assignee thereupon petitioned for a review of the order, which was heard and denied by District Judge Augustus N. Hand.

Walter B. Milkman, in pro. per.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1, 2] The assignee for creditors claims that the order of the District Court requiring him to file his accounts in that court is erroneous. He asserts that he had a right to account to the state court, from which he derived his authority, and he denies the power of the trustee to compel another accounting in the federal court; the matter being res adjudicata by the action of the state court.

Under the Bankruptcy Act an assignment for the benefit of creditors is in itself an act of bankruptcy. The assignment remains valid, unless and until an adjudication in bankruptcy is made. It is properly regarded as potentially a fraud upon the Bankruptcy Law and upon the creditors, since its necessary effect would be to defeat the operation of the Bankruptcy Law and to deprive creditors of the protection that that law affords them and the provisions it makes for a speedy and equal distribution of the estate. In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377.

If an adjudication in bankruptcy follows an assignment, it has the effect of automatically and of its own force avoiding the assignment. The trustee immediately becomes invested with title to the property. He does not take title as the successor of the assignee, but as the successor of the bankrupt. It becomes at once the duty of the assignee to turn over to the trustee, when elected, the estate covered by the as-

signment, and in the meantime to preserve the estate intact. If he does more than that, he assumes the risk of his conduct, as he is chargeable with knowledge of the extent of his powers. The adjudication of the assignor in bankruptcy invests the bankruptcy court from that time with exclusive jurisdiction of the bankrupt's estate. There can be no question of concurrent jurisdiction with the state court in respect thereof. As the Supreme Court declared in Re Watts, 190 U. S. 1, 27, 23 Sup. Ct. 718, 724 (47 L. Ed. 933):

"The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

As the jurisdiction over the bankrupt's estate is exclusive, it follows necessarily that the jurisdiction of the state court is at once superseded upon the adjudication of bankruptcy, and that there is no authority in that court thereafter to authorize any expenditures from the estate the title being at the time in the trustee in bankruptcy. The matter was thoroughly considered by District Judge Augustus N. Hand, and his opinion is satisfactory to this court. The state court was without jurisdiction to settle the accounts of the assignee. It is his plain duty to account in the bankruptcy court for the assets of the bankrupt estate which came into his hands as assignee.

Order affirmed.

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## GREEN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 27, 1917.)

No. 137.

1. BANKRUPTCY ⟸495—OFFENSES—EVIDENCE.
In a prosecution against a bankrupt under Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Comp. St. 1913, § 9613), for fraudulently concealing from his trustee money belonging to his estate, where it appeared that the bankrupt, shortly before adjudication, converted into money merchandise bought on credit, evidence of conversations by the bankrupt at the time of disposing of the merchandise was admissible.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912.]

2. BANKRUPTCY ⟸496—OFFENSES—EVIDENCE—SUFFICIENCY.
In a prosecution, under Bankr. Act, § 29b, for the offense of concealing from his trustee money and property belonging to the bankrupt's estate, evidence *held* sufficient to take the case to the jury.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 913.]

3. CRIMINAL LAW ⟸829(1)—TRIAL—INSTRUCTIONS.
Where the charge covered all material questions of law presented by the evidence, the refusal of requests covered was not error.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

4. BANKRUPTCY ⟸495—OFFENSES—EVIDENCE—ADMISSIBILITY.
In a prosecution against a bankrupt under Bankr. Act, § 29b, for concealing from his trustee money and property belonging to his estate,

where it appeared that the bankrupt had converted into money goods bought on credit shortly before bankruptcy, testimony as to his statements at the time of making the purchases, or shortly before, is admissible to show his design.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912.]

In Error to the District Court of the United States for the Southern District of New York.

Daniel Green was convicted under Bankr. Act, § 29b, of knowingly and fraudulently concealing from his trustee in bankruptcy property belonging to his estate in bankruptcy, and he brings error. Judgment affirmed.

This case comes here on writ of error to review a judgment of conviction based upon the verdict of a jury finding Daniel Green guilty of an offense under section 29b of the Bankruptcy Act. The specific offense charged against Green was that he knowingly and fraudulently concealed from his trustee in bankruptcy money belonging to his estate in bankruptcy amounting to $8,000 together with certain other moneys and property to the grand jurors unknown. The jury found the defendant guilty and he was sentenced for one year and a day in the Atlanta Penitentiary.

The parties will be referred to hereafter as they appeared in the court below, as plaintiff and defendant.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

Slade & Slade, of New York City, for plaintiff in error.

H. Snowden Marshall, U. S. Atty., and John E. Walker, Special Asst. U. S. Atty., both of New York City.

COXE, Circuit Judge (after stating the facts as above). The defendant, Daniel Green, was indicted for having knowingly and fraudulently concealed from his trustee in bankruptcy $8,000 and other property unknown to the grand jurors. The jury found him guilty and he was sentenced to one year and a day in the penitentiary. The charge against him, briefly stated, is that just prior to the bankruptcy he had made large purchases of goods on credit, had sold the goods so obtained, together with other goods he had on hand, at discounts ranging from 2 to 10 per cent., from which sales he realized about $8,000 which he fraudulently concealed from his trustee in bankruptcy. He is also charged with having fraudulently concealed an automobile.

[1, 2] The questions relating to the acquisition and disposal of his goods by the bankrupt were questions of fact and were left to the jury to determine after a fair charge which very properly did not attempt to discuss the facts in detail. The objection to conversations with the defendant at the time he sold the merchandise and converted it into cash just prior to the bankruptcy was properly overruled. Upon the main question the record presents a clear-cut question of fact. Just prior to his bankruptcy Green was converting everything he possessed into cash and placing it in the hands of his relations. He was insolvent at this time and it was for the jury to say whether, while a bankrupt, he had knowingly and fraudulently concealed from his trustee

any of the property belonging to his estate in bankruptcy. The government contends that he concealed property aggregating $8,000 which he obtained by selling it at less than its value and concealing the money obtained therefor.

[3] The trial judge was handed a number of requests to charge by the defendant. The judge was not required to deal with each of these requests separately. He was entirely justified in using his own language rather than the language of counsel in presenting the case to the jury. He followed the usual course in such situations by charging the law, as he understood it, as applicable to the question presented and gave the defendant an exception to his refusal to charge in the exact language of the request. So the question is—Did the judge fairly present the case to the jury; did he cover all the material questions of law presented by the evidence?

The fundamental inquiry in such cases must be—Was the law applicable to the controversy fairly presented to the jury; if so, neither party has a right to complain because the trial judge preferred his own language to that of counsel. Western Union Tel. Co. v. Morris, 105 Fed. 53, 44 C. C. A. 350.

[4] The defendant's counsel moved to strike out the testimony of various witnesses who testified as to conversations with the defendant at the time of making the purchases or shortly prior to that time. The court denied the motion, stating that he did so for the reason that it was only admitted as tending to prove "a design and purpose carried out of concealing goods that belong to the trustee in bankruptcy or to the creditors under the bankrupt law." We see no error in this ruling and think it is sustained by the following authorities: Moore v. United States, 150 U. S. 57, 60, 14 Sup. Ct. 26, 37 L. Ed. 996; Alexander v. United States, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954.

The judgment is affirmed.

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## THE JAMES McWILLIAMS.

(Circuit Court of Appeals, Second Circuit. February 6, 1917.)

No. 167.

COLLISION ⊂=130, 154—SUIT FOR DAMAGES—LACHES.

Where a suit for collision was not brought until four years after the collision, and was not brought on for trial until two years later, libelant, on recovery, *held* not entitled to interest nor costs.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 284, 308.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by William G. Beach against the steam tug James McWilliams; the James McWilliams Towing Line, claimant. Decree for libelant, and claimant appeals. Modified and affirmed.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for appellant.

Park & Mattison, of New York City (Henry E. Mattison, of New York City, of counsel), for appellee.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. This appeal raises two questions: (1) Whether the court below was justified in finding that a fair preponderance of evidence proved the collision complained of as occurring by fault of the tug; and (2) whether, in view of the procrastination characterizing the bringing and progress of the action, libelant was in any event entitled to any or a full recovery.

As to the first point we confirm the findings of the court below, upon the familiar ground that there was clearly evidence for libelant justifying some recovery, and that the court, which heard and saw the witnesses, is better able to weigh and measure all the evidence than is an appellate tribunal reading from the printed page.

The second point requires consideration of some incontrovertible facts derived from the court dockets. The collision in question occurred May 6, 1909, libel was filed April 29, 1913, and the cause was not brought on for trial until May 13, 1915. In so simple a litigation as this, difficulties productive of expense are almost always the natural result of delay (McWilliams v. Philadelphia, etc., Co., 203 Fed. at 861, 122 C. C. A. 84), and a libelant so delaying cannot justly complain if, even when he proves his legal damage, the discretionary allowances of interest and costs are withheld. We think such withholding should occur in this instance.

The decree below is modified, by reducing libelant's recovery to the damages stated in the decree, viz. $246, and, as so reduced, it is affirmed, without costs of this court to either party.

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WOODBURN v. SHEEHY et al.

(Circuit Court of Appeals, Second Circuit. February 6, 1917.)

No. 122.

WHARVES ⊂=20(6)—ACTION FOR INJURY TO VESSEL—UNSAFE BOTTOM.

Respondent, as lessee of a portion of a pier on North River, *held* not liable for an injury to a scow by reason of the unsafe condition of the bottom of the slip, on the ground that the master did not place the scow where directed, and that the evidence was insufficient to show that the shoal water which caused the damage was opposite respondent's part of the pier.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. § 42.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Robert M. Woodburn against Michael J. Sheehy and Frank M. Bedell. Decree for respondents, and libelant appeals. Affirmed.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

This was a libel filed to recover damages caused to a coal scow by reason of the unsafe condition of the bottom of a slip adjacent to a pier on the North River. The respondents leased 160 feet of the inner portion of the pier. There were beyond this about 50 feet of the pier under the control of the city of New York, and beyond that, and farther out, 250 feet under the control of one Mulligan. The scow was so placed that the bow was brought against the pier, pointing toward the northwest, while the stern was pointing toward the bulkhead, but lay out in the slip a few feet from the pier, because the scowman was unable to bring it up to the pier, owing to the shoalness of the slip. The scowman took no soundings, but made fast the stern of his boat to the niggerhead on the pier. When the tide ebbed, the line parted, and the scow slid down on the uneven bottom, was strained, and filled. The respondent Sheehy testified that he had directed the scowman to make fast his boat to the barge Agnes Hickey, where the water was deep.

The District Judge expressly held that he believed the testimony of the respondent Sheehy. The respondents apparently did not know that the bottom was uneven, and the scow was almost entirely, if not wholly, on property of the city and of Mulligan, who had leased the outward portion of the pier. The scow was 100 feet long, and apparently not more than 10 or 15 feet of it, at most, was opposite respondents' portion of the pier, and it was not satisfactorily shown that any part of the shoal on which the scow was grounded was opposite respondents' leasehold. The District Judge dismissed the libel accordingly.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellant.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellees.

Before COXE and WARD, Circuit Judges, and HAND, District Judge.

AUGUSTUS H. HAND, District Judge (after stating the facts as above). We think the libelant has not proved that the shoal, which caused the damage, was opposite respondents' portion of the pier, and consequently no cause of action has been established, and the libel was properly dismissed. Moreover, the fact that the scowman did not place his scow along the Agnes Hickey, as directed by the respondent Sheehy, where she would have been safe, and that he took no pains to get her to a place where there was plenty of water when he found she was bearing against an uneven bottom, shows that the fault of the owner caused the injury.

The decree must be affirmed.

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## E. N. ROWELL CO. v. WILLIAM KOEHL CO.

(Circuit Court of Appeals, Second Circuit. February 2, 1917.)

No. 8.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—MACHINE FOR MAKING PILL BOXES.

The Rowell and Little patent, No. 844,190, for a machine for making paper boxes, was not anticipated, but is valid and a pioneer patent, the machine described being the first to successfully make automatically

what are known commercially as French edge pill boxes, and as such is entitled to a broad construction and a broad range of equivalents. Claims 1, 3, and 5 also *held* infringed.

Appeal from the District Court of the United States for the Western District of New York.

Suit in equity by the E. N. Rowell Company against the William Koehl Company. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 216 Fed. 780.

The E. N. Rowell Company is a corporation organized and existing under the laws of the state of New York and will be referred to as complainant. It is engaged in the manufacture of paper pill boxes at Batavia, in the county of Genesee, in the state of New York. The William Koehl Company is a corporation organized and existing under the laws of the state of New York and will be referred to as defendant. It is engaged in the manufacture of paper box machines at Jamestown, in the county of Chautauqua, and state of New York.

The suit is brought for an alleged infringement of patent No. 844,190, issued by the United States Patent Office to Edward N. Rowell and James Little as inventors, and to complainant as assignee, on February 12, 1907. The defendant maintains that the patent is invalid, and, if valid, that it does not infringe. The defendant avers that the material and essential features of complainant's machine were fully described and set forth in patents of the prior art. The defendant has cited 161 patents; and it is also averred that the alleged improvements of the patent in suit were, long before the alleged invention, known to and used by certain persons, whose names and places of residence are set forth, to the number of over 100. The defendant's alleged infringing machine is covered by patent No. 1,098,314.

The District Judge has held the patent valid, but not infringed. In his opinion he states: "My conclusion is that claims 1, 3, and 5 of the patent in suit are valid, but were not for a pioneer invention, and that they are in fact of narrow scope, and must be limited to the construction shown in the specification. Defendant's machine, as hereinbefore stated, is materially different from complainant's, and is not an infringement thereof. A decree dismissing the bill, with costs, may be entered."

Hans v. Briesen, of New York City, for appellant.

Frank Keiper, of Washington, D. C. (Melville Church, of Washington, D. C., of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The patent in suit is for a machine the particular object of which is to manufacture automatically the top and bottom halves of the ordinary small pill boxes which are used in the drug stores. The patent does not use the expression "pill boxes," yet it is understood that it is intended for the manufacture of that type of boxes. The specification of the patent covers 12 printed pages, and attached to these are 11 pages of drawings, and the number of the claims is 62.

The Clark & Illy patent, being patent No. 1,098,314, is the patent of the defendant, and was issued May 26, 1914. The specification of that patent covers 19 printed pages, and attached to these are 11 pages of drawings, and the claims number 92. The specification states that the object of the invention is to produce a machine for making round pill boxes.

The machinery of the patents is not simple, and the language of the patents makes difficult reading. The boxes which are made by the machine of the patent in suit are known to the trade as French edge pill boxes. They are made up by joining together three essential parts. The body of the box is composed of a ring or cylinder, against one edge of which a disc is placed, and the disc and the ring are then united by a strip of pasted paper, which overlaps the projecting edge of the disc all around the box, being also pasted up against the sides of the ring. As the ring is of smaller diameter than the disc, the gummed paper uniting the strip has to be distorted to a considerable extent in order to be bent around the flange formed by the disc. We are told that in dealing with these small boxes and the delicate paper uniting strip it was found to be comparatively easy to handle them with the fingers of the human hand, but that it was for many years considered quite impossible to substitute any machinery which would bring about a union of ring, disc, and paper by any automatic machine with the perfection and rapidity that was essential to convert the box from a handmade to a machine-made product.

It appears that the top and bottom of the pill box are exactly alike, with the exception that the cap which is used to form the bottom of the box is provided with an additional internal pasteboard ring; and it is pointed out that, if the supplemental ring is driven into the cap, the cap becomes a bottom. If the supplemental ring is omitted, the cap remains a top. The tops and bottoms are identical in size, shape, and construction, and they do not become pill boxes until placed in proper juxtaposition. The parts are so small and delicate that they cannot be readily handled by ordinary machinery.

While the patents of both complainant and defendant are lengthy, and the machines of both are complicated, the real question at issue has to do with a small, though important, part of the two machines. The subject of this controversy relates to the act, which these machines perform, of fastening together by means of gummed paper a cylindrical ring of pasteboard or other material and a cylindrical disc, likewise of pasteboard, of a diameter somewhat greater than that of the ring. The result is the pill box which these machines are intended to produce. We thus have three essential things—the ring, the disc, and the paper—to be brought together and united.

The machine of the patent in suit brings these three things together by means of manually affixing the cylindrical pasteboard ring to a mandrel, letting the mandrel, in pursuance of the preordained functioning of the machine, assume a position in front of a disc holder, thereby bringing the disc and the ring in proper juxtaposition. While the mandrel has been assuming, by revolution of the wheel to which it is affixed, the position aforesaid, a flat piece of metal, called a table, has moved to one side of its appointed path and picked up or picked off a piece of gummed paper of a length sufficient to surround the circumference of disc and ring or either. The mandrel, with the ring upon it and in juxtaposition to the disc, being in position, the piece of metal called the table travels underneath these two pieces of pasteboard and in frictional contact therewith. There is a groove which fits the pro-

jecting disc, and as disc and ring revolve under the action of the moving table the gummed paper is wound upon the same, pressed against it, and ironed. The table having thus moved across and under the position of the mandrel and ring and disc, the machine moves again and by revolution of the wheel on which the mandrel is mounted removes mandrel and all from its position over the table path, and (in the absence of any mandrel) the table moves back and picks up or cuts off another piece of gummed paper. By the time it has done that another mandrel has gotten into position by the revolution of the wheel on which the two mandrels (180 degrees apart) are mounted, i. e., one-half a revolution; and so the operation goes on as long as there is an operator to feed the uppermost mandrel head, and there are any discs in the disc reservoir, and power is applied to the machine.

The specification of the patent in suit states that:

"This invention relates to a machine for making paper boxes, composed of a cylindrical body and a circular head, which are united by a band of gummed paper wound around the body and the head. One object of our invention is to produce a machine in which the feeding of the heads and the winding of the bands are effected automatically."

The claims involved are claims 1, 3, and 5. Claim 1 reads as follows:

"The combination, with the movable table or support, of a mandrel movable toward and from said table or support, substantially as set forth."

Claim 3 reads as follows:

"The combination, with the reciprocating table, of mandrels adapted to bear successively against said table, and a rotary frame provided with bearings supporting said mandrel, substantially as set forth."

Claim 5 reads as follows:

"The combination, with the movable table, of a rotary frame, shafts journaled in said frame and provided with mandrels adapted to bear against said table, substantially as set forth."

Claim 1 is general in its nature, and lays stress upon the use of a mandrel in combination with a movable table or support. Claim 3 emphasizes the use of a reciprocal table in combination with the mandrels, which are to bear successively against the table. Claim 5 differs from claim 3 in that it describes more specifically the method in or by which the mandrels are adapted to bear successively against the table. That is accomplished by means of shafts journaled in the rotary frame.

The complainant claims that the patent in suit is a pioneer patent, and represents the first known practical machine capable of turning out, as a regular machine product, with the regularity and speed essential to a machine product, of the paper caps from which pill boxes are made. It asserts that, prior to the advent of the machine shown in its patent, the art had been striving for 30 years at least, and with great industry and assiduity, to devise a machine for converting the hand-made pill boxes into a machine product. It insists that all prior machines disclosed in the record were merely mechanical aids to hand work, and that not one of them reached that phase which contemplated superseding the work of human hands by a machine product; and the claim is that, when complainant's machine was first made, no pill boxes in the

United States were being made by any known machinery, but that all were being made by hand labor in factories and by women and children at home.

The defenses are anticipation, limitation of the claims, and non-infringement. In addition, the attention of the court is called to the delay in putting the patent through the Patent Office, and we are asked to hold that this long delay is such unequitable conduct as to deprive the complainant of any right to equitable relief.

We come now to inquire as to the prior art. The complainant's expert testifies that prior to the application for the patent in suit such pill boxes as are made under the machine of the patent were produced by hand labor, a slow and relatively expensive process. He declares that the patent in suit discloses the first practical device by which such pill boxes were ever produced by machinery. His testimony is that:

"On the foregoing it is clear that an inventor in the art of making pill boxes by automatic machinery, devoting himself to that problem at a time when such pill boxes were made by hand only, confronted an extremely difficult and complicated problem, which, so far as I am aware, was not solved until the time the machine of the patent in suit was devised. The machine described in that patent was the first of its kind. No machine in the prior art, of which I have any knowledge or information, was capable of making or producing boxes like those in evidence in this suit as either complainant's boxes or defendant's boxes. After the invention of the Rowell & Little patent, in suit, the world had for the first time received information which enabled it to produce thereafter machine-made pill boxes like complainant's and defendant's boxes."

Again he testifies that the patent in suit is—

"the first machine of its kind so far as is known to me, which involved the use for the purpose of making paper boxes of the intermittently rotating mandrel frame carrying two or more intermittently and independently rotating mandrels thereon for the purpose of completing a box. This opinion is founded upon a study of a large number of patents, which have been referred to by the defendant in its answer, in none of which is there described or referred to a complete operative machine capable of producing round French edge pill boxes by automatically bringing the box ring toward the fixed wrapping position in which the disk head is automatically brought into proper relation thereto and these two elements then automatically wrapped with a strip of gummed paper, producing a coherent pill box of the character described. The best that can be said for these prior patents is that they show extremely crude machines generally adapted for other purposes than for making pill boxes. Such so-called machines—I should prefer to call them tools or implements, because they are not really machines, but only aids to manual labor —were mostly operated by treadles or manually operated levers, and were merely adapted to assist the operator in the manufacture of large boxes of the kind already referred to, when I spoke of hat boxes, shoe boxes, collar boxes, etc. In none of those patents are the three essential parts of the finished box brought together automatically, but in every instance these prior mechanical devices required the constant attention and assistance of one or more operators, the operators doing a large part of the work, and the machine in each case was incapable of producing a box without such assistance on the part of the operator. Certainly none of these machines was capable of automatically turning out a completed pill box. It was not until the machine of the Rowell patent came into the field that round pill boxes were entirely made by automatic machinery, capable of operating at a high rate of speed and of turning out completed pill boxes in enormous quantities. Such a patent, in my opinion, fulfills all the requirements of a pioneer patent. It was the first

machine actually to do a certain thing and to bring about a certain desired result."

We have examined the more important of the patents upon which the defendant relies, and particularly the machines of the Terry, Maxfield, Hatfield, and Johnston patents. This examination has led us to the conclusion that the complainant's expert is correct in the conclusions which he expressed.

A patent, No. 25,373, was issued on September 6, 1859, to Silas B. Terry, of Connecticut, as assignor of Silas B. Terry, Jr. He claimed to have invented a new and useful machine for manufacturing paper boxes. In his specification he says:

"This invention relates to a machine that is designed to facilitate the manufacture of circular paper boxes, and it consists in the employment or use of a rotating clamp, gage or socket, discharging ring, pressure roller, and guide; the above parts being arranged substantially as hereinafter described and used in connection with a folding device, whereby the manufacture of the above-named boxes is greatly expedited and the work done in a perfect manner."

The operation of the Terry patent involved considerable manual labor, the operator being required, among other things, to turn the mandrel by hand; and the roller, while performing its work, had to be pressed down by hand. The patentee, after describing the invention, states:

"It will be seen that the invention connects the circular parts $d^1$ with the strips $b^1$, said parts forming the tops and bottoms and sides of the boxes, the remaining work—such as the pasting of the strip $a^*$ in one part—being done by hand, as also the covering of the boxes, if desired, with colored paper. When the parts $a^1$ are connected with the parts $b^1$ of the box, the lever $H$ and mandrel $C$ are forced back by hand, the head $D$ passing within the socket $F$, and the band $E$, being arrested by the screws or stop $J$, serves to force the part of the box just formed off from the head $D$."

The Terry patent is not seriously relied on, and fails to disclose the mechanism of the patent in suit.

The Maxfield patent, No. 52,432, was issued February 6, 1866, for an improvement in machinery for making boxes. His specification describes his invention as follows:

"My invention relates to a mechanism for pressing a strip of glued paper upon the edge of the box at the junction of the bottom and sides or rim and lid, so as to form a union of the circular end with the cylindrical sides of the box; also in a means for pressing upon the cylindrical sides of the box a strip of glued or pasted paper to form a covering for the same, and turning the edges of said paper over, the one edge upon the circular end piece, and the other edge over and within the circular rim of the box or lid, thereby a strong box, smoothly covered, can be made with great rapidity."

This machine is manually operated throughout, even the rotation of the parts being controlled by a hand-operated crank shaft. It is incapable of continuous or automatic operation. The testimony shows that it was intended as an aid to enable an operator to make collar boxes or the like, and that it is not adapted to make French edge pill boxes. The testimony indicates that pill boxes can be made by hand more speedily than by the Maxfield device. We can quite believe the witness who testified that he had seen girls make pill boxes by hand,

and that from his observation he could say that they would finish a number of boxes long before the unfortunate operator of the Maxfield patent had gone through the numerous muscular exercises required of him.

The specification of the Maxfield patent describes a mechanism for securing a cylindrical body to a circular head by means of a strip of paper wound around the box body. The instrumentalities by which this was accomplished consisted of a rotary mandrel co-operating in its forward and backward movements with a rotary pressing wheel. It does not disclose the complainant's combination. It cannot be said that the mandrel of that patent rotated intermittently. A wheel which is rotated by hand until the hand stops rotating it certainly does not rotate intermittently.

Hatfield had two patents. Patent No. 67,050 was issued July 23, 1867. Patent No. 100,621 was issued March 8, 1870. Both patents were for improvements in paper box machines. In the specification of the first patent he states:

"It is well known to paper box manufacturers that boxes, the tops and bottoms of which project beyond the cylindrical body, have hitherto been so expensive and difficult to finish neatly that they have been imported from France, and have thus come to be designated as 'French edge boxes.'"

He goes on, then, to say that it is the object of his invention—

"to finish by machinery paper boxes called technically 'French edge boxes,' and therefore calls the machine of the patent the 'French edge machine.'"

In the specification of the second patent he says that his—

"invention consists in certain mechanism, fully described hereafter, for forming paper boxes and lids for the same, either with or without flanged ends."

The Hatfield patent was intended to manufacture, and was used to manufacture, large boxes, like collar boxes. The operation of the Hatfield mechanism, as described in the specification of patent No. 100,621, shows that two operators were needed to work the machine, and that they were also required to do a material part of the work by hand. In our opinion the Hatfield patent is not capable of use for successfully making pill boxes. We agree with the complainant's expert that, if the present day art had not been advanced beyond the Hatfield patent, it is certain that we should not to-day have the advantage of machine-made pill boxes. In our opinion, the Hatfield construction does not describe the mechanism of the patent in suit, and it should not be regarded as in any way anticipatory of the accomplishment of the inventors of this patent.

The Johnston patent, in the opinion of defendant's expert, is the closest reference to the patent in suit. In his opinion that patent discloses the entire subject-matter of each of the claims, 1, 3, and 5, of the patent in suit. The Johnston patent, No. 514,149, was issued February 6, 1894, to Edward A. Johnston and Arthur H. Marshall; the former having assigned one-half of his right in the invention to the latter. When the application for the patent in suit was before the Patent Office, the examiner five separate times in the course of three years rejected 20 claims on the ground that they were anticipated by the John-

ston patent, and each of these five constructions included claims 1, 3, and 5 of the patent, which are the claims here in suit. The attorneys for the complainant, we are told, "acquiesced" in the rejection of the claims on the Johnston patent and resorted to an interference proceeding to overcome the rejection; and it is urged upon us in argument that, in view of this "acquiescence" of complainant's attorneys, the complainant cannot now be heard to say that the Johnston patent does not anticipate these claims. The complainant, however, never amended its claims, but overcame the rejection by an interference. It is not estopped, therefore, by what occurred in the Patent Office, and is at liberty to prevail in this suit as against the Johnston patent, if upon the merits it is so entitled.

The defendant insists that claims 1, 3, and 5 of the patent in suit describe simply what is shown in the Johnston patent. The defendant's expert, however, was asked and answered as follows:

"Q. Do you find anywhere in the prior art, or in any patent that you have seen or discussed, and relating to paper boxes in any way, mechanism like that employed both in plaintiff's and defendant's machine, and which is embodied in the rotating frame that carries two rotating mandrels? I am referring to the parts which make up *G-H m*, this whole structure that is colored green here, *h-6*? A. Yes; such a structure is in the Johnston patent, unless you wish to restrict your question to the automatic machines for rotating the mandrel frame. Q. But it is not in any other patent, except the Johnston patent? A. No."

The defendant's expert, after discussing the Johnston patent and showing that a certain part was operated by hand, was asked by the court:

"Q. Why does he do that by hand, do you know? A. I presume because he hadn't invented a way of doing it automatically."

The machine of the Johnston patent is not an automatic machine. The machine of the complainant's patent is an automatic machine. The Johnston machine is incapable of performing the functions of complainant's machine; Johnston never having been able to adapt his patent to automatic machinery.

It is not important to determine whether Johnston was the real inventor of the machine of his patent, or whether the credit of the generic features of the invention belongs to Rowell and Little. Johnston worked at the complainant's factory in 1892, and while working there gained his knowledge from complainant's machine, and embodied it in his application for his patent, which was first filed in the Patent Office.

One of the patentees of the patent in suit, Mr. Rowell, testifies positively that, when Mr. Johnston began to work in his factory for him in 1892, they then had in the shop a machine which was like the one in the patent. His testimony was as follows:

"Q. Do you remember what type of machines for making these French edge pill boxes you had in your factory at that time? A. In the side room we had the machine with the round circular table for holding the papers. In the machine shop itself we had under construction the flat-tabled machine with movable mandrels. Q. What was the shape of that table, in comparison with the table shown in your patent in suit? A. The one in my side room? Q. No; the one in the shop. A. One in the shop is like the one that is in the patent. Q. How about the mandrel frame, in its construction and connections?

A. It is the same as in the patent. Q. And those features were in this machine that was in your shop before Johnston ever came to you? A. They were."

The fact is that Johnston, after taking out his patent and within a very short time thereafter, signed a written disclaimer, as well as a concession of priority, to the patentees of the patent in suit, and that subsequently, an interference having been declared in the Patent Office between him and these patentees, priority was awarded to the latter. The "Johnston's Disclaimer" is signed by both Johnston and Marshall. They disclaimed 28 of the claims made in their patent, stating that:

"They have reason to believe that through inadvertence, accident, or mistake the specification and claims of said letters patent are too broad, including that of which the said Edward A. Johnston was not the first inventor."

"Johnston's Concession of Priority" is also signed by both Johnston and Marshall. It "hereby concedes," to use its language—

"priority of invention to Edward N. Rowell and James Little, both of Batavia, in the state of New York of the subject-matter claimed in his said letters patent in the following claims, to wit."

Then follows an enumeration of 28 claims as to which they concede to the complainant priority of invention. Johnston was very young when he signed this disclaimer, and the defendants would have us believe that he was in some way coerced or deceived or fooled into signing it. We have not been able to take any such view of it. Johnston possessed unusual ability as a mechanician, and became a successful and frequent inventor. Although he was young when he signed the disclaimer he was not stupid; neither was he so young that he did not fully understand what he did when he put his signature to the paper. His conduct deprives his testimony of all probative effect. This court cannot attach importance to his statement of invention after his acknowledgment that priority is in the complainant.

In our view of this case, the Johnston patent being excluded, the prior art consists of nothing but the Hatfield and Maxfield "machines." In neither of these "machines" are the three essential parts of the finished box brought together automatically, but it is necessary to have the constant attention and assistance of one or more operators doing a large part of the work, and neither device is capable of producing a completed pill box without assistance on the part of the operator. They were properly designated by one of the witnesses, who referred to them as "so-called machines." He said he preferred "to call them tools or implements, because they are not really machines, but only aids to manual labor," being merely adapted to assist the operator in the manufacture of large boxes, like collar boxes, rather than small pill boxes.

It is the opinion of this court that the device of the patent in suit is the first really successful machine for the manufacture of small pill boxes, and we therefore hold that the patent in suit is a pioneer patent, and as such is entitled to the broad construction, and to the broad range of equivalents, which the law accords to such patents.

The patent in suit being valid, we come to the consideration of the stion of infringement. That the machine of defendant may be

superior to that of the complainant may be true. The question, however, is whether the machine infringes the patent in suit. We have said in an earlier part of this opinion that the specification of defendant's patent states that the object of the invention is to produce a machine for making round pill boxes. But the specification goes on to specify other objects of the invention. It says:

"Another object of this invention is to form a round pill box of a separate ring and a head, made preferably of cardboard.

"Another object of this invention is to construct a machine so as to automatically assemble the ring and head in proper position with relation to each other, and to fasten them together by wrapping around them one or more strips of paper which have been covered with paste, thus joining the two parts together.

"Another object of this invention is to provide a divided box form, on which the box is assembled, and which box form is capable of a variety of operations on said box form.

"Another object of this invention is to provide a forming wheel in the machine that will co-operate with the box forms to wrap the box and finish it.

"Another object of this invention is to provide an improved mechanism for pasting and feeding the wrapping paper for the box.

"Another object of this invention is to provide improved feeding mechanism for the box rings and head.

"Another object of this invention is to provide an improved ejector for casting the finished boxes from the machine.

"Another object of this invention is to provide an automatic tension device for taking up the slack in the wrapping paper for the box and keeping it under uniform tension."

The defendant's machine has a rotating mandrel frame which corresponds exactly with the rotating mandrel frame of the patent in suit. The mandrel frame is fixed to a shaft which corresponds to the shaft of the complainant's patent. The shaft is arranged to rotate intermittently, so as to make a one-half revolution, and then to remain stationary during the time that the main shaft completes its revolution, which corresponds precisely in this respect with the operation of the patent in suit. The mandrel frame has shafts journaled therein; the shafts being provided with mandrels, which correspond to the mandrels of the patent. There are two rotating mandrels, as there are in the patent in suit. Each mandrel has a gear, which is adapted to mesh with a gear segment when one mandrel is in the lower position, and in this respect defendant's machine corresponds in operation with that of the gear and the rack of complainant's machine. As soon as one of the mandrels of defendants' machine is in the lower position its gear meshes with the segment, and as the main shaft rotates the lower mandrel revolves as in the machine of complainant's patent; and as in that patent, so in defendant's, the main drive shaft is driven by a belt. The shaft carries a gear which meshes with a second gear and carries a pressure and ironing device. The arrangement is such that one gear remains idle one-half of the time, whereby during the time that the wrapping and ironing takes place on the revolving lower mandrel the mandrel frame will not revolve, but will remain stationary. When the wrapping and ironing is finished, and the work of the lower mandrel is completed, the clutches are thrown in, and cause the mandrel frame to revolve, thereby bringing the upper mandrel to the lower position.

In the meantime the wrapping and ironing roll or cylinder completes its movement, so that that part of it which first came into pressing contact with the box on the lower mandrel will again be in position to come into contact with the box parts that have been carried into the box-making position when the upper mandrel has come down to the position vacated by the lower mandrel.

The defendant's machine has a "forming wheel" having a diameter of about 18 inches and a pair of box forms that alternately co-operate with this forming wheel for the purpose of forming the boxes. The complainant's machine has no forming wheel, but has a reciprocating table. The table is flat, and has a reciprocating motion, and slides back and forth in guides that are provided in the support for it. Mounted above this table is a mandrel frame that carries two mandrels. This mandrel frame is rotated intermittently, so as to bring the mandrel alternately into engagement with the table when the table is moving to the right. Mandrel No. 1 makes contact with the table when the table is making its odd movement to the right, and mandrel No. 2 makes contact with the table when the table is making its even movement to the right. Neither mandrel makes contact with the table when the table is moving to the left.

As claim 1 of the patent in suit calls for "the movable table," and claim 3 for "the reciprocating table," and claim 5 for "the movable table," and defendant's machine has no such table, it is alleged that there is no infringement. This court, however, holds that the defendant's machine in its essential parts is a reproduction of the machine of the patent in suit. The two machines embody the same general mechanical principles. It is clear that the defendant's machine has the intermittently movable mandrel frame, carrying a set of journaled mandrels adapted to be alternately and successively brought into a fixed box-making position. The rotation of the box frame on one of the journaled mandrels causes the paper strip to be wound around the boxes, and a pressure device is used to bear against the ungummed side of the paper band at the place where the band covers the outer edge of the disc. In the complainant's machine the pressure device is a movable table. In the defendant's device it is in the shape of a forming or pressing wheel, which is merely a mechanical equivalent for the flat grooved table of the patent in suit. In function and mode of operation it is immaterial whether the pressure device is located on a horizontal plane or on a curved surface. The two devices perform practically the same operation, so far as concerns the application of direct pressure to the three box elements at the time they are being united.

The defendant's apparatus has the rotary wheel provided with two mandrels, 180 degrees apart, each mandrel being revolvable on its own shaft or journal, each one of defendant's mandrels being brought into operative position in exactly the same way as in the apparatus of the complainant. In the language of claim 3 of the patent, there are mandrels adapted to bear successively, and there is a rotary frame provided with bearings supporting said mandrels.

But if the "table" of the claims is to be confined to a flat surface, and reciprocating table can have no equivalent except a flat surface that

moves to and fro, as does the piston of a steam engine, then the defendant has not (in the language of the third claim) any "reciprocating table" against which the mandrels "bear successively." What defendant does have is another wheel with a considerable segment of the circumference shaved off, so that only a portion of the circumference touches the mandrel with the pasteboard ring upon it. When the cut-out segment of this so-called finishing wheel of defendant's is nearest the mandrel's working position, said cut-out portion does not touch; but it is observable that so much of defendant's finishing wheel as ever touches the pasteboard ring on the mandrel always approaches from the same side and by revolution always assumes the same position before beginning work, as does the complainant's reciprocating table. In other words, the defendant's circular motion produces the same result for the same purpose as does complainant's reciprocating motion, and we think it is very old in patent law and in mechanics that a circular movement may be the equivalent of a reciprocating movement.

But complainant's reciprocating table, owing to its flatness, does another thing—i. e., it carries the gummed paper, which is the forming agent of the box. The defendant's finishing wheel does not, and cannot, carry the paper. Defendant's machine feeds the paper to the pasteboard ring and disc at the point where the finishing wheel and the mandrel meet by means of a reciprocating feed directly actuated by a cam, and shown in detail in Figure 24 of defendant's patent.

It is clear to us that the object, the mechanical and commercial aim, of both these parties is this: They must procure the application of gummed paper to the revolving and juxtapositioned disc and ring at the tangential point where the ironing and pressing surface is applied to the disc and ring. Now it makes no difference whether the tangential point of application is the tangent of a plane surface with a cylindrical one, or of another cylindrical surface with the first cylindrical one—i. e., the disc and ring. A tangent is always the same thing, and the point of contact is just one point (theoretically), no matter whether the tangency is that of a straight line or a circle. Then, too, the segmentary cut-away revolving finishing wheel of the defendant's machine is, we think, the exact equivalent of the reciprocating table of the complainant.

An examination of the complainant's device and of defendant's device makes it obvious that what each strives to accomplish, and what each does accomplish, is to get tangential pressure upon the revolving pill box form; and tangential pressure can be gotten just as certainly with a wheel as with a table, with a curved line as with a straight line, because the essence of a tangent is that it shall touch the periphery of a circle at one point only. This is done in the patented device by sliding the table underneath the pill box form and making it revolve by tangential pressure. In the interval of idleness the table retires or reciprocates, and so is able to give the same impulse in the same manner ad infinitum. In defendant's machine the tangential impulse is given to the same pill box form on the same rotating mandrel by the pressure of a wheel, only a portion of the periphery of which is useful—say one-half. The rest of the wheel is recessed or cut away, so

that, while that portion of the wheel is passing the tangential point, the mandrel is being reloaded with another pill box form. Motions which are circular and reciprocating may be, and usually are, equivalents when used for the same purpose, and they are equivalents in this case. What the defendant is really doing is using a circular table, instead of a flat one, and getting the effect of reciprocation by revolving his wheel, instead of retracting his table.

We come, in conclusion, to the objection that, owing to the delay in putting the patent in suit through the Patent Office, the patentees have lost their right to equitable relief. The delay complained of was unusual, but we are not able to discover that the defendant has been prejudiced thereby, or that anything has been put into the patent that was not there from the beginning.

Claims 1, 3, and 5 of the patent in suit are valid and infringed. The decree is reversed, with directions to enter a decree as prayed for in the bill.

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## WEBER ELECTRIC CO. v. NATIONAL GAS & ELECTRIC FIXTURE CO.

(Circuit Court of Appeals, Second Circuit. February 6, 1917.)

No. 86.

PATENTS ⟸328—VALIDITY AND INFRINGEMENT—INCANDESCENT LAMP SOCKET.

The Weber patent, No. 743,207, for an incandescent electric lamp socket, claim 3, is not for a useful or patentable combination while claim 6 is void as too broad; claims 2, 7, and 9 *held* valid, but entitled only to a narrow construction, and, as so construed, not infringed.

Appeal from the District Court of the United States, for the Southern District of New York.

Suit in equity by the Weber Electric Company against the National Gas & Electric Fixture Company. Decree for defendant, and complainant appeals. Affirmed.

The Weber Electric Company is a corporation organized under the laws of the state of New York. It has its principal place of business in the city of Schenectady, in the said state. The National Gas & Electric Fixture Company is a corporation organized under the laws of the state of New York, and is established in business in the city of New York. The suit is brought for an infringement of patent No. 743,207, issued by the United States Patent Office on November 3, 1903, to August Weber, Sr.; August Weber, Jr., and John Weber, assignors to said August Weber, Sr.

Frank C. Curtis, of Troy, N. Y., for appellant.
Francis C. Lowthorp, of Trenton, N. J., for appellee.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The patent in suit was issued for improvements in incandescent electric lamp sockets. It relates more par-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ticularly to such sockets as are provided with circuit controlling devices. The patentees state:

"Among the objects of the invention are to reduce the number of parts, to render the device more efficient in operation, and to facilitate and reduce the cost of manufacture, particularly with reference to constructing the base portion of the socket of plastic insulating material, such as porcelain, molded to the desired form by means of dies."

The particular mechanical details of construction are the co-ordination and arrangement thereof to effect the desired objects as pointed out in the detailed description of the invention. The alleged novelty of the invention of the patented construction resides in the particular construction "of the insulating base," and the manner in which the switch mechanism is mounted upon or combined with the base. The insulating base comprises two disk-like members, one of which is called the inner base member and the other the outer base member. These disk members are superposed one on the other, and are adapted to be locked or secured together by means of screws or bolts passing through registering openings in the respective members. One of the base members is formed with a T-shaped recess in the face adjacent the base member, in which recess is mounted a bearing frame provided on its outer end with a lug containing a bearing for the end of the switch shaft adjacent the thumb piece of latter. Rigidly connected to the bearing frame by a rivet is a spring contact, generally T-shaped, and having a head lying in the head portion of the recess in one of the base members, which is cut away adjacent the lug to permit the hub of the finger piece or handle to pass. The lamp socket is such as is attached to an electric light fixture or electrolier to support a screw-threaded sleeve into which the base of an ordinary incandescent lamp is screwed, which socket contains switch mechanism for turning the light on or off by making or breaking the electric circuit. Such a lamp socket is adapted to receive, interchangeably with the lamp, a plug on the end of a flexible conductor connected with one of the numerous electrical household devices, such as an electric sad-iron, coffee percolator, toaster, and the like.

In the modern lamp socket the switch mechanism is mounted in one way or another within and upon a supporting insulating base of porcelain, to which is also fixed the screw-threaded brass sleeve to receive the lamp base; and the porcelain base, with said brass sleeve and the switch mechanism, are inclosed within a casing or shell which is usually made of brass. The invention of the patent in suit relates only to the inclosed parts of the socket, and not to the inclosing case.

The plaintiff does not claim that the invention of the patent is revolutionary, but insists that it has resulted in materially improving the socket. The defendant is charged with making, using, and selling incandescent electric lamp sockets made in accordance with the invention described and claimed in the patent in suit. But the action is in fact based upon the sale by the nominal defendant of incandescent electric lamp sockets manufactured by the Union Electric Company of Trenton, N. J. The court below without an opinion has dismissed the bill.

The defendant denied in its answer that the patentees were the original inventors of the improvement purported to be covered by the pat-

ent, and averred that all material or substantial parts of the patents had been described and illustrated in some 22 patents which it named. But upon the argument in this court the validity of the patent was not challenged. Counsel for defendant conceded in his brief that patentable invention is disclosed. The defendant's expert and the plaintiff's expert were not far apart in their views of the prior art. It is not necessary, therefore, to review the various patents of the prior art. It is clear that no prior patent appears in the record which discloses a switch mechanism comprising in part a contact spring adapted to be confined under compression between the base members and thereby to retain the switch mechanism in place by simple engagement therewith of the chamber walls of the base; and, as that is the invention of the patent in suit, the patent is valid.

The record contains a stipulation that the defendant, before the commencement of the suit and since the date of the patent in suit, sold incandescent electric lamp sockets, within the city of New York and in the Southern district of New York, substantially the same in all respects as defendant's socket No. 1, and that after the receipt from complainant of notice of infringement it continued to sell that socket, as well as socket No. 2, which are exhibits in the case. The two sockets embody a switch mechanism controlled by a switch handle. Socket No. 1 has binding screws on top of the socket, and socket No. 2 has binding screws on the sides of the socket. The inclosing case and the screw shell are identical in the two sockets, but the form of the insulating base and certain parts of the switch mechanism differ in some particulars in the two sockets. The complainant's expert thought that socket No. 1 embodies all of the elements of the claims now in suit, and that socket No. 2 embodies all of the elements of claims 2, 3, 6, and 10. In his opinion these elements have the characteristics and co-operate in the manner and produce the result of the patent in suit. The expert of the defendant, on the contrary, testified that neither of these sockets embodies the subject-matter in the relation expressed and for the specific objects set forth of any of the claims of the patent. As is usual in such cases as this, the court must, having found the patent valid, determine which of these experts is right in its opinion on the question of infringement. In deciding this question it is necessary to decide whether the patent is entitled to a broad or a narrow construction.

The patentee invented just one thing, namely, an arrangement of an old and entirely familiar part of an electric lamp socket by which the switch mechanism for connecting the incandescent electric lamp into or out of circuit was placed in the cavity of a properly made porcelain holder and then clamped down by a porcelain cover, so that there was nothing holding the operative parts in place but the tightness with which they were packed. The lamp socket of the patent, when gotten together, is like any other lamp socket, and functions in exactly the same way.

In construing the patent it is necessary to remember that we are dealing with an exceedingly crowded art and with minute details. If the device in question were one for turning on or off a supply of gas, water, or heat, it is hardly probable that a patent for such a device would be very seriously considered in a court of equity or by the Com-

missioners of Patents. The most liberal Commissioner would hardly think of issuing a patent therefor, unless convinced that a distinctly forward step had been taken. With the art progressed as far as this art was in 1903, when this patent was taken out, small improvements might be made in the apparatus used; but this could never be the subject of a patent, unless some result was accomplished which required the exercise of the inventive faculties, and not merely the work of a skilled electric worker. The patentee says:

"The important features of the present invention relate to the construction of the insulating base and the manner in which the switch mechanism is mounted upon or combined with the base."

Again he says that:

"The object of the invention is to reduce the number of parts, to render the device more simple in operation, and to reduce the cost of manufacture, particularly in the construction of the base or plastic insulating material, such as porcelain."

In other words the description and the claims are confined to details in construction which produce no new result. The claims, therefore, must be strictly confined to the improvements shown.

The claims in suit are claims 2, 3, 6, 7, and 9. Claim 2 reads as follows:

"In an incandescent electric lamp socket and in combination, a two-part insulating base chambered to receive switch mechanism, and switch mechanism mounted therein comprising in part a contact spring adapted to be confined under compression between the base members and thereby to retain said switch mechanism in place by simple engagement therewith of the chamber walls of the base, substantially as described."

Claim 3 reads as follows:

"In an incandescent electric lamp socket and in combination, a two-part insulating base, one part provided with an inwardly open shaft bearing and the other with a recess disposed opposite said bearing; switch mechanism comprising in part a switch shaft adapted to rotate in said bearing; a switch block, mounted upon said shaft to be rotated thereby, a spring contact mounted in said recess in the one base member and engageable under compression with said switch block and adapted to act there through to hold said shaft to its bearing in the other base member; and a contact disposed in opposition to said spring contact and adapted to be connected therewith by said block at certain times, substantially as described."

Claim 6 reads as follows:

"In an incandescent electric lamp socket and in combination, a switch shaft, a switch block loosely mounted upon said shaft to be rotated thereby and capable of self-adjustment thereupon, an insulating base provided with bearings for said shaft and with a chamber adapted to closely confine said switch block, having oppositely disposed walls adapted to engage and guide the self-adjustable block in its rotary movements, and oppositely-disposed contacts adapted to be connected at certain times by said switch block, substantially as described."

Claim 7 reads as follows:

"In an incandescent electric lamp socket and in combination a pair of die-formed insulating blocks, a pair of contact springs separately mounted upon the same die-formed face of one of said blocks whereby they are definitely spaced apart, one of said springs being extended outwardly from between

said blocks and offset around and overhanging a portion of the other of said blocks, contacts respectively in circuit with said springs and adapted to connect with the terminals of an incandescent electric lamp, an oblong switch block adapted to be operated between said springs to make and break said circuit, and means for operating the switch block, substantially as described."

Claim 9 reads as follows:

"In an incandescent electric lamp socket and in combination, a two-part insulating base, and a spring contact plate having at one end an offset shank clamped between the base members, and having its other end bifurcated and the members thereof projected one into the path of one of the terminals of an incandescent electric lamp mounted in the socket and the other into the path of a switch block mounted on said base, substantially as described."

Claim 12 was originally put in suit, but was abandoned on the argument in this court. Claim 2 well describes the real invention. It consists, as there described, in holding a contact spring under compression between the two insulating blocks of porcelain and utilizing the force so developed in said contact spring to hold essential parts of the switch mechanism in position by simple engagement with the chamber walls of the porcelain blocks. Neither of defendant's sockets, No. 1 nor No. 2, contains the sole novel element of this claim. In each of defendant's sockets the contact spring confined under compression between the base members is the spring which is permanently attached to the base member, in which it is mounted by the screw 7, and which, therefore, neither maintains itself nor any part of the switch mechanism in place by simple engagement therewith of the chamber walls or the base.

In the course of the argument in this court defendant's counsel admitted that its socket No. 1 came nearer infringing claim 7 than it did any of the other claims. If claim 7 is not infringed by that socket, it is our opinion that it does not infringe any of the claims. Claim 7 is analyzed in the following form:

| Elements. | Description. |
|---|---|
| 1. A pair of die-formed insulating base members | secured together. |
| 2. A lamp receiving socket sleeve | mounted upon the outer end of the outer base member and having adjacent thereto a cut-away portion. |
| 3. A switch block | |
| 4. Means | for operating said block. |
| 5. A spring contact | mounted upon the end of the inner base member adjacent to the outer base member and engageable with said block on one side thereof. |
| 6. A spring plate | mounted upon said inner end of the inner base member offset from between the base members around and overhanging the outer base member and having its outer end bifurcated, one arm thereof projecting through the cut-away portion of the socket sleeve into the path of one of the terminals of an inserted lamp, and the other arm into the path of said switch block on the other side thereof. |

The plaintiff's expert found that defendant's socket No. 1 comprised in combination—

1. A pair of die-formed insulating blocks.
2. A pair of contact springs.
3. Contacts respectively in circuit with said springs.
4. An oblong switch block.
5. Means for operating the switch block.

In other words he found all the elements of claim 7 in defendant's socket No. 1.

We do not however share in this view of the matter. The subject-matter of claim 7 is not present either in identity or mechanical equivalents in defendant's socket No. 1. In that socket one contact spring is permanently connected to the under surface or bottom of the recess in one of the base members, while the other contact spring is permanently connected to the other base member by means of a bent tongue-like portion thereof which passes through a hole in the latter base member and extends over the lower portion of the said base member. In claim 7 of the patent in suit the two springs are both separately mounted upon the lower of the blocks, one of the springs being extended outwardly from between the blocks and offset around and overhanging a portion of the other of the blocks. In defendant's socket the spring is permanently located, and cannot be separated from the base member on which it is mounted without deforming the spring, and the end of the spring does not extend outwardly from between the blocks or base members, and it is not offset around a portion of the block, but is permanently attached to and passes through the body of the block.

So far as claim 9 is concerned, it is quite clear to us that neither parity of construction, nor mode of application, nor operation is to be found between the specifically defined element of the claim and the contact plate of defendant's socket No. 1. In defendant's socket the spring has no off-set shank clamped between the base members, but the main body portion of the spring plate is held between the ends of the pillars on the base member and the bottom of the recess in the other base member, on which latter the spring is permanently mounted. And in defendant's socket the plate has no bifurcated end at all. On the contrary, it has one extreme end, constituting the T-head thereof, adapted to be engaged by the switch block, and the other extreme end, which is bent through an opening, to underlie the center. The defendant's spring plate does not serve the same purpose and function as the bifurcated end of the spring of the patent in suit.

As to claim 10, it is not infringed by either defendant's socket No. 1 or by socket No. 2. The construction and relative arrangement of the contact spring plate with its bifurcated end finds no concomitant, either structurally or operatively considered, in defendant's contact plate.

Claim 3 is for a combination of elements so incomplete as to be dangerous in use, and therefore not useful, and so not patentable.

Claim 6 is too broad, and covers by its terms the older constructions of Dixon and of Schutt. Every element of the claim is old, and used in many substantially similar combinations. The claim is void for lack of patentable subject-matter.

Decree affirmed.

## AMERICAN GRAPHOPHONE CO. v. GIMBEL BROS.

(Circuit Court of Appeals, Second Circuit. February 20, 1917.)

No. 156.

1 PATENTS ⟸328—INVENTION—TALKING MACHINE.

The Emerson patent, No. 777,615, for a convertible sound box, and the Kraemer patent, No. 899,874, for a talking machine, both relating to means for changing the position of the sound box of a talking machine, *held* void for lack of invention, in view of the prior art.

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—TALKING MACHINE.

The Macdonald patent, No. 957,694, for a disk sound-reproducing machine, if valid, must be narrowly construed, and, as so construed, *held* not infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the American Graphophone Company against Gimbel Bros. Decree for defendant (234 Fed. 361), and complainant appeals. Affirmed.

Appeal by plaintiff from decree in equity, entered in the District Court, dismissing bill on sundry patents below set forth:

(1) No. 777,615, dated December 13, 1904, to Victor H. Emerson, for a "convertible sound box." Claims relied on are as follows:

"3. The combination of a sound box and means for supporting it interchangeably with its diaphragm either parallel to or at right angles to the surface of the sound record."

"5. The combination with a sound box and its diaphragm of supporting means therefor that hold said diaphragm in operative position for a laterally vibrating stylus, said means being adjustable to present said diaphragm in another position operative for a vertically vibrating stylus."

(2) No. 899,874, dated September 29, 1908, to Thomas Kraemer, for a "talking machine." All the claims were relied on. Those numbered 1, 2, 3, and 6 describe the apparatus in one method, and 4, 5, and 7 in another. The two forms below given are sufficient for illustration:

"1. In a talking machine, a sound box having a diaphragm, and a tubular connection thereto for carrying sound, said connection having a joint therein permitting movement of the sound box to either of two operative positions; a single stylus being adapted to vibrate the diaphragm in either of said positions and said stylus projecting in substantially the same direction from the sound box in both of said positions, substantially as set forth."

"4. In a talking machine, a sound-conveying tube, a sound box having a single stylus, and two telescoping tubular pieces, one on said tube and the other on said box, permitting movement of the sound box relatively to the tube to either of two operative positions in both of which said stylus projects in substantially the same direction from the sound box, substantially as set forth."

(3) No. 957,694, dated May 10, 1910, to Thomas H. Macdonald for a "disk sound-reproducing machine"; claims relied on, 3, 9, and 12, of which the most general is:

"3. The combination of a swinging arm carrying the reproducer at one end, a stationary arm, a ring mounted on said stationary arm to turn in a horizontal

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

plane and trunnions connecting the ring to the swinging arm to permit said arm to turn in a vertical plane."

C. A. L. Massie, and Ralph L. Scott, both of New York City, for appellant.

Charles N. Butler, of Philadelphia, Pa., for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The claims in suit are very small efforts toward the furtherance of a business long since so crowded with minor patents that claims such as these before us are by common knowledge limited to a narrow construction. Emerson correctly named his device: It is a sound box, of the well-known kind, for which he claimed nothing, and which he made convertible, by mounting it on a shaft, revoluble in a sleeve, and fastened at any desired position in its revolution by a set screw. By this means he could (by a change of stylus) use the same sound box, in one position for a record with vertical, and in another position for a record with lateral, sound grooves or undulations.

Kraemer did not invent a "talking machine." His patent relates to nothing but means for effecting the same twist of the sound box that Emerson accomplished by shaft and sleeve. This patentee, however, had to deal with a box mounted on a tone arm, which is hollow; wherefore he separated the end of the tone arm nearest the disc into two pieces, put the sound box on the outer piece, and made it revoluble, by fitting one piece into the other after the manner of a stovepipe. This stovepipe movement is what he means by the word "telescoping" in claims 4, 5, and 7; but there is no such capacity for elongation as is ordinarily suggested by the word used.

[2] Macdonald's patent does not disclose a machine for reproducing sound, but only a method of arranging the tone arm, so that it may swing horizontally as the stylus transversely crosses the flat circular record in the manner long ago shown by Berliner, and at the same time have enough vertical play to avoid or minimize the effect on the diaphragm of unintended or intended irregularities of tablet surface. Further, he wished to do this with a good joint or meeting-place between the moving tone arm and the fixed amplifying horn.

Therefore he claims a swinging arm (tone arm), with the reproducer (sound box and stylus) at one end, a stationary arm (any rigid support affixed to the machine frame-work) and the tone arm fastened to a ring on the under side of the support, by "trunnions" (two screws not driven home), so that the arm and ring revolve together horizontally and the partially driven screws permit a slight vertical play. The amplifying horn is on top of the fixed support, and the looseness of the connection cured (so as to get a closed passage for the sound waves prior to their emergence from the horn) by a "nonfluid lubricant"; i. e., petroleum jelly.

Considering these patents as a group, it would not be easy to find better illustrations of that straining of the patent laws, condemned in Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438; and they invite to the conclusion that, even though no prior pat-

ent may constitute distinct anticipation, such attempted additions to the sum of human knowledge amount to no more than a mechanic's response to the demands of commercial business, and should not be dignified with the name of invention. Western Electric Co. v. Rochester Telephone Co., 145 Fed. 41, 75 C. C. A. 313.

Emerson's sleeved shaft and set screw is about as old a mechanical adjustment as can be found. Berliner (No. 564,586), used it to adjust a gramophone stylus, and while we doubt that this patent amounts to anticipation, we are fully convinced that after Berliner there was no patentable invention in what Emerson did, even assuming that, if no one had ever before adjusted any part of a talking machine by this means, it would amount to invention so to do.

Kraemer's patent is an interesting study in the art of making much out of little. Examination of the typical claims quoted shows that the only novelty in the first is "said connection having a joint," and in the fourth "two telescoping tubular pieces," which is but an inaccurate description of the stove-pipe joint.

The very best that can be urged for this patent is that to transfer to or use in the phonograph art the ancient revoluble fastening mentioned constituted invention. Oftentimes such transferred use or adaptation of the oldest devices is invention of a very high kind, if such new use is productive of a new result in a new field of human effort. But a mechanical detail such as the one under consideration had, and could have, no effect at all on sound reproduction. No matter which way the sound box is twisted, the art in question is unaffected; sound box, tone arm, stylus, etc., are operating as usual, and the adjustment of the patent is entitled to no higher favor than if applied to any other contrivance. The patent is void of invention.

Macdonald's claims are all for combinations, and that (if anything) which enables the combined parts to coact in production of a new and desirable result is the "trunnion" device, permitting vertical movement in the tone arm, without interfering with horizontal movement. The possibilities of invention in this narrow field were much circumscribed by Jetter (No. 750,977), who disclosed trunnions for Macdonald's purpose, and accomplished the horizontal swing by means different only in detail.

If the claims of this patent are taken literally and broadly, they are invalid, as disclosing no patentable invention over Jetter, and as covering aggregations of simple mechanical details not productive of a coordinated result. If narrowly confined to the device specified (and no claims ought to have been allowed for more), the defendant does not infringe. On this last question of fact we need not dwell. It concerns this particular defendant only, and was very amply treated in the lower court.

Decree affirmed, with costs.

## AMERICAN GRAPHOPHONE CO. v. GIMBEL BROS.

(Circuit Court of Appeals, Second Circuit. February 20, 1917.)

No. 157.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—SOUND RECORD.

The Macdonald patent, No. 714,651, claim 6, for a sound record for talking machines, construed, and *held* not infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the American Graphophone Company against Gimbel Bros. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 234 Fed. 361.

Appeal from so much of a decree in equity, entered in the District Court, as dismissed a bill for alleged infringement of claim 6 of Macdonald patent, No. 714,651. The patent in suit relates to "recording and reproducing sounds," and the sixth claim is as follows:

"A sound record consisting of a tablet having a sound groove with undulations of varying depths, said undulations being of such lengths that sounds occupying one minute in their production form a record approximately 44 meters in length."

S. T. Cameron, of Washington, D. C., for appellant.

Frederick P. Fish, of New York City, for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. The alleged infringement herein is a large disc record used in phonographs, victrolas, or other machines of that nature. Reading the claim upon such a record, each disc is a "tablet" bearing the familiar groove with "undulations of varying depth" (or amplitude). Since the discs are of considerable diameter, and propelled for reproductive purposes beneath the stylus at a uniform rate of revolution, the outer coils of the helical sound groove pass underneath the style at the rate of 44 meters a minute or more. Infringement is said to result because a part of the disc travels under the style at the rate per minute of "approximately 44 meters."

Macdonald's specification relates to a method of manufacturing sound records. His thought was that the recording stylus should be set at such an angle, and the material cut moved at such speed thereunder, as to minimize or prevent the contact of the heel of the style with the material in or on which sound recording undulations had just been engraved. He states his principle as follows:

"The speed imparted to the record tablet should be such that the crest of each undulation moves from under the recording-style so rapidly that the heel of the latter at no time makes contact with the recording material."

He concludes (as the result of experiment) that this principle was best embodied by "imparting to the tablet during the recording operation a surface speed" of "about 44 meters per minute"; the recording style

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

being set at the proper angle. That recording and reproducing should —indeed, must—be at the same rate of revolution was assumed. The claim in suit is for the product of the process above summarized.

It is urged that whether the alleged infringements are produced by or in accordance with all the details of the process or not is immaterial, because the product being per se patentable must be protected under the sixth claim, no matter whether a later manufacturer has or has not found another and better way to manufacture the product. It is not necessary to dwell on this point, for we shall inquire whether the claim in suit covers such discs as are here complained of, irrespective of the method or process of their production.

It is common knowledge that for many years sounds have been recorded on and reproduced from two forms of records, the cylindrical and circular, and also that a prime requisite for agreeable and successful sound reproduction is that the recording and reproducing rates of operation shall be as nearly alike as is commercially possible. It is clear that the revolution of a cylinder at a uniform rate of speed will pass its material (whether recording or reproductive) under the style at a uniform rate of travel, while the revolution of a circular disc at the same uniform speed will produce a rate of travel under the style varying with the distance of the style itself from the disc center. Long before Macdonald filed his application, means had been provided for so varying the revolution of the circular disc as to make the rate of travel under the style uniform. That method of operation never came into use, because it was not worth while to complicate phonographs therewith. Such was the state of the art when application filed.

In the specification the process is described only with reference to a cylindrical disc; the only product referred to is likewise cylindrical, but it is said that the invention "may be practiced with a flat or a cylindrical tablet." This is obviously true, if the circular record be propelled at a uniform rate of travel under the style; whether the patent has any relation to such records used with a uniform rate of revolution is the question in this case.

The object of the patentee was not merely to avoid contact between the heel of the style and undulations once made, but to obtain a clean and perfect series of undulations recording and reproducing sound, in a manner impossible if the crests of the undulations were blurred or disfigured by heel contact. Therefore mere reading of the specification teaches that 44 meters per minute is not a thing desirable in itself, but it is made the foundation of this claim because that approximate speed and none other produces the best record, and (what is more important for legal purposes) the record of the patent.

The discs complained of are designed for the commercial machine, whose table revolves at a uniform rate; therefore they were manufactured at substantially the same uniform rate of revolution. They become infringements only because they are large enough to cause their outer groove coils to pass under the style at 44 meters or more per minute; in other words, they become Macdonald's records for perhaps a few seconds of their expected and intended use. If such a disc infringes, it must be held that the patentee intended to claim and cover

a method and product, which violated the teaching of his disclosure. He said 44 meters was the speed discovered by him to be best; but this plaintiff says a speed varying, e. g., from 20 to 60, produces infringement, because it crosses 44.

This, to say the least, is not persuasive; but the argument further implies that what is claimed to infringe is exactly what the patentee sought to avoid—i. e., a record produced and reproducing at a rate of less than 44. That rate was and is the virtue in the patent; and nothing desirable, nothing that Macdonald wanted, can result from a momentary use of that critical speed. Uniformity in rate of travel under the style is the only possible method or manner of obtaining anything useful out of Macdonald's disclosure, and of course no patent should be so read as to render the thought revealed thereby useless.

If the application herein had said in so many words, I assign as the basis of my invention the process and result of so revolving a tablet under a style that all or any part of said tablet moves thereunder at the rate of 44 meters per minute, the applicant should and would have been told that he showed nothing useful and nothing new. We decline to construe the claim as applicable to a product not made and used at a uniform rate of revolution under the style. As so construed, there is no infringement; on the validity of the claim, properly construed, we make no finding.

Decree affirmed, with costs.

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## WATERLOO CEMENT MACHINERY CORP. v. ENGEL.

(Circuit Court of Appeals, Second Circuit. February 6, 1917.)

No. 158.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CONCRETE MIXER.
   The Snell patent, No. 842,262, for a concrete mixer, *held* not anticipated, valid and infringed.

2. PATENTS ⟸99—VALIDITY—SUFFICIENCY OF DESCRIPTION.
   It is not essential that a claim of a patent shall describe in detail each element of the combination but it is sufficient if these details are shown in the description and drawings.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 133–135, 137–139.]

Appeal from the District Court of the United States for the Western District of New York.

Suit in equity by the Waterloo Cement Machinery Corporation against George Engel. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 230 Fed. 169.

George C. Kennedy, of Waterloo, Iowa, for appellant.

George M. Finckel, of Columbus, Ohio, and Oscar W. Jeffery, of New York City, for appellee.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

COXE, Circuit Judge. [1] The complainant does not contend that the Snell patent, here in suit, is for a broad generic invention and entitled to a wide range of equivalents. It does, however, insist that the claims in question cover important improvements in the art of mixing concrete and similar substances. The object to be attained is to provide a mixing machine "in which the mixing tank is rotated on its vertical and horizontal axis simultaneously, to amalgamate the material and to dispense the contents." The description also states that "the invention consists in the construction, combination, and arrangement of parts, all as will be more fully described hereinafter." The claims are as follows:

"1. A concrete mixer embodying standards, a supporting cross-bar connected at each end with the top of the standards, a mixing-tank rotably mounted on the cross-bar and having a rack therearound, a shaft journaled in the upper end of one standard, consisting a trunnion for one end of the supporting cross-bar, and having a gear thereon adapted to engage with the rack on the tank, means for rotating said shaft, a spindle journaled in the upper end of the other standard and having one end secured to the other end of the cross-bar to constitute the other trunnion for the latter, and means connected with said spindle for rotating the latter to tilt in the tank, whereby the tank may be rotated on both its vertical and horizontal axis.

"2. The combination with a pair of standards, of a cross-bar pivotally supported by the standards, a mixing-tank rotably mounted on the cross-bar and having a projecting marginal flange provided with a rack upon its upper face, a shaft journaled in one of the standards, and pivotally supporting one side of the cross-bar, and a gear-wheel on the shaft, meshing with the rack on the mixing-tank."

It will be observed that one element of claim 1 is "a supporting cross-bar connected at each end with the top of the standards," and in claim 2, one of the elements is "a cross-bar pivotally supported by the standards." This cross-bar is shown in Figures 2 and 3 and is referred to in the description as follows:

"The mixing-tank *5* is supported upon a cross-bar *6* which is pivoted at each end to the standards *1*. At its center this cross-bar is formed with a depending socket *8* and a raised face *9*, with which a central downwardly-projecting plate *10* on the bottom of the mixing-tank co-operates to form a bearing for the mixing-tank, there being suitable balls *11* mounted in aligning ball-races in the contiguous faces, as shown in Fig. 3."

The cross-bar is further described as follows:

"One end of the supporting cross-bar *6* is hung upon the shaft *18* of the tank-rotating means and the other end of said cross-bar is rigidly secured to the inner end of a spindle *20*, which is journaled in the upper end of the standards *1* at the opposite side of the machine, and thus the supporting cross-bar *6* is suspended at one end by a loose connection with the shaft *18* and at its other end by a rigid connection with the spindle *20*, as at *21* in Fig. 2."

The description also refers to a pair of rollers mounted on suitable spindles fixed in the upright ends of the supporting cross-bar *6*. There can be little doubt as to the function of the cross-bar and of the upwardly projecting spindle attached thereto and a part thereof. In the claims the spindle is not specifically mentioned, but it is described and shown in the specification and drawings and without it the apparatus

could not be operated. The District Judge found that the spindle was so affixed as necessarily to become a part of the cross-bar.

[2] The construction placed upon the claims does not violate any rule of interpretation but simply gives the patentee the benefit of what he has actually invented. When the claim refers to "a supporting cross-bar connected at each end with the top of the standards," it means the cross-bar described and shown. It was not necessary to go into minute details in the claims themselves as to each of their separate elements. When the claims refer to a cross-bar they mean a workable cross-bar, the cross-bar of the patent—the cross-bar described and shown. Such a construction gives the complainant the advantages to which it is fairly entitled as the owner of the Snell patent. It is not essential that the claim shall describe in detail each element of the combination; it is enough if these details are shown in the description and drawings.

Both of the claims in issue have as an element of the new combination described and shown "a mixing-tank rotably mounted on the cross-bar." These claims do not specify the precise means adopted to accomplish this result but the description and drawings plainly show the method used by the patentee which is novel and efficient. We see no reason why the patentee should not have the benefit of his new and valuable mixer even if its construction be not set out in detail in the claims themselves. Very properly the description may be referred to when considering the scope and meaning of the claims which were clearly intended to cover a rotable mounting. Claim 3, not in controversy here, states that the mixing tank is "provided with a sleeve which has a bearing on said axle-shaft." We are of the opinion that being a member of the combination stated in claim 3 does not preclude it from being a member of the combination of claims 1 and 2. Claim 3 is a narrow claim, much more restricted in its scope than are the preceding claims.

The patent in suit, being for a meritorious improvement, should not be defeated by a narrow and technical interpretation of its provisions. We have examined the patents relied on to prove anticipation and lack of invention and agree with Judge Hazel that none of them discloses the combination of the Snell patent.

The decree is affirmed with costs.

ASHLEY et al. v. SAMUEL C. TATUM CO.

(District Court, S. D. New York. March 8, 1917.)

No. 250.

1. PATENTS ⟸136—REISSUE—MISTAKE—RULES OF PATENT OFFICE.
Where the rules of the Patent Office at the time the original patent for design was applied for limited the patentee to a diagrammatic drawing, and so prevented him from broadly describing his invention, it cannot be said that the patent was not issued under a mistaken belief that such a drawing gave him all the broad rights of his invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 198½.]

2. PATENTS ⟸144—REISSUE—MISTAKE—DECISIONS OF COMMISSIONER.
The question of inadvertence, accident, or mistake in the application for the original patent should be left to the decision of the Commissioner of Patents, unless manifest from the record.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 215–217.]

3. PATENTS ⟸138(1)—REISSUE—LACHES—COURT PROCEEDINGS.
A design patent contained no description of the design, but merely a diagrammatic representation thereof, as was then required by the Patent Office rules. The Circuit Court of Appeals held that such a patent covered only the design as shown, without ornamentation, and was not infringed by a design of similar shape having ornamentation thereon. Within a month after the decision, the patentee presented the matter to the Patent Office, and on the advice of that office filed in the court a petition for rehearing, and later a petition for writ of certiorari, which latter was denied 14 months after the original decision. Seven months thereafter, the patentee applied for a reissue of his patent with a written description. *Held*, that he was not guilty of such laches, under the unusual circumstances, as would invalidate his reissue patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 201, 201½, 203.]

4. PATENTS ⟸138(2)—REISSUE—INTERVENING RIGHTS.
Where defendant had, before a design patent was reissued, manufactured and sold a substantial number of articles which did not infringe complainant's original design patent, but did infringe the reissue patent, it has acquired intervening rights which prevent complainant from claiming infringement by defendant.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 202.]

5. PATENTS ⟸147—REISSUE—DESIGN PATENT—CHANGE IN PATENT OFFICE RULES.
A reissue of a design patent, the original of which was taken out when the Patent Office rules limited the applicant to a diagrammatic description, is not open to suspicion because the claims have been broadened, as permitted by the change of rules allowing verbal description.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 220.]

6. PATENTS ⟸328—INFRINGEMENT—DESIGN PATENT—ORNAMENTATION.
Reissue of the Ashley patent, No. 37,504, for a design for an inkstand, in which the claim covered a design consisting of a low, broad, flat base surmounted by a low dome is infringed by an inkstand having those features, though they are so ornamented as to enable a casual observer to distinguish between the two inkstands.

In Equity. Suit by Frank M. Ashley and another against the Samuel C. Tatum Company for infringement of a patent for design. Bill dismissed.

George B. Holbert, of New York City (Nathan Cohen, of New York City, of counsel), for complainants.

Wood & Wood, of New York City (William H. Wood, of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. This suit is for infringement of a reissue of a design patent for a glass inkstand. The original patent, No. 37,504, was granted to the complainant, Frank M. Ashley, August 8, 1905, and the patent was reissued December 23, 1913. Judge Learned Hand held the original patent valid and infringed by this defendant in the case of Ashley v. Tatum (C. C.) 181 Fed. 840. That decree was reversed by the Circuit Court of Appeals (186 Fed. 339, 108 C. C. A. 539), and the patent was held valid, but not infringed. The complainants' inkstand and the alleged infringing inkstand before the court in this suit are the same, or substantially the same, as those involved in the former suit. After the decision of the Circuit Court of Appeals, the complainant sought for a review by writ of certiorari, but the writ was refused, and thereafter a reissue was granted which is believed to have been the first reissue ever granted in the case of a design patent. The original patent was granted when the rules of the Patent Office did not permit a written description of a design patent, but only a diagram of the design. The original patent stated that the complainant, Frank M. Ashley had—

"invented a new, original, and ornamental design for an inkstand, of which the following is a specification, reference being had to accompanying drawing, forming part thereof. The following is a plan view of an inkstand, showing my new design. I claim the ornamental design for an inkstand as shown."

In the reissue patent, the specification sets forth that:

"The essential feature of my design consists in the general outline of the stand, which comprises a low, broad, flat base surmounted by a low dome in which a funnel shape dip cup is located. Having thus described my invention, I claim an ornamental design for an inkstand, consisting of a low, broad, flat base surmounted by a low dome and a funnel shape dip cup located within the dome, substantially as shown and described."

Judge Lacombe, writing for the Circuit Court of Appeals, in the former case of Ashley v. Tatum, supra, said:

"It may be that upon the state of the art at the date of his application complainant would have been entitled to a claim calculated to secure to him the dominant feature of his device, with or without ornamentation, unless, indeed, the ornamentation was carried to such an extent as substantially to modify the effect produced by the contour and proportions. But there is no such claim, and no written description upon which it could be based. The circumstance that both are absent, possibly solely because the Patent Office refused to allow any written description to be filed, does not give this court the power to write such a description and claim into the patent. We must construe the claim according to the rule laid down in the Dobson Case as 'covering the design as a whole, and not any part of it as a part; [testing it] as a whole—as to infringement.'

"We cannot, therefore, eliminate the element shown in the drawing, viz., the absence of any applied ornamentation. That element must be held to be as essential as any other element. In defendant's inkstand, the general contour of base and dome in the same relative proportions is found; but around the lower half of the dome there is a series of circumferentially displayed facets which effect a substantial modification of appearance of the inkstand

by suggesting the idea that it is made out of cut glass, instead of pressed glass. The difference between the two is readily apparent to any one—expert or nonexpert—and there seems no likelihood that, whether looked at together or apart, the one could be mistaken for the other. In our opinion infringement of the claim has not been made out."

It seems clear from Judge Lacombe's opinion that the Circuit Court of Appeals has held that the defendant's design was such a departure from the diagrammatic description of the complainant's design contained in the original patent that it did not infringe. Both Judge Lacombe and Judge Learned Hand held that the particular feature of complainant's invention, which was new and meritorious, was the flat, broad base of the inkstand, surmounted by a low dome, and the pleasing effect based on the simple and useful combinations. Judge Lacombe spoke of these characteristics as the "dominant" features of the design.

[1, 2] It was with a view to obtaining protection for the design of any inkstand having these dominant features, and not being limited simply to the particular inkstand in use, that the complainant sought and obtained a reissue patent. In view of the rules of the Patent Office at the time the original patent was applied for, which seem to have prevented the complainant from broadly describing his invention by means of a written description, and limited him to a diagrammatic drawing, I cannot say that the original patent was not issued under a mistake, due to the belief on the part of the patentee that a diagrammatic drawing gave him all the broad rights of his invention. The question of inadvertence, accident, or mistake, unless manifest from the record, should be left to the decision of the Commissioner of Patents. Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658.

[3] I think it clear that the defendant's inkstand has the dominant features described in complainant's claim in the reissue patent, and that it infringes complainant's reissue patent, and the complainants should succeed in this suit unless they are barred by laches, or by intervening rights. Defendant's intervening rights arose out of a design patent for a so-called diamond inkstand No. 40,125, granted to S. E. Hilles, July 6, 1909—four years prior to the date of the granting of the reissue patent in suit.

Reissue patents were discussed in the case of Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783, Mr. Justice Bradley there said:

"But in reference to reissues made for the purpose of enlarging the scope of the patent, the rule of laches should be strictly applied; and no one should be relieved who has slept upon his rights, and has thus led the public to rely on the implied disclaimer involved in the terms of the original patent."

The dates which are important for consideration are the following: The Circuit Court of Appeals directed the dismissal of the bill by opinion dated March 13, 1911. Thereafter, and in the same month, the complainant communicated with his counsel and sent the latter to Washington to see what could be done in regard to the matter of a reissue. Upon the advice of the Patent Office, a petition for a rehearing was thereafter filed, which was denied in October, 1911. Work was then commenced on a petition for a writ of certiorari, which was presented in March, 1912, and denied in May, 1912. The application for a reissue was not filed until January, 1913.

The prosecution by the complainant, Ashley, of his applications for a rehearing, a writ of certiorari, and a reissue patent was not very expeditious, but the situation was difficult and unprecedented. The practice of the Patent Office not to allow written descriptions in the case of design patents was apparently disapproved of by the Circuit Court of Appeals, and the customs and legal theories of many of the patent profession were disturbed. Under these circumstances, the trial of every expedient, and a protracted consideration, were unusually justified. The reissue patent should not, under such circumstances, be held invalid for laches.

[4] Ever since the issue of its patent for the diamond inkstand granted July 6, 1909, the defendant has done a business in the manufacture and sale of these inkstands which I have held infringed complainant's reissue patent. This business appears to have been larger in the first two or three years after the issue of the Hilles patent than it has been since. While, therefore, the defendant may not have manufactured or sold large quantities of its inkstands, it is nevertheless an incontrovertible fact that it has manufactured and sold under the Hilles patent a substantial number of inkstands, and that neither the patent nor the inkstand infringed Ashley's original patent according to the construction placed thereon by the Circuit Court of Appeals. I can feel no doubt that a business of some importance has been built up by the defendant between the dates of the granting of the original patent and of the reissue, and that consequently intervening rights have arisen within the legal acceptation of the term. Under these circumstances, complainants cannot be allowed to claim "infringement by this particular defendant in continuing the manufacture and sale which it entered upon while the * * * [original patent] was the only public announcement of complainant's alleged monopoly." See Autopiano Co. v. American Player Action Co., 222 Fed. 282, 138 C. C. A. 38.

[5, 6] A reissue of a design patent, the original of which was taken out at a time when the rules of the Patent Office limited the applicant to a diagrammatic description, is not open to suspicion because the claims cover the dominant features and are not limited to a verbal description of nothing more than the exact diagrammatic drawing shown in the specification of the original patent—in other words, because the claims have been broadened. The defendant's inkstand is undoubtedly within the claims of the reissue patent and contains all the dominant features of the Ashley design. It is not enough for defendant, while using this design as a basis, to superimpose ornamentation thereon, even though the ornamentation is sufficient to make defendant's inkstand readily distinguishable by the casual observer from complainants. The changes made by the defendant must have proceeded so far that it cannot fairly be said that Ashley's design is a substantial and easily discernible feature of the completed structure. Such is not, I think, the case here.

While, therefore, the reissue patent is valid and infringed, this suit cannot be maintained against this particular defendant, because of its intervening rights, and the bill must be dismissed, with costs.

## ASSOCIATED PRESS v. INTERNATIONAL NEWS SERVICE.

(District Court, S. D. New York. March 29, 1917.)

No. 263.

1. LITERARY PROPERTY ⊜9—PIRACY—EVIDENCE.
In a suit between rival news agencies, where complainant moved for a preliminary injunction to restrain defendant from appropriating news gathered by it, affidavits and moving papers *held* to warrant finding that defendant arranged with employés of newspapers served by complainant to deliver such news to defendant for a consideration before publication.
[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 8.]

2. LITERARY PROPERTY ⊜9—PIRACY—EVIDENCE.
In a suit between rival news agencies, where complainant sought a preliminary injunction to restrain defendant from appropriating news gathered by it, evidence *held* to warrant a finding that defendant induced a newspaper served by complainant to permit defendant to obtain news furnished by complainant before publication, by allowing defendant's employés to read such news sheets in the editorial room of a newspaper.
[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 8.]

3. LITERARY PROPERTY ⊜8—PIRACY—WHAT CONSTITUTES.
Where complainant newsgathering agency furnished news to so-called members, who were under an obligation to use it only for their own publi cations, complainant is entitled to be protected against defendant's method of procuring such news before publication by hiring employés of the members to give information as to news, or securing information directly from news sheets furnished members; such acts constituting a tortious invasion of complainant's rights.
[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 7.]

4. PRINCIPAL AND AGENT ⊜116(1)—LIABILITY OF PRINCIPAL FOR ACTS OF AGENT.
A principal is liable for the acts of agents within the general scope of their employment, even though contrary to its directions.
[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 377.]

5. EQUITY ⊜65(2)—INJUNCTION—CLEAN HANDS.
Complainant conducted a news service agency, serving members who were under obligation to use such news only in their own publications. Defendant, a rival newsgathering agency, hired employés of members to inform it of news gathered by complainant before publication, and in some cases secured news direct from members. Occasionally complainant received tips as to stories from an employé of a member, who was in the pay of the defendant. *Held* that, though complainant sporadically obtained news from defendant contrary to the directions of its officers and managers, complainant cannot be denied relief, on the ground that he who comes into equity must do so with clean hands, for such doctrine cannot be based on technical theories of agency.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 186.]

6. LITERARY PROPERTY ⊜9—PROTECTION—PIRACY.
Complainant news service company served various newspapers, which were its members. Defendant took news published in early editions by members and disseminated it to its own customers, although in some instances verifying the stories. *Held* that, in view of the analogy of common-law copyrights and stock and grain quotations, complainant was for a reasonable time entitled to protection from the piracy of its news, and defendant could not take news from such early editions.
[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 8.]

7. LITERARY PROPERTY ⟸5—NEWS—PUBLIC POLICY.
In such case, as complainant might withhold news gathered, defendant cannot justify its piracy on the ground that public policy required the dissemination of news.
[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 4.]

8. LITERARY PROPERTY ⟸9—RIGHT TO PROTECTION—INJUNCTION.
Where complainant gathered news, which was disseminated to members, who were entitled to use it only in their own publications, a preliminary injunction will be issued to prevent defendant from obtaining such news by hiring employés of members to furnish it with such news before publication, where such piracy was systematic, and defendant claimed to be entitled to continue, though it also claimed that its managing officers did not know of the practice.
[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 8.]

9. LITERARY PROPERTY ⟸9—PRELIMINARY INJUNCTION—RIGHT TO.
Complainant news service company gathered news, which was disseminated to newspapers that were members of complainant. Defendant pirated such news, by taking it from early editions issued by complainant's members, and then disposing of it to others. *Held* that, while complainant was entitled to protection, nevertheless, as the matter was one of first impression, and not free from doubt, a preliminary injunction will not be granted.
[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 8.]

In Equity. Bill by the Associated Press against the International News Service. Decree for complainant.

Stetson, Jennings & Russell, of New York City (Frederic B. Jennings and Winfred T. Denison, both of New York City, of counsel), for complainant.

William A. De Ford, of New York City (Samuel Untermyer, Henry A. Wise, Irwin Untermyer, William A. De Ford, Claude A. Thompson, and John T. Sturdevant, all of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. This is a motion for an injunction pendente lite to restrain the defendant from appropriating the news gathered by the complainant. Each party to the suit is engaged in the business of procuring news and supplying it to newspapers. The complainant is a membership corporation, and the defendant a stock corporation. The complainant during the year 1915 expended about $3,500,000 in gathering news from all parts of the world for its members, which was assessed among them under the provisions of its by-laws, and the defendant expended more than $2,000,000 during the same year in supplying news to its customers. It thus appears that the gathering and distributing of news requires a very large expenditure of labor and capital, and it is hardly necessary to say that no modern daily newspaper can afford to be without the facilities offered by a well-equipped news agency.

The by-laws of the Associated Press provide that each member shall be entitled to receive a service of news for the purpose of publication in the newspaper specified in his certificate of membership, and for that purpose only, and that a member shall publish the news of the Associated Press only in the newspaper, language, and place speci-

fied in his certificate of membership, and shall not permit any other use to be made of the news furnished by the corporation to him or to the newspaper which he represents, and that no member shall furnish, or permit any one in his employ or connected with the newspaper specified in his certificate of membership to furnish, to any person who is not a member, news of the Associated Press in advance of publication. Each of the members is likewise required by the by-laws to gather and supply the local news of his district to the Associated Press, and to no one else (affidavit of W. P. Leech, verified January 19th, filed on behalf of complainant).

Much the same arrangement as above outlined exists between the International News Service and the newspapers receiving its service. A considerable number of newspapers make use of the news furnished by both of these agencies. The value of the news accumulated by each of the parties to this suit depends upon its accuracy and upon its reaching the newspapers served before the news of any other competing news agency can be furnished. The bill of complaint states that:

"An essential part of the plan of operation of the complainant accordingly is that news collected by it shall remain confidential and secret until its publication has been fully accomplished by all of complainant's members, because otherwise competing newspapers, which bear no part of the cost, would unfairly and inequitably receive the benefit of the service, and such a result would ultimately greatly impair the usefulness of the Association to its members and imperil its very existence."

There is, to be sure, no requirement of the by-laws of the Associated Press that its members must publish news furnished by it at the same hour, and they necessarily do issue their publications at various times. Western papers, owing to the difference in time, can be furnished by a competing news agency with the news of the Associated Press published in the newspapers of its Eastern members, and gathered by it at great cost, with no expense of collection to the rival agency, unless the *sale* of the news can be withheld for a sufficient time to prevent this. It is therefore undoubtedly a part of the successful operation of a country-wide news agency that rivals shall not be able to sell the news which its customers have published in the East to newspapers published several hours later in the West. In no other way can the results of its labor and enterprise receive any real protection within much of the territory it undertakes to serve. I comment upon this noticeable fact in passing, without at this time discussing the legal features.

The complainant alleges that the defendant has wronged it, and should be enjoined as to three matters: (1) Arranging with employés of members of the Associated Press to furnish its news to the defendant for a consideration before publication; (2) inducing members to violate complainant's by-laws and permit defendant to obtain news of the Associated Press before publication ; (3) copying news on bulletin boards and in early editions of complainant's members and selling this news to defendant's customers.

[1] I will take up the foregoing charges seriatim. The moving papers establish beyond a peradventure that the defendant employed

at $5 per week a B. E. Cushing, the telegraph editor of the Cleveland News, a paper holding a certificate of membership from the Associated Press, to furnish the defendant with local news gathered by the Cleveland paper. Indeed, the defendant not only admits that such is the fact, but insists that such was the nature of the employment of Cushing and his only authorized service for defendant. Cushing not only furnished the defendant with local news of the Cleveland district, but also a substantial amount of other and particularly of foreign news, which had come to the Cleveland paper over the wires of the Associated Press. The sinking of the hospital ship Britannic in the Ægean Sea, the decision by the United States District Court in Kansas that the Adamson law was unconstitutional, the fire on the steamer Powhatan off Block Island, the German raid on the east coast of England on November 28, 1916, the sinking of the steamer Chemung in the Mediterranean, the declination of A. Bonar Law of the premiership and preliminaries to the appointment of Lloyd George, the explosion in the Quaker Oats plant in Canada, the fire in Toledo, Ohio, the illness of Lloyd George, the statements of Premier Briand as to the attitude of the Allies regarding German peace proposals, and the explosion and loss of life in mines of the Tennessee Coal & Iron Company were all matters in respect to which some communications were made to the defendant by Cushing of news received from the Associated Press.

Barry Faris, the day manager of the defendant, on November 21, 1916, wrote F. H. Ward, the manager of the Cleveland office of the defendant, a letter of which the material portion is the following:

"Dear Mr. Ward: Agnew had an arrangement somewhere in the Cleveland office whereby he could tip us off on big news stories that the A. P. was carrying. I wish you would find out from him just what this connection was, and if you cannot make use of it. It proves very valuable to receive a tip what the A. P. is carrying as soon as it puts it out on the wire. Don't mention the A. P. in any messages of that kind, but simply say, 'Ansonia carrying fifty dead Pennsylvania wreck Pittsburg,' or whatever it may be. * * *

"Barry Faris."

The foregoing letter from a responsible man in the employ of the defendant indicates a systematic attempt to secure news of the complainant and is the strongest corroboration of the latter's charges. It is not necessary to suppose that such a system was known to the officers of the defendant, or the proprietor of the Cleveland News, who deny that knowledge; but it is sufficient that the system existed and the acts were frequent and continuous. The only qualification of the facts I have recited, which the defendant makes, is the statement of Cushing, in his affidavit submitted by defendant, that he seldom volunteered tips of the Associated Press to the defendant, and that there were only two cases that he can definitely remember where such information originated with him. It can hardly be thought that Faris, in his letter to Ward, referred to local Cleveland news when he spoke of "big stories that the A. P. was carrying." The only difference between local and foreign news is that the latter was more valuable to the defendant, and the divulging of it more serious to the complainant, especially since the Allies have deprived the defendant of the right

to use their cables, and thus get news readily in the countries of Europe. It was equally illegal for the defendant to secure local news from the Cleveland newspaper, since that involved a violation by the latter of its express contract with the complainant not to divulge this news to any one but the Associated Press, except so far as it published it in its own papers.

Agnew was the manager of the defendant in Cleveland, and makes oath to certain communications to the defendant in reference to the foregoing news of the Associated Press. Cushing himself deposes to his employment by the defendant, without the knowledge of either the Cleveland News or the Associated Press of his relationship with the defendant. He also swears that he communicated to the defendant both foreign and domestic news belonging to the Associated Press. There cannot be the slightest doubt that complainant's news was pirated at Cleveland, and it is not really questioned. Cushing says, in his affidavit read on behalf of the defendant, that "he seldom volunteered tips to the manager of the Cleveland office of the International News"; but this is a weak qualification of the opposing affidavits, two of which he makes himself. He admits he was approached by the manager of the defendant's Chicago office and was employed to give it news. The intimate relation of the New York office of the defendant to this abstraction of complainant's news is evident from the following dispatches to the International News at Cleveland from Barry Faris:

"D. R. Anything on Chemung sunk? B. F. 2:45 p. m."
"D. R. Has Lloyd George resigned war secretaryship? B. F. N. Y. December 5, 12:27 p. m."
"D. R. What Ansonia now say Lloyd George? B. F. 1:10 p. m. Dec. 5."

More than that, Ward, the Cleveland manager of the office of the International News, says in his affidavit (folios 140, 141):

"The first time that I learned that B. E. Cushing was an employé of the International News Service was when I substituted for Agnew during Agnew's vacation in the summer of 1916. I then learned for the first time that Cushing was employed to notify the Cleveland bureau of the International News Service of any local news, promptly, which originated in Cleveland or vicinity, and which came to him or to the Cleveland News, and which the Cleveland News would naturally carry. I also learned at this time from Agnew that Mr. Cushing occasionally called him on the telephone and told him that the Associated Press was carrying such and such a story. While I was so substituting for Agnew, during the summer, the said Cushing called me on the telephone several times and tipped me off to certain stories which had come into the offices of the Cleveland News, through the Associated Press. He also, of course, gave me a number of items of news originating in Cleveland and vicinity. At that time, so far as I can remember, I did not send over the wire to the International News Service any information given me by Cushing relative to Associated Press stories. After I became manager of the Cleveland bureau of the International News Service, when I was tipped off that the A. P. was carrying a certain story, I would at once message New York, with the idea of getting an International News Service story for the Cleveland News, and for my Ohio state wire, so that I could legitimately serve our own subscribers with the same story that the A. P. had. Cushing never read me the A. P. story or bulletin, so far as I know; all he ever gave me was a tip as to the nature, character, and source of the story. It was up to us to get our information, then, as best we could."

This is certainly not a convincing defense by the Cleveland manager of a corporation charged with securing news improperly, and the foregoing affidavit of Ward, when taken with the letter and telegrams of Faris I have mentioned, establishes that the first charge of the complaint is sustained by the moving papers.

[2] The second charge against the defendant is the claim that defendant's employés read the news sheets of the Associated Press in the editorial room of the New York American. The New York American was and is a member of the Associated Press, and had a Morkrum receiving machine in its editorial room on which the news appeared. James Finnerty, who attended to the Morkrum machine, has made an affidavit, verified January 3, 1917, in which he states that Coates, an employé of the International News Service, the office of which was in the same building as that of the New York American, nightly examined the sheets containing the news received from the Associated Press and made copies or extracts. E. P. Koukol, who attended to the Morkrum machine one night a week, and Ronald S. Wishart, a Morkrum inspector, made a similar affidavit as to Frank B. Atwood, one of the editors of the International News Service, and deposed that he constantly came to the office of the New York American and examined Associated Press news sheets, and at times took notes from them. That such was the practice of defendant's employés is further corroborated by the affidavit of George H. Eke, who was accustomed to go to the office of the New York American to inspect the Morkrum machine.

These charges are strenuously controverted in the affidavits filed by the defendant. It is to be noticed, however, that no affidavit appears either from Coates or Atwood, who are the persons said to have secured the complainant's news. This is very significant, and in view of such an omission the positive affidavits that such things occurred should prevail over defendant's affidavits from persons who simply swear, however positively, or even truthfully, that they never witnessed such practices.

[3] It is well settled that the defendant had no right to obtain news from the members of the Associated Press, who were under an obligation only to use it for their own publications, by employing their clerks to give the information, as was done in the case of Cushing of the Cleveland News, or by securing the information directly, as was done through looking over the news sheets of the complainant in the office of the New York American. The news was gathered by the Associated Press at great cost, and was entitled to be protected from abstraction in any such ways. Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031; Exchange Telegraph Co. v. Gregory, [1896] 1 Q. B. D. 147; Exchange Telegraph Co. v. Central News, Ltd., [1897] 2 Ch. Div. 48; Dodge v. Construction Information Co., 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412.

[4] The foregoing acts, whether or not done contrary to the directions of defendant's officers, were done by persons acting for it within the general scope of their employment, and the liability must rest upon the principal.

[5] The strongest objection urged by the defendant to the granting of any injunction is based upon the charge that complainant has been guilty of continuous abstraction of defendant's news, and therefore should be debarred from seeking the aid of a court of equity. I think the complainant has established that such practices, if they have existed, were contrary to the rules of the Associated Press and the careful direction of its officers and manager, and were limited to but a few sporadic instances at most. Now the doctrine that he who comes into equity must come in with clean hands does not recognize mere imputations of guilt based upon technical theories of agency. To invoke it a knowledge must exist on the part of the principal of the facts upon which the charge of unconscionable conduct is based, and in the case of a corporation those facts must be brought home to the persons exercising general control over its affairs.

No such knowledge has been shown on the part of the officers or manager of the Associated Press, and the complainant consequently is not barred from seeking relief against the matters referred to in (1) and (2) supra, by reason of anything complainant itself has done. On the other hand, complainant's counsel are entirely right in their contention that the liability of the defendant for the acts of its agents exists entirely irrespective of knowledge of its officers, and an injunction may issue to prevent the continuance. The legal questions involved in this conclusion are discussed by the New Jersey Court of Errors and Appeals in a clear and convincing opinion in the case of Vulcan Detinning Company v. American Can Co., 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. (N. S.) 102, and I fully concur in the reasoning of that court.

The briefs contain so much discussion as to the practices of the complainant in obtaining news that I should perhaps refer briefly to the evidence on this point. Various employés of the Cleveland News have furnished affidavits to defendant that Cushing gave tips to the Associated Press of news he had received from defendant before it had ever been published. The subject-matter of such tips, with two exceptions, which I shall mention, is not related, and the text of the affidavits seems to indicate that Cushing was seeking information for the Cleveland News, rather than imparting to the Associated Press any information he had received from the defendant. Smiley, in his affidavit, says, for example, that Cushing, "when some story of great importance was carried on the wires of the International News Service, and which had not yet appeared in the copy sent to the telegraph desk of the Associated Press, and in a way which might be construed as a tip, inquired if they knew anything about said story." Field, in his affidavit, says Cushing would call up the Associated Press and "say, for example: 'Hearst has a bulletin on a wreck down state. Can you find anything about it for me?' " Anson makes affidavit that Cushing would say, "for example: 'Hearst is carrying such and such a story out of such and such a place. What have you got on it?' " Shimansky likewise deposes that Cushing would say, "for example: 'Hearst says hundred drowned on steamer Eastland, turned over in Chicago river. What have you?' "

It is manifest that these affidavits are intended to illustrate Cushing's

practice, rather than to relate any particular incident. Indeed, it is not clear that the news Cushing was telephoning about was not Cleveland local news. Moreover, McGuire, who was correspondent of the Associated Press in Cleveland, deposes that all the news supplied by Cushing came to him; that the latter only gave him Cleveland local news, and never any items which to his knowledge originated in the dispatches of the International News Service. The only item of news specifically referred to in defendant's affidavits as having been furnished by Cushing to the Associated Press is that Pope Pius was still alive, when the Cleveland News, on information derived from the Associated Press, had published an extra that he was dead. In answer to this charge is the positive affidavit of Frederick Roy Martin, the assistant general manager of the Associated Press, that the latter never reported that the Pope was dead on the occasion in question, and that it reported him dead the following night, and only after his death occurred.

Cushing admits that he notified both complainant and defendant of the conflict in their stories as to the decision of the Adamson case, which resulted in the defendant's securing the correct news (which it did not theretofore have) that the District Court had held the act unconstitutional. It is clear that Cushing was secretly employed by defendant to furnish at least local news to it, though such news belonged to complainant, while his employment by the complainant to furnish local news was on the recommendation of the Cleveland News, and was known to every one in that office. Even if the officers of the defendant were innocent, it is also clear that Faris and Agnew sought and obtained from Cushing news that was other than local.

The cases where Cushing gave any news of the defendant to the Associated Press were, I think, so sporadic and occasional as to be almost inevitable in a person in his position. He swears that he never made a practice of giving such information to the Associated Press, and I believe he gave it, if at all, when he was endeavoring to verify items of news he had received as between the two agencies. An occasional lapse of this kind, if it occurred, is very different from the systematic disclosure by Cushing to the defendant of the news that the Associated Press carried. The secrecy of his employment by the defendant, I think, indicates the purpose of Agnew, who was defendant's representative at Cleveland at the time.

The defendant further charges the complainant with getting tips of the Lusitania disaster and the Solvay explosion that came over the wires of the International News Service at Syracuse during the Barnes-Roosevelt trial. Complainant's affiant, Kloeber, swears that their news about the Lusitania came from the service of the Dow-Jones Company, and in regard to the Solvay explosion that their representative at Syracuse telegraphed, "Can I do anything on explosion?" and complainant answered, "No, thanks; regular man should get the night story."

[6] The complainant, last of all, charges the defendant with taking news from early editions of newspapers which are members of the Associated Press and selling it to defendant's customers in the same text or in a paraphrase of its own. In reply to this charge the defendant has submitted affidavits that in Washington, Chicago, Atlanta, and else-

where the representatives of the Associated Press have taken news from early editions of defendant's subscribers and thereafter sold this news which defendant had secured. These affidavits contain general allegations rather than specific instances, and the allegations are denied by the complainant. In any event, this practice of obtaining news originally derived from a competing news agency, but after publication, is quite different from that of securing the news of a rival agency surreptitiously before publication. Both defendant and complainant confessedly secure news or "tips," so called, from first editions of newspapers supplied by their competitors, and both insist that they do not transmit any such news until an independent investigation is made and the news is verified. The methods employed by the Associated Press are set forth in its brief as follows:

"At this point there should be noted a clear and vital distinction between two kinds of use to which news taken from newspapers is put. The one use is for the purpose of obtaining the mere information or rumor that such and such an event has happened. Upon receipt of this information or rumor, the news distributing service then proceeds to obtain the news by its own independent investigation from the original sources at its own expense, and the only story sent out is based solely upon the strength of such investigation. This has been a recognized practice among all news agencies and has existed by common consent. The other use is to send out a story based in whole or in part upon the news obtained from the newspaper without independent investigation. This use may include the sending of the bare statement of the fact of the event, or a more extended copy of the details of the story of the rival news agency. This practice has never been recognized as fair or proper, and has never been adopted or allowed by the complainant. * * * This 'tip,' when received by The Associated Press, is used, not textually, nor in any modified form as a dispatch to the papers within its fold, for publication by them, but as a suggestion for investigation. An inquiry is set on foot, and an independent news report may be developed and used."

It is evident from the foregoing statement, as well as from the proofs as a whole, that both sides think news, *when published* by any subscribers to a competing news agency, may properly be investigated, and, if verified, the result of the verification may be sold. It is to be noted, however, that the original news is ex hypothesi the product of the labor and capital of him who gathers it, and whether it be treated as a mere "tip" for further investigation, or as an authentic and final report, it cannot be used by a rival news agency without depriving the gatherer of the very thing which is of value to him, namely, the power to control the sale of the news he has gathered until sufficient time has elapsed to enable it to be published by all the newspapers he supplies. Moreover, there is something rather grotesque in going through the form of verifying a tip, no matter how authentic it may be. In many cases the verification with modern telephonic communication would be so rapid that the time required for it would in no sense protect the original gatherer of the news. I cannot but feel that this matter of independent investigation is rather a question of business policy, for the news service that receives the tip, than of substantive law or fair dealing. In other words, the real matter for consideration is whether news gathered and sold to a newspaper, which publishes it, can be used after publication by a competing news agency, either as a tip for further investigation or as authentic news for immediate dis-

tribution before sufficient time has elapsed for the news to be published within the territory in which the gatherer is engaged in the general dissemination of news.

This question is most novel and important. I have said in the earlier part of this opinion that a news service is subjected to serious loss if its news is not protected from sale by a competing service until sufficient time has elapsed for publication by substantially all of its customers. This result might be secured if the news gatherer provided in its contracts that no publication of its news should be made by any of its subscribers until a given number of hours after receipt of the news. Such a plan would obviously be wholly impracticable, and, while giving theoretical protection, would result in holding back the publication of the news sold for many hours. I think, therefore, that the only way to afford full protection to the newsgatherer is to prevent the use of news by a rival, either in the form of tips or otherwise, for a sufficient time to enable the daily newspapers throughout the country to receive and publish the news. There is no real publication, or purpose to abandon to the public, until that time. There have been various cases where the courts have protected those who have produced scenarios, plays, lectures, and pictures after publication; and at common law the right remained after publication, unless a purpose to dedicate to the public was plain. Ferris v. Frohman, 223 U. S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492; Universal Film v. Copperman, 218 Fed. 577, 134 C. C. A. 305; Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480; Caird v. Sime, L. R. 12 App. Cas. 326; Werckmeister v. American Lithographic Co., 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591.

Perhaps the closest analogy to the present situation is to be found in the stock and grain quotation cases, where it has been uniformly held that a rival quotation agency cannot secure the news in a broker's office, or upon an exchange, and sell it, even though these places may be open to all who desire to come in, and the news, except for this limitation, has become public property. Board of Trade v. Christie Grain & Stock Co., 198 U. S. 250, 25 Sup. Ct. 637, 49 L. Ed. 1031; National Telegraph News Co. v. Western Union, 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; Board of Trade v. Tucker, 221 Fed. 305, 137 C. C. A. 255; Board of Trade v. Kinsey Co., 130 Fed. 507, 64 C. C. A. 669, 69 L. R. A. 59; Board of Trade v. Cella Commission Co., 145 Fed. 28, 76 C. C. A. 28. See, also, Kiernan v. Manhattan Quotation Telegraph Co., 50 How. Prac. (N. Y.) 194.

The protection of lectures, plays, and paintings from piracy, even after wide publicity, is sometimes placed by the courts upon rights of authors to literary or artistic property, and sometimes upon the theory of an implied contract arising from the relations of the parties. In the stock and grain quotation decisions the right has been likened to a trade secret. Board of Trade v. Christie, supra. But in all these cases there is little basis for anything like secrecy, and there is often no real contract not to disclose what is published. Indeed, the person who hears or sees whatever may be the product of another's labor is entitled to the fullest use and enjoyment short of competitive commercial employment, just as the public is entitled to all the news that

appears in a newspaper, whatever may be its origin. The question in any given case is whether abandonment to the public has been so complete that no further justifiable cause remains for protecting these business interests from competitive interference. They do stand like trade secrets, in that they are entitled to protection until surrendered to the public; but the real basis for invoking equitable aid either in the case of a lecture, a play, or a trade secret is that one who has, with labor and expense, created something which, while intangible, is yet of value, is entifled to such protection against damage as is not inconsistent with public policy.

The case of Tribune Co. of Chicago v. Associated Press (C. C.) 116 Fed. 126, is confidently relied upon by the defendant. That was a decision by Judge Seaman to the effect that news of the South African War, published in the London Times and sent by cable to the Chicago Tribune, could not be copyrighted, and that a suit by the Tribune against the Associated Press to restrain infringement of copyright would not lie. The case was based solely upon doctrines of copyright law, the matter now under discussion was not referred to, and the decision was rendered by a single judge prior to that of the Circuit Court of Appeals of the Seventh Circuit, in the case of National Telegraph News Co. v. Western Union, 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805.

A most useful discussion of the legal questions here involved is found in the opinion of Judge Grosscup, writing for the Court of Appeals of the Seventh Circuit, in the case of National Telegraph News Co. v. Western Union, supra. That court held that stock quotations received on a ticker in a broker's office, while not subject to copyright and in general available to any one who cared to examine them, would be protected from sale for one hour after receipt. Judge Grosscup said:

"* * * The business is, as an entirety, a lawful one. It meets a distinctive commercial want, and in some of its branches, at least, adds to the facilities of the business world. * * * The business involves, also, the use of property. This consideration brings it at once, in a general way, within the protecting care of courts of equity. At first glance the immediate act restrained in the order below—the use of the information by a rival enterprise until after 60 minutes—may not appear as a trespass upon, or injury to, property, other than to the extent that there may be property in the printed matter. But such a view falls short of looking far enough. Property, even as distinguished from property in intellectual production, is not, in its modern sense, confined to that which may be touched by the hand, or seen by the eye. What is called tangible property has come to be, in most great enterprises, but the embodiment, physically, of an underlying life—a life that, in its contribution to success, is immeasurably more effective than the mere physical embodiment. Such for example, are properties built upon franchises, on grants of government, on good will or on trade-names, and the like. It is needless to say that to every ingredient of property thus made up—the intangible as well as the tangible, that which is discernible to mind only as well as that susceptible to physical touch—equity extends appropriate protection. Otherwise courts of equity would be unequal to their supposed great purposes; and every day, as business life grows more complicated, such inadequacy would be increasingly felt.

"Nowhere is this recognition by courts of equity of the intangible side of property better exemplified than in the remedies recently developed against unfair competition in trade. An unregistered trade name or mark

essence, nothing more than a symbol, conveying to eye and ear information respecting origin and identity, as if the manufacturer, present in person, and pointing to the article were to say, 'These are mine;' and the injunctive remedy applied is simply a command that this form of speech—this method of saying, 'These are mine'—shall not be intruded upon unfairly by a like speech of another. Standing apart, the symbol or speech is not property. Disconnected from the business in which it is utilized, it cannot be monopolized. But used as a method of making an enterprise succeed, so that its appropriation by another would be a distinctive injury to the enterprise to which it is attached, the name, or mark, becomes at once the subject-matter of equitable protection. Here, as elsewhere, the eye of equity jurisdiction seeks out results, and though the immediate thing to be acted upon by the injunction is not itself, alone considered, property, it is enough that the act complained of will result, even though somewhat remotely, in injury to property.

"Considering that in such case equity without question, lays its restraining hands upon the injurious appropriation of words that belong to the common language of mankind—than which nothing could be freer to the uses of men—there ought, it would seem, to be no difficulty, in the case under consideration, to find the power so manifestly needful. The case under consideration may be summed up as follows: The business of appellee is that of a carrier of information. The gist of its service to the patron is that, by such carriage, the patron acquires knowledge of the matter communicated earlier than those not thus served. The ticker, with its printed tape, is an implement or means only to this commercial end, which the patron, or the patron's patron, may utilize to the end intended but may not appropriate to some end not intended, especially if such appropriation result in injury to, or total destruction of, the service. In short, the law being clearly inadequate to that purpose, equity should see to it that the one who is served and the one who serves each gets what the engagement between them calls for, and that neither, to the injury of the other, shall appropriate more."

Professor Langdell, in discussing trade-marks and good will in his book entitled "A Brief Survey of Equity Jurisdiction," has expressed much the same theory that Judge Grosscup elaborated in the opinion above quoted, and has pointed out that the wrong in such a case is not a tort to any particular thing, but—

"to the estate of the person injured in the aggregate, to the universitas of his estate (as the Romans call it), consisting, as it does, in making him so much poorer. Of this description are many species of fraud, for example, the so-called infringement of a trade-mark or of good will, which consists in wrongfully and fraudulently depriving another person of customers whose patronage he would otherwise have received."

I think sufficient analogies exist, particularly in the stock and grain quotation cases which I have cited, for holding that the damage to the complainant, which arises by taking from early editions of newspapers published by its members information which it has gathered at great cost, constitutes a tortious invasion of its rights unless, as a matter of public policy, adequate cause can be shown for holding that the partial disclosure to the public arising from the publication in some of the newspapers that are members of the Associated Press should deprive it of further right to restrict the use of its news.

[7] The question remains whether there is any sufficient ground in public policy for depriving a news service of the fruits of its labors merely because a limited number of its customers have already been allowed to publish the news. Undoubtedly the public is legitimately interested in and benefited by the dissemination of news, and the dissemi-

nation, when once begun, should not be too long delayed; but no adequate reason occurs to me for allowing a competitor to sell and disseminate the news obtained through the efforts of the gatherer until the ordinary customers of the gatherer, within the field in which it operates, have had sufficient time to receive and publish the news. The newspapers which have a contract with the news service which acquired the information will secure it at once, and the papers that have not such a contract can receive it from the rival agency within three or four hours, which ought to be sufficient time to protect the business interests of the news service that first acquired it. I can see no harm to the public in such an adjustment of the correlative rights of the parties; and this conclusion is most reasonable. Concededly the complainant can withhold news from the public, and no one is entitled to it prior to publication. The object of its business, however, is to disseminate information. To serve its customers efficiently, it must communicate the news at the earliest possible time. Its effort is to give out its news at once for immediate publication. The publication intended, and generally effected, is one substantially simultaneous throughout the country; that is, so far simultaneous as geographical differences in time may permit. It cannot, therefore, be said that the complainant has in any fair sense caused its news to be published, and thus abandoned it to the public, until all the members whom it serves have been put in a position where publication of the news has been possible.

Viewed in this reasonable light, the argument that the complainant has no further right to protection after the first publication of its news loses much of its force. The news is in effect unpublished and unavailable for use by competing news agencies until the time for general publication has elapsed, since only then can the complainant be truly said to have abandoned its news to the public by an unrestricted publication. Nor can it in my opinion be said that the complainant is barred from asserting its rights in this case after publication, because it has acted inequitably in making use of "tips" received from the defendant. Both parties have in this respect acted in substantial accordance with common business practice, and under the belief that their conduct was technically lawful. Under such circumstances neither should be debarred from asserting its legal right and obtaining the protection of a court of equity, but a court of equity should only enforce this right if the other party to the suit is awarded similar protection.

[8] The defendant urges that it should not be subjected to an injunction restraining it from abstracting complainant's news, because any acts of this nature which have been done were contrary to defendant's rules and the directions of its officers. I should be inclined to take this view, were it not for the fact that the conduct of the representatives of defendant in responsible positions has shown such a serious and systematic infraction of complainant's rights, in numerous cases specified in careful detail, that I cannot think anything less than an injunction sufficient to meet the situation. Furthermore, defendant, if I understand its argument, still insists upon its right to obtain the Cleveland local news in the manner heretofore practiced, although this is clearly in violation of complainant's rights. Upon the proofs offered, a

preliminary injunction should be granted to the complainant, restraining the defendant from abstracting its news before publication.

[9] While I am personally satisfied, after giving the matter most deliberate and careful consideration, that the right exists to prevent the sale by a competing news agency of news which is taken from early publications of complainant's members before sufficient time has elapsed to afford opportunity for general publication, and that the existing practice amounts to unfair trade, yet the matter is one of first impression, and my decision cannot be regarded as sufficiently free from doubt to justify the granting of a preliminary injunction upon this branch of the case.

Settle order on notice.

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## UNITED STATES v. OHIO OIL CO. et al.

(District Court, D. Wyoming. January 31, 1916.)

No. 852.

1. MINES AND MINERALS ⟸17(1)—LOCATION—VALIDITY.
A location of a mining claim is not valid until there is a discovery, in case of a lode claim, of a vein or lode containing mineral, or, in case of a placer claim, a discovery of petroleum or other mineral within its limits.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24, 27, 28.]

2. MINES AND MINERALS ⟸17(1)—LOCATION—VALIDITY.
Upon discovery of minerals within the claim, the location becomes valid, although in case of a lode claim the finding of float rock, or in case of a placer claim the mere indications of mineral or oil, is insufficient.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24, 27, 28.]

3. MINES AND MINERALS ⟸38(22)—LOCATION—DISCOVERY.
Whether there has been a discovery of minerals within a claim, so as to perfect the location, is a question of fact, depending on the circumstances of the particular case.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 108.]

4. MINES AND MINERALS ⟸17(1)—LOCATION—VALIDITY.
A discovery of minerals sufficient to perfect location of a claim must be such a discovery that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success, either in developing a valuable mine, or, in case of an oil claim, of securing oil in paying quantities, and the question cannot be left to the mere arbitrary will of the locator.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24, 27, 28.]

5. MINES AND MINERALS ⟸16—"PLACER CLAIM"—"LODE CLAIM."
The term "placer claim" means ground within definite boundaries which contains mineral or valuable mineral deposits not in place, while the term "lode" or "vein," used in the statute relating to lode claims, means lines or aggregations of mineral imbedded in quartz or other rock in place.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 21–23.
For other definitions, see Words and Phrases, First and Second Series, Placer Location; Second Series, Lode Location.]

6. MINES AND MINERALS ⊜38(17)—LOCATION—DISCOVERY—EVIDENCE—SUFFICIENCY.

In a suit to withdraw mineral lands from appropriation, evidence *held* to warrant a finding that the locator of claims on such land had made a discovery of oil previous to the withdrawal order sufficient to validate the claim, because justifying a person of ordinary prudence in further expenditure of labor with prospects of success in securing oil in commercial quantities.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 103.]

7. MINES AND MINERALS ⊜36—LOCATION—WITHDRAWAL.

Under Act June 25, 1910, c. 421, § 2, 36 Stat. 847, as amended by Act Aug. 24, 1912, c. 369, 37 Stat. 497 (Comp. St. 1913, § 4524), declaring that all lands withdrawn from appropriation shall be open to exploration, discovery, and occupation under the mining laws, so far as the same apply to metalliferous minerals, but that the rights of any person who at the date of any order of withdrawal is a bona fide occupant or claimant of oil or gas bearing lands, and who at such date is in the diligent prosecution of work leading to the discovery of oil and gas, shall not be affected or impaired, so long as such occupant shall continue in such diligent prosecution, labor performed or improvements made at a distance from a claim on oil-bearing lands, intended to facilitate work on the claim, such as the construction of a camp or the building of roads, falls within the statute.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87.]

8. MINES AND MINERALS ⊜38(20)—LOCATION—LABOR—PERFORMANCE.

In a proceeding to forfeit locations on mineral land withdrawn from appropriation, evidence *held* to show the performance of labor and the making of improvements sufficient, within Act June 25, 1910, c. 421, § 2, as amended by Act Aug. 24, 1912, c. 369, to hold the claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 106.]

In Equity. Suit by the United States against the Ohio Oil Company and others. Decree for defendants.

T. W. Gregory, Atty. Gen., of Washington, D. C., C. L. Rigdon, U. S. Dist. Atty., of Cheyenne, Wyo., and E. J. Justice and F. P. Hobgood, Jr., Sp. Asst. Attys. Gen., both of Greensboro, N. C., for the United States.

Eugene J. Sullivan, of Basin, Wyo., and Burke & Riner, of Cheyenne, Wyo., for defendants Ohio Oil Co. and Grass Creek Oil & Gas Co.

C. A. Zaring, of Basin, Wyo., for defendants Kent and others.

RINER, District Judge. This is a suit in equity, brought by the United States against the defendants named in the bill, principally the Ohio Oil Company, to have the lands in controversy, viz., the N. W. ¼ of section 18, township 46 north, of range 98 west of the sixth principal meridian, and the E. ½ of the S. W. ¼ of said section, now in the possession of the defendant the Ohio Oil Company, declared by decree of the court to have been at all times from and after the 6th day of May, 1914 (the date of the withdrawal order issued by the President), lawfully withdrawn from mineral exploration and all forms of location, settlement, selection, filing, entry, or disposal under the mineral and nonmineral public land laws of the United States.

The bill further prays that the defendants and each of them be adjudged and decreed to have no estate, right, title, interest, or claim in or to said lands, or any part thereof, or in or to any mineral or minerals or mineral deposits contained therein, or any part thereof, and that all and singular said lands, together with all the minerals and mineral deposits, including petroleum or mineral oil and gas therein contained, be adjudged and decreed to be the perfect property of the plaintiff, free and clear of the claims of said defendants, and each and every of them. There is also a prayer for an injunction and accounting.

To this bill the defendants answered, asserting their right to the land in controversy by reason of certain mineral locations which they claim were made pursuant to the requirements of the public land laws of the United States relating to mineral entries.

Under the issues made by the pleadings, two questions are presented for determination by the court: First. Was there a discovery of mineral upon the lands in controversy prior to the date of the withdrawal order? Second. Were the defendants, at the date of the withdrawal order, viz., the 6th of May, 1914, in the diligent prosecution of work leading to discovery on the claims, or either of them, and thereafter continued in the diligent prosecution of such work? These questions will be noticed in the order above stated.

[1-3] No one, I take it, will contend that under the mining laws of the United States a valid location of a mining claim, if it be a lode claim, can be made until there is a discovery of a vein or lode containing mineral within the limits of the claim located, and, in case of a placer claim, a discovery of petroleum or other mineral within the limits of the claim. And we may assume, further, in view of the decisions upon the point, that no one will claim that mere indications of mineral constitute a discovery within the meaning of that term as used in the law. Such indications, as is well stated by an eminent jurist, do not constitute the discovery of the mineral itself. In the case of a lode claim it is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes a discovery; and in the case of a placer claim it is because of the finding of petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, that a discovery can be said to have been made. The mineral need not be of commercial value, it is true; for, as said by Judge Hawley, in speaking of a lode claim, in Book v. Mining Co. (C. C.) 58 Fed. 106:

"When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low."

But in all cases it must be a discovery of mineral, as distinguished from mere indications of mineral, and this rule, I think, applies equally to lode and placer claims. In ascertaining whether or not a discovery was made, the question in any given case must be determined with reference to the special facts and conditions shown to exist in the particular mining district where the claim under consideration is located, in connection with the facts of the case before the court. Thus it would not do to say that the discovery of seepage oil upon a mining location could not in any case constitute a discovery; on the other hand,

it would be equally erroneous to say that in every case where seepage oil is found upon a mining location that it constitutes a discovery. And this rule accounts for some apparent difference of opinion among the courts as to what constitutes a discovery. I think, however, a careful analysis of most of the cases where these apparent differences are found will show that there is no substantial difference of opinion as to the correctness of this rule; but its application to the facts before the court in each case, which necessarily differ in different cases, cause what might seem at first blush to be a difference of opinion as to the rule itself. It is always, in every case, a question of fact, to be determined by the court or jury, as the case may be, whether a discovery has been made or exists within the limits of the claim or location in controversy.

[4-6] The affirmative evidence upon the question of discovery in this case is found in the testimony of the witnesses Edgitt, Loving, and Davis. Their testimony is to the effect that on the 30th of July, 1913, they commenced drilling a prospect well on the E. ½ of the S. W. ¼ of section 18; that that well was drilled to a depth of 35 feet, and that oil was discovered therein; that on the 2d of August they began drilling a well on the N. W. ¼ of section 18, which well was drilled to a depth of 57 feet, and that they found oil therein. These wells were both finished in August, 1913. The witnesses are positive in their statements as to finding oil, and two of them, at least, Mr. Edgitt and Mr. Davis, were men of experience in drilling oil wells. These two witnesses testified, not only to the fact that they found oil, but that the oil found by them was of sufficient quantity and quality to justify a person of ordinary prudence in making further expenditures of money and labor, with a reasonable prospect of success in developing a valuable deposit of oil, and in this view they are sustained by the subsequent development of the property. The testimony of these three witnesses was given in a straightforward manner, both upon direct and cross examination, and bears the impress of truth.

The testimony on behalf of the government on this question is all of a negative character. Mr. Walker, a witness for the government, testified that he was there in the following May, nine or ten months after these drill holes were put in; that he examined them by dropping a line, to which was attached a weighted can, to the bottom of the wells; that in one he found no indications of oil; that in the other there was an oily substance, more like gasoline or kerosene, but that it was not the crude oil found in that district. There were some other witnesses whose testimony was to about the same effect. Then there was the evidence of Mr. Rath and Mr. Durham, special agents of the Land Department, to the effect in June and July of 1915, almost two years after these drill holes were put down, and after a number of commercial wells had been brought in in the district, some upon the land in controversy and others near there, that they put down test holes near the test holes put down by Edgitt and his associates, but discovered no oil. Other than this, no effort was made by the government to impeach or discredit the testimony of Edgitt, Loving, and Davis, who testified positively that they put these wells down and that they found oil therein.

Applying the ordinary rules of evidence governing the weight to be

attached to affirmative and negative testimony, the court feels bound to find that oil was taken from and was found in the test wells or holes on the land in controversy, drilled by Edgitt, Loving, and Davis, as testified to by these witnesses.

In order to determine what constitutes a discovery, within the meaning of that term as used and understood in the law, it is important to bear in mind the difference between a placer claim and a lode claim. The term "placer claim," as I understand it, means ground within definite boundaries which contains mineral, ground that includes valuable deposits not in place; while by the term "veins" or "lodes," as, used in the statute, are meant lines or aggregations of mineral imbedded in quartz or other rock in place. In both placer and lode claims, however, there must, as already suggested, be a finding of mineral, and it must be of such character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, or, if it be oil, oil in commercial quantities. It was held in some of the earlier cases that a mere willingness on the part of the locator to further expend his labor and means was a fair criterion; but this rule is no longer accepted. A very clear statement of the true rule as now recognized and enforced by the courts is found in Lindley on Mines (1st Ed.) § 336, where it is said:

"But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state, which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induced him to locate, should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

Or, as stated by Mr. Justice Brewer, in Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770:

"There must be such a discovery of mineral as gives reasonable evidence of the fact, either that there is a vein or lode carrying the precious mineral, or, if it be claimed as placer ground, that it is valuable for such mining."

The case last cited went up from the state court of the state of California upon a finding made by the trial court, and affirmed by the Supreme Court of that state, to the effect that there had been no sufficient discovery of oil upon the lands in controversy, and that the plaintiffs in error did not make an attempted location in good faith, and never did any work upon the tract. These questions, as we have seen, being questions of fact found by the state court, were, under the rule announced by the Supreme Court of the United States, conclusive in that court. And it clearly appears from the above quotation from this case that it does not lay down any other or different rule from that hereinbefore referred to.

Many cases bearing upon this question were called to the court's attention at the argument. These cases have all, with the exception of two, been examined by the court; but to attempt to review them would extend this memorandum to unwarranted length. I will, however, briefly notice a few of them.

The case of Butte Oil Co., 40 Land Dec 602, is a case where there was a small seepage of oil on the surface of the claim; but in that case the geological evidence upon which the decision was based tended to establish the fact that the source of the oil from which the seepage came might be and probably was elsewhere than within the limits of the claim. And in view of this evidence First Assistant Secretary Adams held that the small seepage of oil found upon the ground and a slight flow of natural gas, insufficient for commercial purposes and without value, from a drilled well which failed to develop oil, were not sufficient to constitute a discovery of oil as a basis for a placer mining location; but it is said in the course of the opinion in that case:

"It is not necessary in the decision of this case to hold that under no conceivable circumstances could there be such seepages or flows of oil on the surface of land as, when found by one attempting to locate a mining claim, would constitute a discovery"

—thus recognizing that each case must be determined upon the facts then before the court. The case is not at all at variance with the rule announced by Judge Ross in Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673. In that case the learned judge, after stating what was a sufficient discovery of a lode claim, said:

"So, in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay."

Another case upon which counsel for the government seem to place some reliance is that of Bay v. Oklahoma Southern Gas, Oil & Mining Co., 13 Okl. 425, 73 Pac. 936. This case was a controversy between a homestead claimant and the locator of a mining claim. The case was not argued, as shown by the opinion, where it is said:

"The defendants in error have not favored us with a brief, and we are left to the record alone to ascertain the grounds for the action of the trial court. In cases of this character, where the defendant in error has sought and secured the favorable action of the trial court, and relieving him from the operation of a prohibitory order, and the adverse party brings the case to this court for review, and the defendant in error does not manifest a sufficient interest in the result to brief the case for the benefit of the reviewing court, we shall not go into any critical examination of the record or extensive investigation of authorities in order to sustain the judgment appealed from. If the plaintiff in error makes a prima facie showing of error, and the case is one affecting no public interest, we will reverse the judgment."

The facts as disclosed by the opinion are in substance as follows: On the 15th day of November, 1901, Bay made a homestead entry on the land in controversy, and on that date settled upon the land, and remained in peaceable possession thereof until the 17th day of July, 1902, when the defendants in error moved a drill upon the land and drilled a well 43 feet deep, at which depth they found oil and took out 1½ gallons of oil, when the work was stopped by a temporary injunction restraining them from further trespassing upon the land.

This restraining order was issued by the probate judge, the district judge being absent, as authorized by the laws of that state. On August 20th of the same year the district judge, upon a hearing, dissolved the temporary injunction, and it was from this last order dissolving the temporary injunction that the appeal was taken.

In support of the right to take the land as a mining location, the defendants in error introduced in evidence in the district court a notice, purporting to have been given July 9, 1901, and filed with the register of deeds, for the county in which the land was situate, on the 26th of August, 1901, in which notice they claimed the tract as a placer mining claim. In opposition to this showing made by the defendants in error, the plaintiff in error filed his own and eight other affidavits, all to the effect that the parties making the affidavits had examined the land in question carefully, and that it was all prairie land, covered with sod and grass, at the time of the homestead entry, and that there were no oil seepages, or seeps or indications of oil upon the land. By congressional enactment in 1891 all lands in Oklahoma were declared to be agricultural lands, and proof of the nonmineral character thereof was not required in making homestead entry. This statute applied to all lands in Oklahoma, except certain lands thereafter acquired, by treaty, from certain Indian tribes. The last-named lands, where they contained valuable mineral deposits, were open to location and entry under the mining laws of the United States. On the 3d of March, 1901, Congress passed an act providing, among other things, that the lands to be opened to settlement and entry under the acts of Congress ratifying the agreements or treaties with the Indians should be so opened by proclamation of the President, and, to avoid contests or conflict of claims, that the President's proclamation should prescribe the manner in which settlement might be made upon the lands, and that:

"No person shall be permitted to settle upon, occupy or enter any of said lands except as prescribed in such proclamation until after the expiration of sixty days from the time when the same are open to settlement and entry." Act March 3, 1901, c. 846, § 1, 31 Stat. 1093.

It is to be observed that under this statute no person was permitted, whether seeking to discover minerals or to acquire settlement as a homestead, to enter or occupy the lands until 60 days after the time fixed by the President's proclamation for opening the same to settlement and entry had expired. The President's proclamation, which was issued on the 4th of July, 1901, fixed August 6, 1901, as the day for the opening of these lands to settlement. This being the situation, and there having been no discovery of oil made prior to the homestead entry, the Supreme Court of Oklahoma said:

"Those who were qualified to make mining locations and obtain title to public lands were not permitted to occupy any of these lands for the purpose of discovering minerals, prospecting for oil, or making mineral locations until 60 days after August 6, 1901."

And further:

"All lands containing petroleum are not subject to entry under the mineral laws, but only such as are 'chiefly valuable therefor'; and this is a subject

of proof. If the oil is in such limited quantities that it cannot be worked at a profit, then it cannot be said to be 'chiefly valuable' for its oil. Where a homestead entry has been made in good faith, after an examination by the entryman of the surface indications, and no evidences of minerals or oils discovered, the discovery of minerals or oils in such land afterwards will not necessarily defeat his right to the land. * * * The homestead entry may be attacked by contest or protest, and when the character of the land as mineral or nonmineral is put in issue it must be determined by the Land Department, and the findings of that department on questions of fact are, as a general rule, conclusive on the courts. But this court has frequently held that a homestead entry entitles the entryman to the exclusive possession of the land embraced in his entry as against all persons except one asserting a superior or prior right. * * * And injunction is a proper remedy to prevent trespassers and interlopers from interfering with the entryman's possession."

The foregoing and some further pertinent remarks found in the opinion, but not quoted, would seem to completely dispose of the questions before the court under the issues presented by the pleadings in that case. The court, however, near the close of its opinion, and after quoting the well-recognized rule that no location of a lode mining claim can be made until discovery of the vein or lode within the limits of the claim located, proceeds to say that:

This "means, when applied to placer mining for petroleum, that no location can be made until the discovery of the vein or deposit from which the oil is drawn."

This would mean, I take it, that no discovery in the case of oil would be recognized as such until the oil-bearing sands had been reached, and, if applied in the case of a gold placer mine, there would be no discovery until the bedrock (upon which in almost every instance the values are found) was reached. I find no such rule recognized by any other court.

The object of the law in requiring the discovery to precede the location of a mining claim is to assure good faith on the part of the locator and to prevent frauds upon the government; hence the discovery, as stated by Mr. Justice Brewer in Chrisman v. Miller, must be such as to give reasonable evidence that the ground claimed as placer ground is valuable for such mining, but beyond that the locator is not required to go.

A case more directly in point is that of Lange v. Robinson, 148 Fed. 799, 79 C. C. A. 1, a gold placer mining location. The court, after stating, as above suggested, that where there is placer gold it is almost a universal rule "that the 'pay streak,' so called, is in and upon, or near, the bedrock," and further stating that the bedrock in that particular case was from 125 to 150 feet below the surface, and, further, that the overlying ground was of no value, in that it did not contain sufficient gold to pay for working it, proceeds to state the evidence upon the question as follows:

"The plaintiff is a miner of many years' experience, and testified, in substance, that before making his location he washed upon each claim a few pie plates of the sediment deposited in and along the sides of the creek upon which the claims are located, and found in the several washings from two to six fine colors of gold. This was all of the gold actually discovered by him before he made the locations. The plaintiff also testified that his belief that

there was gold on the bedrock of the claims located by him was based upon the colors which he had found."

And then, after quoting a question and the answer of another witness, who testified that the gold thus taken was in his judgment sufficient to justify a reasonably prudent man in the expending of time and money in exploring the ground, the court proceeds:

"It will be noticed from the foregoing statement of facts that prior to making the locations under consideration plaintiff did not actually discover gold in paying quantities upon the claim located, but he did find some small particles of gold therein. Was this sufficient to give to the plaintiff the right to locate as placer mining claims the lands upon which this gold was found?"

And after a discussion and review of several cases, the court reached the conclusion that the plaintiff had made a sufficient discovery of gold upon the lands in controversy to entitle him to make a valid location of the same as placer claims under the laws of the United States.

Applying the principles announced in this and other cases (to some of which I have referred) to the evidence in this case, I think the lessors of the defendant the Ohio Oil Company made a sufficient discovery of oil on the claims in controversy to entitle them to make valid locations of the same as placer claims. There can be no question, I think, as to the good faith of these locators, for within a year after the date of discovery two commercial wells were brought in upon these claims at an expense of more than $20,000.

[7, 8] It might well be said that the conclusion reached by the court on the first question renders it unnecessary to consider or decide the second question suggested at the beginning of this memorandum, viz.: Were the defendants, at the date of the order of withdrawal, bona fide occupants or claimants of the land in controversy, and were they on the 6th of May, 1914, the date of the withdrawal order made by the President, in the diligent prosecution of work leading to the discovery of oil? But as the question was raised and fully argued, a large part of the briefs of counsel being devoted to a discussion of it, an expression of the court's views and a finding should, perhaps, be made thereon, as well as upon the first question. The act of Congress of June 25, 1910, as amended by the act of August 24, 1912, reads as follows:

"Sec. 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: Provided, that the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work."

I think there can be no question under the evidence but what the defendants were, at the date of the withdrawal order, bona fide claimants of the lands in controversy, and in actual occupancy of the lands. The evidence shows that in April, 1914, Mr. Harrison, attorney in fact for the locators, in company with Mr. Hurley and Mr. McFadden, two representatives of the defendant the Ohio Oil Company, examined

the lands; that in the last part of April the representatives of the Ohio Oil Company entered into an oral agreement with Mr. Harrison to lease the premises and proceed with the drilling of wells for oil in commercial quantities. Mr. McFadden, who was the Wyoming superintendent of the defendant the Ohio Oil Company, at once took steps to carry out this agreement. His testimony, which is undisputed, is to the effect that the defendant the Ohio Oil Company at once employed Virgil Jackson, and left him in charge of the claims; that he followed this up by directing that certain material owned by the defendant and stored at Casper be loaded on the cars for shipment to Kirbey, the nearest railroad point to the lands in controversy; that on the same day, May 4th, he ordered lumber from the Clark Lumber Company to be delivered on the lands in controversy, and employed a carpenter to construct certain necessary buildings, all of which was done; that on the day following, May 5th, he entered into a contract with a man by the name of R. E. Good to drill wells upon the claims in controversy which was subsequently done, the first well being brought in on the 24th day of July.

The record shows without dispute that prior to the 6th of May, 1914, the defendant the Ohio Oil Company had, pursuant to the oral contract made with Mr. Harrison, expended and obligated itself, for materials necessary to the work of drilling wells upon the lands in controversy, in the sum of $2,000 or more; that on the 6th of May, 1914, Mr. Harrison was in possession of the land, had established a camp, and that materials ordered at Thermopolis on the 5th of May arrived on the ground on the 7th, and the construction of the permanent camp was at once commenced; that this was promptly followed up by sinking two commercial wells, one on each of the claims, at an expense of something more than $22,000; that in addition to that the defendants erected a steel tank on the land for storing oil derived from the wells on the claims in suit, at an expense of something like $15,000; and I think the evidence shows that this work was done and the expenditures made for the benefit of the several claims.

It has been so often decided that labor and improvements within the meaning of the statute are deemed to have been had on a mining claim when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the mineral the claim may contain, though in fact such labor and improvements be at a distance from the claim, that the citation of authorities seem unnecessary. Thus, it has been held that the building of roads and the like for the purpose of aiding in the development of mining property, although not within the limits of the claim itself, was a sufficient compliance with the statute requiring assessment work to be done.

Without prolonging this memorandum by reviewing the cases or the testimony relating to this question, it is sufficient to say that I have examined the cases called to my attention in the briefs of counsel, and have read at length the evidence contained in the record, and have reached the conclusion that the defendants were bona fide occupants and claimants of the oil-bearing lands in controversy, and were en-

gaged in the diligent prosecution of the work leading to the discovery of oil in commercial quantities on said lands at the date of the withdrawal order made by the President, to wit, the 6th day of May, 1914.

Findings will be made to conform to the views just stated, and a decree entered thereon.

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## UNITED STATES v. STOCKTON MIDWAY OIL CO. et al.

(District Court, S. D. California, N. D. January 5, 1917.)

(No. A-54.)

1. MINES AND MINERALS ⟸17(1)—LOCATION—EFFECT OF.

The mere location of claims does not establish a valid mineral claim, discovery of minerals being the prerequisite, although the locators before discovery are entitled, as against all persons save the government, at least, unhindered to engage diligently in the prosecution of work leading to the discovery of minerals.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24, 27, 28.]

2. MINES AND MINERALS ⟸9—WITHDRAWAL OF LANDS—MINERAL LOCATIONS.

Under Pickett Act June 25, 1910, c. 421, 36 Stat. 847 (Comp. St. 1913, §§ 4523–4525), declaring that in event of withdrawal of public lands from appropriation, those engaged at the date of withdrawal in the diligent prosecution of work leading to the discovery of oil or gas under mining locations shall be protected, such a locator, even as against the government, is entitled to pursue his work of discovery uninterrupted.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 9–13.]

3. MINES AND MINERALS ⟸36—DISCOVERY—EFFECT OF.

A locator's discovery of oil on one claim cannot perfect his location on an adjoining claim, as to which there was no discovery, though raising a natural inference that oil could be discovered on such claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87.]

4. MINES AND MINERALS ⟸23(2)—ASSESSMENT WORK—GROUP THEORY.

Under Rev. St. § 2324 (Comp. St. 1913, § 4620), declaring that on each claim, until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year, annual assessment work under the group theory, if otherwise sufficient in amount, done upon one of a group of contiguous claims and calculated to aid in the development of the mineral resources of the entire group, is sufficient to hold and protect all of the claims constituting the group.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 54.]

5. MINES AND MINERALS ⟸9—LOCATION—DISCOVERY—GROUP THEORY.

The Pickett Act, relating to withdrawal of public lands from appropriation, declares that such withdrawal shall not affect the rights of locators in diligent prosecution of work leading to the discovery of oil. Rev. St. § 2324, declares that until issuance of patent not less than $100 worth of labor shall be performed or improvements made during each year, while section 2325 (Comp. St. 1913, § 4622) declares that a patent for any land claimed and located for valuable deposits may be obtained only in case $500 worth of labor upon the claim has been performed. A contract for the exploration of contiguous locations, to discover whether the group contained oil, required explorations to be made on only one claim, and, in event of the discovery of oil, provided that they should be continued on the other claims. Before oil was discovered the lands

were withdrawn from appropriation, though exploration work at that time was proceeding on one of the claims. The work resulted in the discovery of oil, and defendant, the value of the exploration work on one claim exceeding the amount which would have been required to hold all the claims, contended that it was entitled to all of the claims, notwithstanding withdrawal under the group development theory; the work on one of the claims being for the development of all. *Held* that, as the group development theory is applied only to development work after discovery and as defendant, if unsuccessful as to the claim explored, would have abandoned the others, such theory is inapplicable.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 9–13.]

In Equity. Suit by the United States against the Stockton Midway Oil Company and others. On application for injunction and for receiver. Injunction granted, and receiver appointed.

E. J. Justice, Sp. Asst. Atty. Gen., Frank Hall and A. E. Campbell, both of San Francisco, Cal., and Albert Schoonover, U. S. Atty., of Los Angeles, Cal., for the United States.

A. L. Weil, of San Francisco, Cal., and C. W. Miller, of Stockton, Cal., for defendants.

BLEDSOE, District Judge. This is an application by the plaintiff for an injunction in restraint of waste and for the appointment of a receiver for oil property claimed by the government in its proprietary capacity, and now in the possession of and being operated for the production of oil by defendants. The case is a so-called "withdrawal suit" and in its substantial features is of the form, scope, and purpose of cases heretofore considered and reported. United States v. McCutchen et al. (D. C.) 234 Fed. 702, same case on final hearing 238 Fed. 575; also United States v. Midway Northern Oil Co. (D. C.) 232 Fed. 619, heretofore heard and determined by Judge Bean sitting in this court.

The facts of the case present no conflict. Substantially they are as follows: The land in dispute is the southeast quarter of section 14, township 31 south, range 22 east, Mt. Diablo meridian, in the state of California. All of the four quarters of the section named were located as four placer claims at the same time and by the same persons, and of course are contiguous. Each quarter section later passed into the possession of the Bear Creek Oil & Mining Company, under which the General Petroleum Company now claims, for development purposes; previously to production of oil upon the land, it was what is known as "wild-cat" territory, in that it was not known to contain oil, and was not near enough to a known oil territory to make the existence of oil therein reasonably probable, although its relation to other oil lands, and its geological characteristics were such as to suggest the possibility that it contained oil. The Bear Creek Oil Company concluded to explore the land for oil, and in pursuance of that purpose entered into a contract with the original locators which contained the following among other stipulations:

"In consideration of said covenants on the part of the party of the first part, the party of the second part hereby agrees that it will, within 20 days after the date hereof, commence the erection on each three quarters in said section of buildings sufficient and suitable to carry on the business of drilling

for oil, and an oil drilling derrick. On the remaining quarter, to complete a standard drilling rig and as soon as practical thereafter to commence the actual work of drilling the well and continue the same with reasonable diligence *until success or abandonment, that is to say, until the territory shall have been tested for petroleum oil.* (Italics supplied.) After the completion of a well on the first quarter producing oil in paying quantities, the said party of the second part agrees to commence a well on one of the remaining quarter sections, and after oil shall have been discovered on the second quarter in paying quantities, work will be commenced and prosecuted in a similar manner on each of the third and fourth quarters successively."

Pursuant to this contract the Bear Creek Oil & Mining Company established a camp at the center of the section and erected a building or buildings on each of the four quarter sections, which were thereafter continuously occupied by its employés. A water line was run, a water tank was established on one of the quarters, a road was made, and a skeleton derrick was erected on each quarter. These improvements were made in the spring of 1909, and completed some time in June of that year. Work on the drilling of a well on the southwest quarter and near the center of the section was begun in June, 1909, and continued until oil was discovered in the fall of 1909, and the well completed in February, 1910. The skeleton derrick on the southeast quarter, involved in this suit, was destroyed by wind in the fall of 1909, and another derrick was erected thereon during the winter following.

After the completion of the well on the southwest quarter, wells were drilled consecutively on the northwest, northeast, and southeast quarters, the one on the southeast, the last to be drilled, having been spudded in in May, 1910, and later oil was discovered on that tract. On December 15, 1909, an affidavit as to the work theretofore done on the southeast quarter was filed, which said affidavit purported to recite the doing of so-called assessment work upon the claims during the year 1909 in a sum considerably in excess of the statutory requirements. Said affidavit also recited that such expenditures were made for the purpose of holding said claim, and also recited that, in addition to the labor done on said claim, the Bear creek Oil & Mining Company was the owner of the four claims heretofore referred to, covering the four quarters of the section above mentioned; that they lay in a contiguous compact group, and that the labor done and improvements placed upon any one of said claims tended to and did develop and determine the oil-bearing character of said contiguous claims and of each of them; also that upon said group of claims the owner had performed labor and made improvements of the value of not less than $20,000, etc.

[1] The lands in question were withdrawn from appropriation under the mineral land laws of the United States by the executive withdrawal of September 27, 1909. See U. S. v. Midwest Oil Co., 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673. Up to the time the lands in controversy were withdrawn from appropriation, no "discovery" of any mineral had been made. The claim had been "located"—that is, appropriate monuments and a mineral location notice had been set up—but the sine qua non of a valid mineral claim, viz., the discovery of mineral within the limits of the claim, had not been accomplished. The locators, then, were in the position referred to and commented upon in McLemore v. Express Oil Co., 158 Cal. 559, 112 Pac. 59, 139 Am. St. Rep. 147.

They had acquired no permanent vested rights of any character, and in virtue of their location and occupancy of the claim had acquired merely the limited right, as against all persons save the government, at least (McLemore v. Express Oil Co., supra) unhindered, to engage diligently in the prosecution of work leading to a discovery of oil or other mineral content within the boundaries of the claim located.

[2] As I was led to conclude in the McCutchen Case, on application for a receiver, supra, the withdrawal order itself, by its terms, recognized and sought to protect this substantial, though limited, right. Express congressional recognition of it was accorded in the Pickett Act (36 Stat. 847), which, while neither acknowledging nor repudiating the validity of the withdrawal order, limited the extent to which such order might otherwise go, if valid, by protecting from withdrawal those who were at the date of withdrawal "in diligent prosecution of work leading to discovery of oil or gas." In other words, by this act Congress sought to give oil locators before discovery the same rights as against the government that judicial decisions had given them as against third persons. There is no inference to be drawn, however, that Congress, legislating, as it then was as to withdrawals and in aid of the proprietary rights of the government, was intending to confer any additional rights, particularly as against the government, upon those claiming, without a discovery, land withdrawn by competent authority. The net result of the situation, then, was that, upon the withdrawal of the land embraced within his claim, in the absence of a discovery, a claimant possessed no rights at all, as against the government, save the right, if he were then actually engaged in the diligent prosecution of work leading to a discovery of oil or gas on such claim, to "continue in diligent prosecution" of such work until a discovery, as a result of such continued diligent prosecution, had been effected. By that event, of course, and not till then, his immunity as against attack by the government in its proprietary capacity would be complete. Previously to such event, and in the absence of the required diligent prosecution of work, he has no defense to the government's claims.

[3] Confessedly, at the date of the executive withdrawal order in 1909, no work of any kind, diligent or otherwise, leading to a discovery of oil in the southeast quarter of section 14, was in progress. Diligent work, pursuant to the contract herein above referred to, was in progress on the southwest quarter; but the most that work could "lead" to, as in fact all it did "lead" to, was a discovery with respect to the claim on such southwest quarter. A discovery of oil on the southwest quarter, no matter how persuasive as to the presence of oil in, could not validate the location on, the southeast quarter. Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673; Olive Land & Development Co. v. Olmstead (C. C.) 103 Fed. 568. Defendants concede this, but claim (and this is the only question in the case) that the diligent prosecution of work at the time of withdrawal on the southwest quarter, under the so-called "group development" rule, sufficed to protect, until actual discovery, the other three claims in the group.

[4] This "group development" theory is based upon a situation well known and recognized in the mining world, to the effect that annual assessment work, if otherwise sufficient in amount, done upon one of a group of contiguous claims and calculated to aid in the development of the mineral resources of the entire group, will be accepted by the government and will suffice to hold and protect all the claims constituting the group. Section 2324, Rev. Stat. (Comp. St. 1913, p. 4620); Anvil Hydraulic Co. v. Code, 182 Fed. 205, 105 C. C. A. 45, where a very satisfactory statement of the rule may be found. But the inherent and fundamental weakness of defendant's contention in this regard is that the rule of "group development," both in the statute and in the decisions, relates only to subsisting mineral claims—i. e., claims upon or within which a discovery has been made. No case to which my attention has been called, and no statute or regulation of which I have knowledge, makes the group development rule applicable to any claims other than those upon which annual assessment work is due, viz. claims founded upon a discovery. Prior to discovery, "assessment work" will not suffice to hold a claim, nor will it suffice to take the place of a discovery. In its legal effect, it is "irrelevant and immaterial." McLemore v. Express Oil Co., supra. Nor is the Pickett Act, expressly or impliedly, a recognition of the "group development theory," as suggested by counsel for defendant. As above indicated, that act was passed because of, and with reference to, a controversy over the status of claims where a discovery had not been made; it had no concern with, and is not affected by, any regulation or statute respecting the continued holding of claims already valid in law because a discovery therein had been made.

Counsel's argument is based upon the fact that the language of the Pickett Act does not in express terms demand that the "diligent prosecution of work" shall be performed upon the claim in question, and that in consequence, and in light of the practice and decisions respecting the doing of annual assessment work upon claims held in groups, such practice and decisions are "to be read into" the Pickett Act, and "diligent prosecution of work" adjudged accordingly. The dissimilarity of the situations, however, makes inapposite the suggestion of reading the one law into the other. The one had to do with the holding of a claim valid in law; the other had to do with the initiating of such a claim. In addition, though it may not be so phrased in express terms, the clear inference to be drawn from the Pickett Act is that Congress intended that the work therein provided for should be done upon the precise land which might be the subject of a withdrawal order. Nothing in the act serves to indicate any other intention; the language of the decisions furnishing the inspiration as well as the wording of the act (Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; McLemore v. Express Oil Co., 158 Cal. 559, 112 Pac. 59, 139 Am. St. Rep. 147; Borgwardt v. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 417) lends countenance to no such suggestion as is advanced herein; and, finally, the language of the act itself is inconsistent with such a conclusion. It provides that, if a bona fide occupant or claimant is in "diligent prosecu-

tion of work leading to discovery of oil or gas," he shall not be affected by the withdrawal order. Obviously, the work which will avoid withdrawal must be work which, if persisted in, will "lead" to—i. e., bring about—a discovery of mineral upon the precise land withdrawn. No other land was in contemplation; on no other land could a discovery be made which would be productive of any mineral rights in or to the land withdrawn.

The argument is also advanced that, though section 2325, Revised Statutes (Comp. St. 1913, § 4622), permits the issuance of a patent as for mineral land only in case $500 worth of labor "upon the claim" has been performed, yet nevertheless the Land Department has consistently applied the "group development" rule to applications for patent, and has in consequence directed issuance of patents where the work was not done "upon the claim," but only upon one of a group of claims. Copper Glance Lode, 29 Land Dec. 542; Zephyr and Other Lode Claims, 30 Land Dec. 510. With this premise, the conclusion is urged that the ruling of the court in its consideration of the Pickett Act should be along similar lines. Aside from the obvious fact that a different rule of construction might reasonably be followed as between section 2325, in which the government is asserting and seeking to enforce no proprietary right, and the Pickett Act, in which such a right is asserted and dealt with, it would seem to suffice to suggest that under section 2324 of the Revised Statute (Comp. St. 1913, § 4620), where the group development rule received its first recognition, by the doing of assessment work pursuant to such rule, the one substantial right in connection with mineral land, viz. the right to hold and work the claims, even as against the government, was secured. Such being the case, it was perhaps not improper, and in furtherance of the liberal construction of mining laws in aid of mineral development, that the department should consider that a vested right, even as against the government, having been thus acquired, a patent, which is merely evidentiary of that right, should follow, even though express authorization of such patent, based upon group development work, was lacking in section 2325. It might be that the department was too liberal in its construction of section 2325. However, nothing in aid of a proper construction of the Pickett Act, where the rules are to be applied with strictness in favor of the government, is to be gleaned, in my judgment, from the department's construction of section 2325.

The decision of Judge Riner, of the District Court of Wyoming, in United States v. Ohio Oil Company, 240 Fed. 996, is cited in support of defendant's contention. True it is, in that case, that Judge Riner, apparently without giving consideration to the precise point involved herein, did hold that work done apparently on one or more claims for the benefit of several would redound to the benefit of the claimant and suffice, as against the provisions of the Pickett Act, to vest him with a valid title to the land as mineral land with respect to all of the claims. Preliminarily, it should be observed that with respect to the claims in question Judge Riner had found that a sufficient "discovery" in law had been made; for the holding of the claims thereafter, of course, the "group development" rule adverted

to by Judge Riner was applicable and proper. Moreover, it is apparent from the facts in that case that the contract entered into previously to the withdrawal order provided for the drilling of wells "on these lands." It would seem, therefore, as if in that case there was a positive agreement to prosecute work by the drilling of wells upon each one of the claims in question. Such might properly have been held by Judge Riner to have been the diligent prosecution of work with respect to all of the claims at the time of the withdrawal order. In the case at bar, however, it is apparent from the terms of the contract entered into that in the event of the failure to discover oil on one of the claims, no wells would have been drilled upon the others; in consequence there was no positive obligation to do anything on the southeast quarter at the time the withdrawal order was promulgated. As a necessary result thereof, there was no diligent prosecution of work at that time with respect to such southeast quarter. Irrespective of what the conclusion may have been in the Ohio Oil Case, then, the case at bar is clearly differentiated from that case, and not within either the spirit or scope of its ruling.

In addition, it may be said that, to hold that one may acquire rights as against the government, in the face of a withdrawal order, merely by following the "group development" rule, prosecuting his work upon several claims in succession, but always one at a time, is to go counter to the holding in Borgwardt v. McKittrick Oil Co., supra. There it was sought to engraft upon the rule requiring diligent prosecution of work leading to a discovery, the qualification that it might be engaged in within a "reasonable time" after location. This qualification was expressly repudiated by the court, it being said (164 Cal. 661, 130 Pac. 421):

"The rule declared by the decisions does not so provide. The attempting locator's possession is protected only while he may fairly be held to be actually engaged in such work as may reasonably be held to be discovery work."

So here, if actually engaging in the diligent prosecution of work leading to discovery is essential, the putting off of that work with respect to one claim, while another claim was being explored for purposes of discovery, would seem to be destructive of the right of the claimant to be protected in his claims upon which no work was actually being done. The lands in controversy having been withdrawn before discovery, and no diligent work leading to such discovery having been in progress at the date of withdrawal, it follows that defendants show no such right to the lands as to negative the probability of the government's success on final hearing.

The motion for injunction and receiver, applied for, will therefore be granted. Counsel will draft appropriate decrees.

## WOREN v. WITHERBEE, SHERMAN & CO.

## KUZMAN v. SAME.

(District Court, N. D. New York. March 28, 1917.)

COURTS ⊂=506—COMITY—STATE AND FEDERAL COURTS—CONCURRENT JURISDICTION—ACTION FOR DAMAGES.

Where the state and federal courts have concurrent jurisdiction over a cause of action for damages for negligence, wherein no specific property is seized or made the subject of the litigation, the prosecution of an action in the federal courts will not be stayed until the determination of an action for the same relief previously begun in the state courts, since to grant such relief would be for the federal courts to refuse to exercise their jurisdiction.

At Law. Separate actions by Joseph Woren and by Branislaw Kuzman against Witherbee, Sherman & Co. On motions by the defendants to stay the further prosecution of the actions until the trial and determination of actions by the same plaintiffs, respectively, against the same defendants, for the same cause, pending in the state court. Motions denied.

Motions by defendants, respectively, to stay the further prosecution of these suits in this court until the trial and determination of suits by the same plaintiffs, respectively, against the same defendants, respectively, for the same cause, respectively, now pending in the Supreme Court of the State of New York, Essex County, and which suits in the state court were brought prior to the bringing of these actions in the federal court.

Stokes & Owen, of Port Henry, N. Y. (H. E. Owen, of Port Henry, N. Y., of counsel), for the motion.

Grant & Wager, of Utica, N. Y., opposed.

RAY, District Judge. It would seem to be the law that a person having a cause of action, or claiming to have a cause of action, against a defendant, may bring suit thereon in the state court, proper county, and also in the United States District Court, proper district. The *pendency* of the one suit in the one court is not a bar to the suit in the other or to its prosecution. This assumes, of course, that for purposes of jurisdiction in the United States court there is the necessary diversity of citizenship and amount in controversy. Here it is conceded that in each suit more than $3,000, exclusive of interest and costs, is involved and in dispute, and that there is the necessary diversity of citizenship. No property has been seized or taken possession of by either court in either action. Each action is to recover damages for alleged negligence of the defendant. Each of the above-named plaintiffs brought his action in the state court, and thereafter without trial in the state court, and without discontinuing his suit in that court, brought action for the same cause in the United States District Court, Northern District of New York.

In each case the defendant asserts that it should not be harassed by the pendency of the case in the state court and also the pendency of

the case on the same cause of action in the United States court, and that the plaintiff, he having first sued in the state court, should either discontinue in the state court or be enjoined by the United States District Court from further prosecuting the case in such District Court until a trial, determination, and judgment in the state court. But both courts have jurisdiction of this cause. If the federal court enjoins the plaintiff in its court from proceeding further, it is refusing to exercise its own power and jurisdiction and in effect surrendering it to the state court. This the federal court cannot do, unless there is property or property rights involved, which is the subject of the litigation and the custody of which is in the state court. As I understand the rule, when there is a res and the one court having jurisdiction has taken possession (in effect) of that res, and is proceeding to hear the case and adjudicate regarding it, the other court of concurrent jurisdiction will not exercise its jurisdiction regarding or over that subject-matter as to the same questions. This proceeds on the doctrine of comity, and not because of want of jurisdiction in the first instance. Thus in Rickly Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 262, 31 Sup. Ct. 11, 13 (54 L. Ed. 1032), the court held:

"Where riparian rights of several parcels of land in different states, but on the same river, are involved, the courts of both states have concurrent jurisdiction, and the court first seized should proceed to determination without interference."

In the opinion the court said:

"We are of opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the court first seized should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the states. Prout v. Starr, 188 U. S. 537, 544 [23 Sup. Ct. 398, 47 L. Ed. 584]; Ex parte Young, 209 U. S. 123, 161, 162 [28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann.. Cas. 764]."

In Harkrader v. Wadley, 172 U. S. 148, 164, 19 Sup. Ct. 119, 125 (43 L. Ed. 399), the court held:

"When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases."

This is also expressly stated in the opinion in the case, citing Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257; Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Ex parte Crouch, 112 U. S. 178, 5 Sup. Ct. 96, 28 L. Ed. 690.

If this broad statement applies in cases where an action has been commenced first in the state court in an action to recover damages for negligence, and later in the United States District Court by the same plaintiff against the same defendant on the same precise cause of action, and no property has been attached, then the United States District Court must suspend all action until the parties have in some manner disposed of the case pending in the state court. If this be the law, then in a case to recover a judgment for damages for negligence the pendency of a former action for the same cause between

the same parties in the state court is, in effect, a bar to the further prosecution of a suit between the same parties on the same cause of action subsequently brought in the United States court, no property having been attached or seized.

But I do not so understand the case or rule intended to be stated. In Palmer v. Texas, 212 U. S. 118, 125, 29 Sup. Ct. 230, 232 (53 L. Ed. 435), the court said:

"If the state court had acquired jurisdiction over *the property* by the proceedings for the appointment of its receiver, and had not lost the same by the subsequent proceedings, then, upon well-settled principles, often recognized and enforced in this court, there should be no interference with the action of the state court while thus exercising its authorized jurisdiction. The federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired *over property* by a court of the other sovereignty. If a court of competent jurisdiction, federal or state, has taken possession *of property*, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty. Wabash Railroad v. Adelbert College, 208 U. S. 38, and previous cases in this court cited therein at page 54 [28 Sup. Ct. 182, 187, 52 L. Ed. 379]."

In this Wabash Railroad Case the court held that:

"The taking possession by a court of competent jurisdiction *of property* through its officers withdraws *that property* from the jurisdiction of all other courts, and the latter, though of concurrent jurisdiction, cannot disturb that possession, during the continuance whereof the court originally acquiring jurisdiction is competent to hear and determine all questions respecting the *title, possession, and control of the property*." (Italics mine.)

In McClellan v. Carland, 217 U. S. 268, 282, 30 Sup. Ct. 501, 505 (54 L. Ed. 762), it was expressly held that *the pendency* of a suit in the state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction thereover. In the opinion the court said:

"The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction, for both the state and federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case."

In the last-cited case the federal court stayed proceedings in its own court in an action where it had jurisdiction in order that a suit involving the same matter might be brought in the state court and there determined. This, it was held, it could not do. The court said:

"So far as the record presented to the Circuit Court of Appeals shows, the only ground upon which the Circuit Court acted in postponing the suit was because the state of South Dakota, which had applied to be made a party, and which application was denied, was about to begin a suit in the state court to determine an escheat of the estate of John C. McClellan, therefore the action was stayed, first, until the beginning of such suit, and then until it was determined. It therefore appeared upon the record presented to the Circuit Court of Appeals that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a

federal court may not do. Chicot County v. Sherwood, 148 U. S. 529, 534 [13 Sup. Ct. 695, 37 L. Ed. 546]."

In this last case, 148 U. S. 534, 13 Sup. Ct. 697, 37 L. Ed. 546, it is said:

"But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. Suydam v. Broadnax, 14 Pet. 67 [10 L. Ed. 357]; Union Bank v. Jolly's Administrators, 18 How. 503 [15 L. Ed. 472]."

In the instant case no property is held, or in question, of which either court is seized. It is a cause of action to recover damages, and nothing more. True, an action on this cause of action (each case) was first brought in the state court and is still pending, and the exercise of its powers and jurisdiction invoked. But this was no bar to the bringing, and is no bar to the prosecution, of a suit in the federal court thereafter brought on the same cause of action and between the same parties (McClellan v. Carland, supra), and is no bar to the prosecution of the suit in the federal court. If this court now enjoins the plaintiff in each suit, respectively, from proceeding further in the federal court until final action in the state court, such action on its part is a practical abandonment of its own jurisdiction in favor of the state court for the time being, and a refusal to exercise its jurisdiction and powers in the premises until that time. To proceed with the cause is not an interference with the state court or any property in its custody regarding which it is proceeding to adjudicate. The conclusion reached is sustained also by the decision in Defiance Water Co. v. City of Defiance (C. C.) 100 Fed. 178. At page 179 the court said:

"On the other hand, the rule is well settled that, where there is a mere controversy between the parties without the possession by the court of any property taken under its control for the purposes of the suit, the pendency of a suit in the state court involving the same subject-matter is no bar to the prosecution of a suit in a federal court. See Ball v. Tompkins (C. C.) 41 Fed. 486, where the distinctions are pointed out; Morris v. Lindauer, 6 U. S. App. 510, 54 Fed. 23, 4 C. C. A. 162; Rothschild v. Hasbrouck (C. C.) 65 Fed. 283. It follows that the complainant in this case has the right to proceed with the suit in this court, and the court is bound to entertain such suit in the ordinary course. While this court will not go out of the ordinary course of procedure for the purpose of expediting the case, so as to anticipate a judgment of the state court, it has no authority to hinder the plaintiff in bringing the case forward to judgment for the purpose of favoring proceedings in any other jurisdiction."

I think it would be fatal error to grant these motions. For the convenience of witnesses these actions ought to be tried in Essex county, where the alleged causes of action arose, but no term of this court is held in that county. I know of no authority for staying proceedings in this court, even temporarily, for that reason. There is no way to compel the plaintiffs in the suits pending in the state court to proceed there. The defendants can move the cases in the state court, and, if not prosecuted by the plaintiff, take a dismissal with costs. Should this court grant these motions and should the plaintiffs in the suits in the state court either consent to or allow a dismissal, such dismissals would not be on the merits or a bar to the prosecution of these suits

in the federal court, and the defendants would be in no better position than they now occupy. The plaintiff in each suit may elect in which court he will proceed to trial and submit to a dismissal in the other. Of course, when a case in the one court of concurrent jurisdiction has proceeded to judgment, and perhaps to trial and decision by court or jury before judgment, such judgment or determination may be pleaded as a bar to the further prosecution of a suit for the same cause between the same parties in the other court.

My conclusions are, there being no statute conferring power, that when a person brings suit against a defendant in the state court to recover damages for negligence, and no specific property is seized or made the subject of the litigation, and the same plaintiff thereafter sues the same defendant on the same alleged cause of action in the federal court (there being the necessary diversity of citizenship and amount in controversy), the federal court is without power to stay the prosecution of the suit in its court until the determination or dismissal of the suit brought in the state court. The federal court in such a case cannot refuse to exercise its jurisdiction and power, but is bound to proceed to judgment and afford appropriate redress. The pendency of the suit in the one court in such a case is no bar to the prosecution of the suit in the other court of concurrent jurisdiction.

The motions must be denied.

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## ALBION LUMBER CO. v. INTER-OCEAN TRANSP. CO. et al.

(District Court, N. D. California, First Division. October 30, 1914.)

No. 15648.

SALVAGE ⊜22—LIABILITY OF SALVORS—REFUSAL TO SURRENDER VESSEL IN TOW.

Respondent's steam schooner, in response to signals of distress, passed a line to a steamer laden with lumber, whose engines had become disabled in a storm, and commenced to tow her; the master and crew remaining on board. Being advised by wireless, the owners of the steamer sent out a representative with a tug and demanded possession of the steamer and cargo, but the schooner refused to cast off her line. The hawser afterward parted without fault of the schooner, the steamer drifted ashore, and her cargo was lost. *Held*, that the action of the schooner in refusing to throw off her own line was not a conversion of the cargo, which rendered her liable for its loss as an insurer, since the master and crew of the steamer were in full possession, and could themselves have cast off the line and taken one from the tug.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 52.]

In Admiralty. Suit by the Albion Lumber Company against the Inter-Ocean Transportation Company and B. W. Olson. On exceptions to libel. Exceptions sustained.

See, also, 240 Fed. 1019.

Andros & Hengstler, of San Francisco, Cal., for libelant.

Denman & Arnold, of San Francisco, Cal., for respondents.

DOOLING, District Judge. The libel herein sets forth that libelant, at Albion, on the coast of California, shipped on board the steam-

er Pomo certain lumber destined for San Francisco; that in consequence of a heavy storm the Pomo's engines became disabled, and the steam schooner Adeline Smith, in response to distress signals, came to her assistance, and, having passed her a line, commenced to tow her "with her cargo and all hands remaining on board of her"; that the managers of the Pomo, being apprised of her condition, notified the master of the Adeline Smith by wireless that the tug Dauntless would be sent out from San Francisco to take delivery and charge of the Pomo and her cargo, and requested said master to deliver the Pomo to said tug; that the said tug met the said Adeline Smith with a representative of said managers on board, and said representative, by word of mouth, demanded of the master of the Adeline Smith that he deliver to him and the said tug the management, possession, and control of the Pomo with her cargo, and "that respondents wrongfully refused to deliver the said Pomo or her cargo to her managers, or to surrender her into the keeping and control of the said tug Dauntless, but willfully continued to retain possession and control of the same"; that said tug was fully equipped to receive the said Pomo with her cargo, and to take control and possession and care thereof, and that the owners of the Pomo were then and there entitled to the possession thereof; that after such refusal to deliver the possession of the Pomo and her cargo to the Dauntless, the hawser, which connected the Pomo with the Adeline Smith, parted, and the Pomo drifted ashore and her cargo was totally lost; that the Inter-Ocean Transportation Company is the owner, and B. W. Olson the master, of the Adeline Smith. Libelant seeks a decree for $2,600, being the amount of the damages occasioned by the loss of cargo under the circumstances above briefly detailed.

There is no negligence charged; the theory of the libelant being apparently that the respondents were in such possession of the Pomo and her cargo that the mere refusal to surrender them to their owners constituted a conversion which rendered the respondents thereafter liable as insurers. But the master and crew of the Pomo were in full control of her, and could at any time have cast off the line by which she was connected with the Adeline Smith. It does not appear that there was any one on board the Pomo representing the Adeline Smith, and no possession of the former by the latter, other than the connecting hawser. It was not even the hawser of the Pomo which would have been left in the possession of the Adeline Smith, if those on board had seen fit to cast it off and take a line from the Dauntless. It is quite true that the owners were entitled to the possession of the Pomo and her cargo, and that the value of the salvage service of the Adeline Smith up to that time could not be lessened by a transfer of the tow to the Dauntless. But where the possession and control of the Pomo were so peculiarly in the hands of her master and crew, I cannot regard as a conversion the mere refusal on the part of respondents to cast off their own line, which was, after all, the only thing that they could have done to separate the Adeline Smith from her tow.

The exceptions to the libel are therefore sustained.

ALBION LUMBER CO. v. INTER-OCEAN TRANSP. CO. et al.

(District Court, N. D. California, First Division. March 15, 1917.)

No. 15648.

1. ADMIRALTY ⟹124—DOCKET FEE—PROCTOR—"FINAL HEARING."
The dismissal of a suit in admiralty without prejudice on the unopposed motion of libelant is not a "final hearing," within the meaning of Rev. St. § 824 (Comp. St. 1913, § 1378), which entitles the proctor for respondent to a docket fee of $20.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 836–857.
For other definitions, see Words and Phrases, First and Second Series, Final Hearing.]

2. ADMIRALTY ⟹124—DOCKET FEE OF PROCTOR—FINAL HEARING.
The submission of a cause to the court on exceptions to the libel, which are sustained, is, however, a "final hearing," and respondent's proctor is not deprived of the right to a docket fee by the filing of an amended libel, alleging facts which libelant is unable to prove, and which is therefore voluntarily dismissed without hearing.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 836–857.]

In Admiralty. Suit by the Albion Lumber Company against the Inter-Ocean Transportation Company and B. W. Olson. On motion to retax costs. Denied.
See, also, 240 Fed. 1017.

Andros & Hengstler and G. W. Bell, all of San Francisco, Cal., for libelant.
Denman & Arnold, of San Francisco, Cal., for respondents.

DOOLING, District Judge. This is a motion to strike out from the costs taxed by the clerk the item of $20 allowed to respondent's proctor as a docket fee. This cause was regularly set for hearing, and upon the day designated respondent was in attendance with its witnesses and ready to proceed. Libelant's proctor appeared and asked for a continuance, on the ground that he had been misinformed as to the testimony in the case, and desired time to investigate, and interview a certain witness upon whom he relied, and who, he had just been told, would not testify as he had expected him to do. The court granted the motion for a continuance, subject, however, to the condition that the testimony of a witness for respondent, who was present in court, should be taken, so as to avoid the necessity of bringing him in again. The witness was either sworn, or just about to be sworn, but had given no testimony whatever, when proctor for libelant moved for a dismissal of the cause without prejudice. The motion was not resisted by respondent, and an order was entered dismissing the cause upon libelant's motion, without prejudice, but with costs to respondent. Among the items of costs taxed by the clerk was the proctor's docket fee of $20, now called in question.

[1] The warrant for the allowance of a proctor's docket fee is

found in the following provisions of sections 823 and 824 of the Revised Statutes (Comp. St. 1913, §§ 1375, 1378):

"The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States * * * on a final hearing in equity or admiralty, a docket fee of $20.00."

What is meant by the words "on a final hearing" has been a matter of diverse opinions by different courts. Some of the earlier decisions hold that any proceeding which finally disposes of a particular case is a final hearing thereof. The Alert (D. C.) 15 Fed. 620; Goodyear v. Sawyer (C. C.) 17 Fed. 2; Andrews v. Cole (C. C.) 20 Fed. 410; Partee v. Thomas (C. C.) 27 Fed. 429. These cases would support the allowance of the docket fee in the present instance. There is another line of cases, however, which hold that the words "on a final hearing" imply that the cause has been presented to the court in some such manner as to invoke its judgment on the merits of the controversy, either upon the facts or upon the law, whereby a determination is reached which disposes of the controversy.

In Wooster v. Handy (C. C.) 23 Fed. 49, Justice Blatchford, after a full review of the cases in which the meaning of those words had theretofore been considered, states his conclusions as follows:

"The conclusion from the considerations above stated, supported as they appear to be by all the cases cited, except, perhaps, that of Goodyear v. Sawyer, is that to constitute 'a final hearing in equity or admiralty,' within the meaning of section 824, there must be a hearing of the cause on its merits; that is, a submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libelant has made out the case stated by him in his bill or libel as the ground for the permanent relief which his pleading seeks, on such proofs as the parties place before the court, be the case one of pro confesso, or bill or libel and answer, or pleadings alone, or pleadings and proof."

This rule was followed in this district by Judge Sawyer in Mercartney v. Crittenden (C. C.) 24 Fed. 401, and by Judge De Haven in The Mount Eden (D. C.) 87 Fed. 483. This interpretation seems to me to be sound, and where no question is submitted to the court, the disposition of which finally ends the case, a docket fee is in my judgment not warranted.

[2] These considerations would dispose of the present motion, and require the disallowance of the docket fee, if the matter were to be determined solely upon what occurred on the day that the libel was dismissed. But the cause had theretofore been submitted to the judgment of the court upon exceptions to the original libel. The exceptions were sustained, and the libel would then have been dismissed as the result of the determination of a question submitted to the court, the disposition of which would have finally ended the case, had not libelant filed an amended libel. The amended libel set up a sufficient cause of action. The additional facts pleaded in the amended libel, and which rendered it sufficient, were the facts which proctor expected to prove by the witness, who, as he was informed at the last moment, would not testify in support thereof. These facts did not

reach proctor directly from the witness by whom he expected to establish them, but through "hearsay" of a third party not called. The result of this was that a libel setting forth such facts as libelant could prove was saved from dismissal by amendment setting forth facts to which no witness could be found to testify. No reproach is intended upon the action of proctor for libelant, who acted upon the information furnished him, presumably through libelant. But the result has been that proctor was compelled to move for a dismissal of the action because of the inability of libelant to furnish any proof of the material averments of the amended libel, after the court had determined that the facts as originally stated were not sufficient to warrant a decree. If the libel had been dismissed because of the action of the court in sustaining the exceptions thereto, the docket fee would have been allowed, as such dismissal resulting from the submission of the exceptions to the court, and its order sustaining the same, would have been on a final hearing. The filing of an amended libel, stating additional facts sufficient to support a decree, which facts libelant is unable to support by any testimony, and which, indeed, it makes no effort to support by any testimony, so that the amended libel is afterwards dismissed on its own motion, cannot deprive respondent of the proctor's docket fee, which must necessarily have been allowed, had the libel not been amended. Otherwise, a docket fee could always be avoided, after exceptions sustained, by the simple process of filing an amended libel and dismissing the same. In Carter v. Sweet (C. C.) 84 Fed. 16, Judge Wellborn, considering this question, says:

"It is manifestly within the spirit, if not exact letter, of this rule to hold, as I do, that where there has been presented to the court for consideration any issue of law or fact, and the expression of the court's opinion thereon, after hearing, results in a final disposition of the cause, although such disposition be a dismissal on motion of the complainant, the docket fee is taxable."

Upon such facts as it could support by testimony the libelant invoked the opinion of the court in its original libel. The court's opinion was adverse, and would have resulted in a final disposition of the case, had libelant not, in an amended libel, added other and sufficient facts, which it neither endeavored, nor was able, to support. There was, in my judgment, such an issue of law presented to the court as resulted in the final disposition of the real case, although such disposition was the dismissal of the amended libel on motion of the libelant.

The docket fee objected to will therefore be allowed.

## MEMORANDUM DECISIONS.

ANDERSON v. EL RAYO MINES CO. (Circuit Court of Appeals, Second Circuit. March 16, 1917.) No. 12. In Error to the District Court of the United States for the Southern District of New York. H. Snowden Marshall, U. S. Atty., of New York City, for plaintiff in error. Greene, Hurd & Stowell, of New York City, for defendant in error. Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Judgment affirmed in open court.

ANDERSON v. LA ROSE CONSOLIDATED MINES CO. (Circuit Court of Appeals, Second Circuit. March 16, 1917.) No. 26. In Error to the District Court of the United States for the Southern District of New York. H. Snowden Marshall, of New York City, for plaintiff in error. Greene, Hurd & Stowell, of New York City, for defendant in error. Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Judgment affirmed in open court.

ARMSTRONG CORK CO. et al. v. RINGWALT LINOLEUM WORKS. (Circuit Court of Appeals, Third Circuit. April 4, 1917.) No. 2197. Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge. Suit by the Armstrong Cork Company and others against the Ringwalt Linoleum Works. From a decree dismissing plaintiffs' appeal (235 Fed. 458), plaintiffs appeal. Reversed and remanded, with directions. Frank P. McDermott, of Jersey City, N. J. (Edward S. Rogers and F. F. Reed, both of Chicago, Ill., of counsel), for appellants. Hans v. Briesen and Fritz v. Briesen, both of New York City, for appellee. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. This is an appeal from a decree dismissing the plaintiff's bill in pursuance of an opinion reported at (D. C.) 235 Fed. 458. In view of the important and far-reaching commercial questions raised in this case, we feel that they can better be approached and decided in this court after full proofs and final hearing. Following our usual course in such a situation, we express no present opinion on those questions, and confine ourselves to reversing the order made below dismissing the bill, and remanding the case, with directions to reinstate the bill, overrule the demurrer, without prejudice to raising the same questions on final hearing, and to proceed to final hearing. We might add that, in view of the possibility of bringing such matters as are here involved before the Federal Trade Commission, this order is made without prejudice to the right of the parties while this bill is pending to apply for relief to that body, if it so desires.

CASSELS et al. v. DAVIS. (Circuit Court of Appeals, Fifth Circuit. April 6, 1917. Rehearing Denied April 28, 1917.) No. 2848. Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge. Suit by Harwell G. Davis, as trustee in bankruptcy of Thomas M. Cassels, against Thomas M. Cassels and others. Decree for complainant (220 Fed. 958), and defendants appeal. Affirmed. W. P. Acker, of Anniston, Ala., and Woodson J. Martin, of Gadsden, Ala., for appellants. Amos E. Goodhue and O. R. Hood, both of Gadsden, Ala. (W. J. Boykin and Goodhue & Brindley, all of Gadsden, Ala., on the brief), for appellee.

PER CURIAM. An examination of the record in this case in the light of the arguments of counsel has led the majority of the court to the conclusion that it does not show the commission of any reversible error. We think that the propriety of the decree appealed from is sufficiently shown by the

opinion rendered by the District Judge. Davis v. Cassels, 220 Fed. 958. That decree is affirmed.

PARDEE, Circuit Judge (dissenting). The decree of the court takes from Mrs. Ida B. Cassels, wife of the bankrupt, so adjudicated in 1913, the homestead property which was purchased from her husband in 1906, then fully solvent, for a full money consideration, and of which she has been in continuous possession, on the theory that she was then in collusion with her husband, who was perfectly solvent, in a general scheme to defraud after-acquired creditors. The District Judge, in his opinion filed in the case, found as to the sufficiency of Mrs. Cassels' title as against creditors, as follows: "As I see it, the plaintiff has not made out a case as to any one of the assailed transactions, upon the theory that the conveyances were voluntary and voidable as to existing creditors and assailable for that reason by the trustee as the representative of existing creditors. From the evidence, as I construe it, no one of the conveyances was made after the debts now represented by the trustee were incurred, unless it be the conveyance of the home place as to the debt of Strater Bros. It appears that their claim had accrued but had not been reduced to judgment prior to October 24, 1906, the date of the bankrupt's conveyance of the home place to his wife. I think, however, that the preponderance of the evidence shows that there was a consideration moving to the bankrupt from his wife's father to all but possibly $200 of that recited to have been actually paid. The fact, if it be a fact, that the $200 recited to have been paid in money, was the money of the bankrupt, and not that of his wife, should not operate, as I see it, to destroy the conveyance in its entirety, but only to give the trustee and interest to that extent in the transferred property." The evidence as to Mrs. Cassels' knowledge of or participation in any scheme her husband may have had to defraud any creditors consists of the fact that she was a trusting and docile wife, and signed her name in other transactions whenever and wherever her husband advised her. There is no evidence warranting the confiscation of her property lawfully acquired and duly recorded as against existing creditors of her husband, as shown by the above extract from the opinion of the District Court, fully approved by the decree of affirmance.

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CRESTON-COLORADO CO. v. ANDERSON. (Circuit Court of Appeals, Second Circuit. March 20, 1917.) No. 74. In Error to the District Court of the United States for the Southern District of New York. Greene, Hurd & Stowell, of New York City, for plaintiff in error. H. Snowden Marshall, U. S. Atty., of New York City (John E. Walker, Sp. Asst. U. S. Atty., of New York City), for defendant in error. Before COXE, WARD, and HOUGH, Circuit Judges.

PER CURIAM. Judgment affirmed in open court.

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DONALD McNEIL CO. v. TAYLOR. (Circuit Court of Appeals, Third Circuit. April 11, 1917.) No. 2185. In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge. Arthur H. Hull, of Harrisburg, Pa., and Thos. D. McCloskey and Kinnear, McCloskey & Best, all of Pittsburg, Pa., for plaintiff in error. J. P. Carpenter, of Sunbury, Pa., N. B. Spangler, of Bellefonte, Pa., and F. A. Witmer, of Sunbury, Pa., for defendant in error. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. The judgment is affirmed. Three-fourths of the costs in this court to be paid by the plaintiff in error, and one-fourth of the costs by the defendant in error.

## ROYAL EXCH. ASSURANCE OF LONDON v. THROWER.

(District Court, N. D. Georgia. April 4, 1917.)

No. 1319.

On motion for rehearing. Denied.
For former opinion, see 240 Fed. 811.

NEWMAN, District Judge. There is a motion for a rehearing in this case, on the ground that the court omitted to decide a certain feature of the contention made by the Royal Exchange Assurance. This claim is that "the policy of insurance upon which defendant based his set-off provided 'the entire policy shall be void if any change, other than by death of the assured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) by voluntary act of the assured, or otherwise.'"

As shown by the opinion filed on March 12th (240 Fed. 811), I did not understand that there was any particular contention by counsel for the plaintiff on this subject. The clause, or language, of the policy which I then disposed of was: "If the hazard be increased by any means within the control or knowledge of the insured." Following this, after some intermediate language, is the provision to which attention is now called, which is: "Or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise"; that is, it is provided that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise."

The claim here, as I understand it, is that there was such a change in possession of the building insured in this case as increased the hazard, which increase of hazard rendered the policy void. The evidence here shows that about the time the building was completed it was insured, the policy being dated June 15, 1908, and that the lease of the premises was dated September 14, 1908. So that there was no tenant in it, and it was not occupied until after the date of this lease, unless Thrower's ownership of the building made him in legal effect an occupant, as contended here.

I think it is unnecessary to discuss the question as to whether there was a change in occupancy, however, because, if there was a change in occupancy, it must have been "without increase of hazard." I do not see how it is possible to construe the expression "increase of hazard" in this connection differently from the way in which I held it should be construed in reference to the preceding clause, which was an increase of hazard "by means within the control or knowledge of the insured." In other words, I think the decision on the other language of the policy embraces what is contended for here. I do not see why an increase in hazard by change of possession or change of occupancy should subject the insured to any greater risk of having his policy voided than the other provision of the policy as to the increase of hazard "by means within the control or knowledge of the insured."

The possession here changed after the policy was taken, and when the property was leased, from the constructive possession, or occupancy, if it may be so called, of Thrower to that of the Cotton Products Company, and the court has already held that the possession, activities, or character of business, whatever it was, of the Cotton Products Company, was not an increase of hazard "by means within the control or knowledge of the insured," so I do not think it ought to be held so as to this clause of the policy.

Counsel for Thrower have called my attention to two decisions, one Rumsey v. Phœnix Insurance Company (C. C.) 1 Fed. 396, in which the court held as to a clause in a policy, "if any change take place in title or possession," that the

change of possession contemplated is something more than a change of occupation. It is held that the leasing of the insured premises would not void under a provision in the policy reading as follows: "If the property be sold or transferred, or any change take place in title or possession, whether by legal process, judicial decree, voluntary transfer, or conveyance." And in the same case, apparently, in 2 Fed. 429, one of the headnotes is as follows: "Nor, was it a 'change of title or possession' for him to have the same occupied by tenants, instead of himself; but that the change thereby contemplated referred to the possessory right, and not mere occupation."

But, independently of these authorities, I think the increase of hazard referred to in the case now under consideration should be construed as it was in the question heretofore considered, and consequently the motion for a rehearing must be denied.

END OF CASES IN VOL. 240